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1931

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COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables :—

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS, JOURNALS and PERIODICALS with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, MADRAS SERIES, for the year 1931, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 54 MADRAS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 54 Madras=All India Reporter.

ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.		
1	1930	*M*	833	239	1931	*M*	73	455	1931	*M*	149	601	1931	*M*	441	842	1931	*M*	772
5	"	"	913	251	"	"	240	462	1930	"	915	622	"	"	644	845	"	"	629
12	"	"	834	252	1930	"	867	469	1931	"	28	627	"	"	83	852	1932	"	19
16	"	"	765	257	1931	*PC*	36	491	1930	"	987	654	"	"	185	857	"	"	131
21	"	"	764	266	"	*M*	343	495	1931	"	55	671	"	"	300	883	1931	"	707
24	1931	"	37	269	"	"	404	504	"	"	436	678	"	"	430	887	"	"	561
27	1930	"	883	306	1930	"	995	512	"	"	488	691	"	*PC*	165	889	"	"	636
59	1931	"	199	315	"	"	918	515	"	"	231	708	"	*M*	592	900	"	"	659
63	1930	"	854	324	"	"	1012	520	"	"	422	722	"	"	586	924	"	"	714
68	"	"	870	331	1931	"	16	527	"	"	452	727	"	"	474	928	"	"	574
75	1931	"	177	334	1930	"	873	532	"	"	328	739	"	"	317	931	"	"	689
81	1930	"	817	337	1931	"	471	543	"	"	553	758	"	"	478	943	"	"	697
92	"	"	963	345	1932	"	41	554	"	"	216	759	"	"	773	955	"	"	650
112	"	"	945	352	1931	"	45	558	"	"	482	764	"	"	771	973	"	"	785
132	"	"	824	364	"	"	152	561	"	"	575	768	"	"	772	980	"	"	717
153	1931	"	58	409	"	"	65	565	"	"	626	770	"	"	590	989	"	"	745
163	"	"	140	416	"	"	175	574	"	"	688	774	"	*PC*	234	1006	"	"	672
184	"	"	399	422	1930	"	975	576	"	"	264	788	"	*M*	820	1011	"	"	801
198	"	"	170	427	1931	*PC*	128	588	"	"	427	793	"	"	284	1018	"	"	702
212	1930	"	930	440	"	"	109	595	"	"	419	821	1932	"	97	1025	"	"	484
237	1931	"	38	445	1930	*M*	991	598	"	"	770	823	1931	"	344	1034	"	"	488

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1931 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

60 Madras Law Journal=All India Reporter.

MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.		
1	1931	*PC*	9	167	1931	*M*	471	267	1931	*M*	277	378	1931	*M*	236	478	1931	*M*	538
7	1930	"	267	173	1932	"	41	270	"	"	792	386	"	*PC*	48	488	"	"	377
13	1931	*M*	207	179	1931	*PC*	22	275	1930	*PC*	251	393	"	*M*	422	495	"	"	419
25	1930	"	896	183	"	"	186	280	1931	*M*	58	399	"	*PC*	39	498	"	"	170
56	1931	"	140	191	"	*M*	83	293	"	"	352	404	"	*M*	430	506	"	*PC*	36
69	"	"	199	210	1930	*PC*	265	299	"	"	181	410	1930	"	836	514	1930	*M*	918
72	1930	"	1017	213	1931	*M*	185	302	"	"	335	423	1931	*PC*	33	520	1931	"	770
79	"	"	988	214	"	"	363	309	"	"	124	430	"	*M*	282	521	"	"	456
85	1931	"	19	219	"	"	81	315	"	"	300	433	"	"	482	524	"	"	488
90	1930	"	1009	223	1930	*PC*	287	320	1930	*PC*	302	435	"	"	457	527	"	"	580
97	"	"	930	229	1931	*M*	357	332	1931	*M*	500	441	"	*PC*	52	538	"	*PC*	79
117	"	"	945	237	1930	"	987	336	"	"	231	450	"	*M*	73	551	"	*M*	152
133	1931	"	183	239	1931	"	149	339	"	"	325	456	"	"	55	583	"	*PC*	45
137	"	"	135	245	"	*PC*	5	341	1930	*PC*	255	462	"	"	424	588	"	*M*	688
142	"	*PC*	1	253	"	"	30	350	1931	"	57	467	"	"	634	590	"	"	641
149	1930	"	278	260	"	*M*	122	355	"	*M*	251	471	"	"	270	593	"	*PC*	72
155	1931	*M*	97	264	"	"	343	370	"	"	242	475	"	"	791				

60 Madras Law Journal=All India Reporter—(*Concld.*)

MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.		
600	1931	*M*	520	619	1931	*PC*	84	659	1931	*M*	590	694	1931	*M*	240	709	1931	*M*	216
609	"	*PC*	42	628	"	*M*	303	662	"	"	561	695	"	"	529	711	"	"	488
615	"	*M*	478	648	1931	*PC*	107	676	"	"	28	698	"	"	479	713	"	"	1
616	"	"	496	652	"	"	75	691	"	"	481	701	"	"	45	721	"	"	399

61 Madras Law Journal=All India Reporter

MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.		
1	1931	*PC*	128	208	1931	*PC*	160	399	1932	*M*	97	563	1931	*M*	284	805	1931	*M*	260
9	"	"	89	212	"	"	118	402	1931	*PC*	121	589	"	*PC*	245	812	"	"	672
19	"	*M*	264	219	"	*M*	773	408	"	"	239	596	"	*M*	650	815	"	"	801
27	"	"	366	222	"	"	771	415	"	"	231	608	"	"	689	820	"	"	745
34	"	"	561	224	"	"	644	420	"	"	263	623	"	*PC*	289	837	1932	*PC*	22
35	"	"	726	229	"	"	441	424	"	*M*	717	632	"	"	162	842	1931	*M*	484
39	"	"	24	251	"	*PC*	165	430	"	"	707	638	1932	*M*	146	848	1932	"	26
43	"	"	67	261	"	"	63	434	"	"	714	642	1931	"	808	852	"	"	70
47	"	*PC*	104	265	"	*M*	697	437	"	"	785	648	"	"	659	854	1931	"	490
52	"	*M*	571	273	"	*PC*	125	442	"	*PC*	268	665	"	*PC*	136	857	1932	"	84
58	"	"	128	279	"	"	111	449	"	"	157	675	1932	*M*	139	860	"	"	24
66	"	"	317	285	"	"	212	456	"	"	68	680	1931	"	712	862	"	"	108
78	"	*PC*	196	294	"	"	229	462	1932	*M*	8	683	1932	"	119	863	"	"	169
91	"	"	109	299	"	"	132	474	1931	"	777	684	"	"	129	864	1931	*PC*	149
94	"	"	100	307	1932	*M*	260	477	1932	"	263	686	"	"	130	874	1932	*M*	44
102	"	"	171	312	1931	"	586	479	"	"	33	688	"	"	170	878	"	"	39
111	"	*M*	626	316	"	"	542	489	1931	*PC*	143	692	"	"	125	884	1931	"	782
117	"	"	574	330	"	*PC*	28	501	"	"	179	699	1931	*PC*	299	887	1932	"	267
120	"	"	575	334	"	"	15	507	1932	*M*	177	704	"	*M*	825	894	"	"	164
123	"	"	772	340	"	"	307	512	"	"	196	710	1932	"	142	898	1931	*PC*	317
125	"	"	772	343	"	"	226	516	1931	*Notes*	23*b*	714	"	"	162	904	1932	*M*	193
127	"	"	769	348	"	*M*	656	518	"	*M*	788	719	"	"	63	909	1931	"	465
130	"	*PC*	112	354	"	"	797	520	1932	"	7	724	"	"	100	914	"	"	778
135	"	*M*	452	357	"	"	723	522	1931	*PC*	294	740	193	*PC*	217	915	"	"	775
139	"	"	553	358	"	"	820	532	"	"	302	748	"	*M*	497	920	"	"	813
148	1932	"	131	362	"	*PC*	154	535	"	*M*	629	754	"	"	525	931	"	"	812
173	1931	"	344	367	"	"	234	541	1932	"	19	761	1932	"	157	933	"	"	683
186	"	*PC*	209	377	"	"	207	544	"	"	112	763	"	"	66	943	"	*PC*	254
191	"	"	224	381	"	*M*	668	549	"	"	31	770	1931	"	702	958	1932	"	108
196	"	"	114	388	1932	"	241	552	"	"	15	774	"	"	474	975	1931	"	248
203	"	*M*	724	395	1931	"	743	556	1931	"	636	783	1932	*PC*	1	987	1932	*M*	371

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MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.		
1	1931	*M*	185	143	1931	*M*	471	318	1931	*M*	457	468	1931	*M*	366	604	1931	*M*	590
12	"	"	49	149	1932	"	41	323	"	"	317	475	"	"	419	607	"	"	118
14	1930	*Notes*	17*b*	154	1931	"	149	336	"	"	488	477	"	*PC*	84	611	"	"	634
20	1931	*M*	207	159	"	"	343	339	"	"	538	485	"	*M*	97	615	"	"	529
30	"	*PC*	9	162	"	*PC*	186	348	"	"	430	497	"	"	122	618	"	"	561
36	"	*M*	17	168	"	*M*	83	359	"	"	303	501	"	*PC*	36	619	"	"	478
39	1930	*PC*	226	186	"	"	22	378	"	"	273	506	"	"	59	620	"	"	344
41	1931	"	1	189	"	"	38	381	"	*PC*	22	513	"	"	28	632	"	"	236
49	1930	*M*	861	191	1930	"	789	384	"	*M*	278	517	"	*M*	636	640	"	"	242
51	"	*PC*	227	201	1931	"	43	391	1930	"	988	523	"	*PC*	39	648	"	"	542
60	1931	*M*	170	205	"	"	18	397	"	*PC*	255	528	"	*M*	586	661	"	"	641
68	"	"	69	206	"	"	24	405	1931	*M*	185	532	"	"	520	664	"	"	597
70	"	"	200	210	"	"	1	407	"	"	363	540	"	"	137	671	"	"	484
74	"	*PC*	22	218	"	"	436	411	"	"	277	542	"	"	240	676	"	"	629
75	"	*M*	138	224	"	"	152	414	"	"	427	543	"	*PC*	72	681	"	"	284
78	"	"	110	254	"	"	424	419	"	"	575	549	"	*M*	270	707	"	*PC*	89
85	1930	*PC*	248	259	"	"	81	423	"	"	482	553	"	"	488	716	"	"	128
86	1931	*M*	106	263	"	"	272	425	"	"	422	554	"	"	326	723	"	"	107
92	"	"	36	264	1930	"	796	430	"	"	183	559	"	"	603	727	"	*M*	335
95	"	"	140	269	1931	"	264	434	"	*PC*	45	561	"	"	688	734	"	"	357
107	1930	"	971	277	"	*PC*	30	439	"	"	48	562	"	"	474	741	"	"	792
109	1931	"	120	284	"	*M*	51	446	"	*M*	324	570	"	"	429	747	"	"	644
113	"	"	12	291	"	"	231	448	"	"	325	571	"	"	440	757	"	*PC*	100
121	"	*PC*	5	294	"	"	502	449	"	*PC*	33	572	"	"	361	763	"	*M*	352
129	1930	"	232	301	"	*PC*	42	455	"	*M*	216	576	"	"	580	768	"	"	456
133	1931	*M*	181	307	"	*M*	300	457	"	"	282								
135	1930	*PC*	221	311	"	"	233	460	"	"	770	586	"	*PC*	79	771	"	"	561
140	"	"	224	312	"	"	468	462	1930	*PC*	278	596	"	"	52	785	"	"	479

34 Madras Law Weekly=All India Reporter

MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.		
1	1931	*PC*	162	234	1931	*PC*	165	459	1931	*PC*	114	676	1931	*PC*	289	848	1932	*M*	108
7	"	"	175	244	"	"	171	465	"	"	268	684	1932	*M*	162	849	"	"	167
13	"	"	154	252	"	*M*	716	472	"	"	226	689	1931	"	804	853	1931	*PC*	299
19	1932	*M*	131	254	"	"	801	477	1932	*M*	8	697	1932	"	90	858	1932	*M*	24
36	1931	*PC*	75	259	"	"	714	489	1931	"	668	704	"	"	144	859	"	"	151
42	"	*M*	772	262	"	"	707	496	"	"	813	708	"	"	119	864	"	"	263
44	"	"	772	266	"	"	785	507	"	"	619	710	1931	"	777	866	"	"	73
45	"	"	771	271	1932	"	260	518	"	*P*	234	712	1932	"	146	884	"	"	44
47	"	"	672	276	1931	"	723	527	"	*M*	560	715	"	"	84	889	"	"	189
51	"	*PC*	179	277	"	"	705	528	"	"	512	719	1931	"	808	896	"	"	213
57	"	"	111	282	"	"	441	529	"	"	490	725	1932	"	157	898	"	"	53
59	"	"	112	305	"	"	650	531	"	"	511	727	"	"	26	903	"	"	171
63	"	"	121	317	"	"	674	533	"	"	760	730	"	"	15	906	"	"	169
69	"	*M*	679	324	"	"	610	546	"*Notes*		23*b*	735	"	"	63	908	"	"	95
76	"	*PC*	143	329	"	"	702	547	"	*M*	597	740	1931	*PC*	68	911	"	"	1
87	"	"	157	333	"	"	525	548	1932	"	31	746	1932	*M*	100	912	"	"	188
92	1932	*M*	371	340	"	*PC*	212	551	"	"	177	761	1931	"	788	915	1931	"	743
94	1931	"	724	349	"	*M*	481	556	1931	"	592	763	"	*PC*	302	919	1932	"	163
99	"	"	717	352	"	"	67	565	"	*PC*	262	765	1932	*M*	264	921	"	"	141
105	"	"	745	356	"	*PC*	104	569	"	"	245	772	"	"	196	923	1931	*PC*	279
117	"	"	797	360	"	*M*	656	575	"	"	254	776	"	"	267	933	1932	*M*	97
119	"	*PC*	118	365	"	"	726	589	"	"	294	783	"	"	170	936	1931	*PC*	217
125	"	*M*	552	369	"	"	128	598	"	*M*	550	786	"	"	70	943	"	*M*	497
128	"	"	689	377	"	"	778	601	"	"	199	788	"	"	66	949	1932	"	182
143	"	"	729	378	"	"	712	607	"	*PC*	248	795	"	"	142	955	1931	"	260
162	"	"	820	380	"	"	775	618	1932	*M*	1	799	"	"	112	961	1932	"	155
165	"	"	626	385	"	"	782	629	"	"	130	804	"	"	154	964	1931	*PC*	307
171	"	"	773	388	"	"	779	631	1931	"	420	806	"	"	7	967	1932	"	120
175	"	*PC*	136	394	"	"	571	633	"	"	812	809	"	"	86	975	1931	*M*	227
185	"	*M*	659	399	"	"	753	635	1932	"	115	817	"	"	125	977	"	*PC*	15
201	"	"	697	411	"	*PC*	196	643	"	"	241	824	1931	"	465	982	"	*M*	615
209	"	"	574	424	1932	*M*	39	650	"	"	139	829	"	*PC*	303	989	1932	"	164
211	"	"	769	429	1931	"	683	654	1931	"	825	837	1932	*M*	158	993	1931	*Notes*	22*d*
214	"	"	452	439	"	*PC*	231	660	"	"	490	841	"	"	129	995	"	*M*	313
220	"	"	553	444	"	"	229	663	1932	"	148	843	"	"	109	1001	"*Notes*		24*b*
231	1932	"	19	448	1932	*M*	33	669	"	"	71								

1931 Madras Weekly Notes=All India Reporter

NOTE.—*The pages of cases not mentioned below are cases either considered not reportable or not sanctioned by the Hon'ble Judges.*

MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.		
1	1930	*PC*	255	208	1931	*PC*	22	327	1931	*M*	185	461	1931	*M*	629	609	1931	*PC*	100
8	1931	*M*	505	213	"	*M*	343	328	"	"	560	466	"	"	26	615	"	"	75
18	"	"	149	224	1930	"	956	329	"	"	497	480	"	*PC*	79	620	"	"	104
23	"	"	561	241	1931	*PC*	52	335	"	"	553	487	1932	*M*	32	624	1932	*M*	241
41	"	*PC*	1	248	"	"	42	345	"	*PC*	39	489	1931	"	484	631	1931	"	128
48	"	*M*	303	254	"	*M*	326	349	"	"	36	494	1932	"	371	641	"	"	228
65	"	*PC*	5	259	"	"	570	353	"	*M*	452	495	1931	"	490	652	"	"	427
72	1930	"	300	261	"	"	601	364	"	"	482	497	"	"	300	657	"	*PC*	125
73	1931	*M*	152	263	"	"	550	366	"	"	487	501	"	"	264	662	"	"	121
103	1930	"	429	266	"	"	420	368	"	"	770	508	"	"	613	667	1932	*M*	1
118	1931	"	233	269	"	"	424	369	"	*PC*	57	513	"	"	702	677	1931	"	716
120	1930	"	448	273	1930	*PC*	188	373	"	"	45	521	"	*PC*	72	679	"	*PC*	118
121	1931	*PC*	186	281	1931	"	33	378	"	*M*	344	527	"	*M*	278	683	"	"	248
126	"	*M*	361	286	"	"	22	390	"	"	533	533	"	"	656	695	"	"	149
137	"	*PC*	9	287	"	*M*	597	392	"	"	688	537	"	"	525	701	"	"	165
142	"	*M*	538	290	"	"	586	393	"	"	436	544	"	"	609	710	"	*M*	791
150	"	"	468	294	"	"	363	399	"	"	439	546	"	"	607	713*b*	"	"	768
155	"	"	19	297	"*Notes*		24*c*	404	"	"	488	549	"	"	571	715	"	"	779
161	"	"	697	299	"	*M*	282	405	"	"	769	554	"	"	495	733	"	*PC*	136
167	"	"	430	302	"	"	354	409	"	*PC*	63	561	"	*PC*	84	742	"	"	114
179	"	"	488	305	1930	*PC*	284	415	"	*M*	529	568	"	"	109	748	"	"	107
182	"	"	231	310	1931	*M*	512	417	"	"	597	570	"	*M*	647	751	1932	*M*	175
185	1930	*PC*	267	311	"	"	461	423	"	"	465	576	"	"	650	755	"	"	39
189	"	"	242	317	"	"	122	428	"	"	520	586	1932	"	41	760	1931	"	642
193	1931	*M*	340	321	"	"	422	435	"	*PC*	89	590	1931	"	471	764	1932	"	108
199	"	"	324	325	"	"	429	444	"	*M*	474	601	"	*PC*	111	766	1931	"	240
201	1930	*PC*	209	326	"	"	440	451	"	"	619	603	"	"	112				

1931 Madras Weekly Notes=All India Reporter—(*Concld.*)

MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.		
767	1931	*M*	772	906	1931	*M*	785	1015	1931	*Notes*	24*b*	1118	1932	*M*	171	1226	1932	*M*	109
768	"	"	773	910	"	*PC*	245	1016	"	*M*	679	1121	1931	"	199	1231	"	"	151
771	"	"	772	916	"	*M*	683	1023	"	"	824	1124	1932	"	170	1235	"	"	86
772	"	"	771	924	1932	"	63	1026	"	"	822	1127	"	"	139	1242	"	"	272
774	"	"	441	929	1931	*PC*	143	1029	1932	"	8	1131	"	"	66	1246	"	"	245
793	"	*PC*	154	931	"	"	175	1040	"	"	15	1137	"	"	25	1251	"	"	95
798	1932	*M*	33	937	"	*M*	729	1047	"	"	129	1138	"	"	24	1253	"	"	167
807	1931	"	723	957	"	"	799	1048	"	"	130	1141	"	"	115	1257	"	"	120
808	1932	"	28	961	1932	"	157	1049	1931	*Notes*	20*c*	1148	"	"	155	1266	"	"	55
817	1931	*PC*	128	963	1931	"	828	1050	1932	*M*	25	1149	"	"	369	1278	"	"	44
824	"	"	217	965	1932	"	177	1053	"	"	21	1162	"	"	119	1282	"	"	185
830	"	*M*	760	969	"	"	97	1058	"	"	26	1163	1931	*PC*	226	1287	"	"	328
842	1932	"	260	975	1931	"	789	1061	1931	"	778	1169	"	*M*	804	1301	1931	*PC*	209
848	1931	*PC*	294	978	"	*PC*	268	1069	"	"	813	1177	"	"	689	1305	1932	*M*	254
857	"	*M*	775	984	"	*M*	825	1079	"	"	812	1191	1932	"	216	1308	"	"	271
865	"	*P*	162	989	"	*PC*	179	1081	"	"	157	1192	"	"	213	1310	1931	"	777
870	"	*M*	714	994	1932	*M*	90	1085	"	"	317	1197	"	"	189	1314	1932	"	253
886	"	"	820	1002	1931	"	795	1097	"	"	808	1204	"	"	164	1321	"	"	160
891	1932	"	18	1008	"	"	830	1102	"	"	610	1207	"	"	1	1323	"	"	207
893	1931	"	705	1014	"	"	784	1111	"	*PC*	212	1209	"	"	73	1329	"	"	275
902	"	"	782																

4 Madras Criminal Cases=All India Reporter

NOTE.—*The pages of cases not mentioned below are cases either considered not reportable or not sanctioned by the Hon'ble Judges.*

MCrC)	A. I. R.			MCrC)	A. I. R.			MCrC)	A. I. R.			MCrC)	A. I. R.			MCrC)	A. I. R.		
11	1931	*M*	228	106	1931	*M*	772	171	1931	*M*	482	220	1931	*M*	777	297	1931	*M*	772
17	1930	"	978	115	"	"	702	174	"	"	436	223	"	"	439	300	"	"	773
22	1931	"	180	127	"	"	697	180	"	"	770	225	"	"	771	306	"	"	779
26	"	"	481	136	1930	"	927	182	"	"	440	244	"	"	820	312	"	"	778
30	"	"	492	139	1931	"	18	183	"	"	419	248	"	"	276	318	1932	"	26
44	"	"	427	141	"	"	240	187	"	"	420	261	"	"	490	342	1931	"	775
60	"	"	231	142	"	"	17	194	"	"	488	266	1932	"	463	349	1932	"	130
79	"	"	227	145	"	"	484	206	1932	"	371	275	1931	"	487	351	1931	"	689
86	"	"	488	152	"	"	430	210	1931	"	688	278	"	"	560	389	1932	"	21
92	"	"	233	160	"	"	424	215	"	"	495	283	"	"	490	395	"	"	24
94	"	"	422	166	"	*PC*	111	218	"	"	429	285	"	"	441	397	"	"	25
101	"	"	185																

4 Income-tax Cases=All India Reporter.

ITC)	A. I. R.			ITC)	A. I. R.			ITC)	A. I. R.			ITC)	A. I. R.			ITC)	A. I. R.		
1	1929	*P*	419	123	1929	*P*	476	226	1930	*M*	209	345	1930	*M*	449	424	1930	*M*	1003
4	1932	*O*	164	146	1930	*C*	1	245	"	*PC*	56	360	"	"	457	427	"	"	763
11	1930	*R*	10	151	"	"	641	247	"	*A*	389	365	"	*C*	449	431	"	*L*	982
15	1929	*P*	449	160	1929	*R*	248	255	"	*N*	183	370	"	"	625	438	"	*M*	808
33	"	*L*	593	171	1932	*N*	65	259	"	*P*	44	375	1932	*N*	61	447	"	*C*	627
40	"	"	609	178	1930	"	6	264	"	"	33	380	1930	*PC*	151	451	"	*L*	1014
49	"	*R*	193	182	1932	*R*	66	283	"	"	81	387	1932	*P*	167	454	1931	*A*	23
55	1930	*C*	178	188	1930	*M*	119	312	"	*PC*	54	388	1930	*R*	249	464	1930	*R*	224
60	"	*A*	211	196	"	"	126	315	"	*L*	197	396	1932	*N*	68	467	1932	*P*	166
61	"	"	49	200	"	"	121	318	"	*B*	201	398	1930	*L*	605	468	"	*C*	411
87	"	*R*	33	204	"	"	123	324*a*	1932	*P*	167	401	"	"	738	472	"	*A*	1
90	"	*P*	14	207	"	"	127	324*b*	1930	*A*	288	407	1931	*C*	209	475	"	*C*	409
97	1929	*A*	919	211	"	"	124	332	"	*B*	381	418	1932	"	410	478	1929	"	753
107	1930	*C*	297	217	"	"	113	340	"	*R*	78	421	1930	*M*	764	486	1930	*PC*	226
111	"	*R*	4																

15 & 16 All India Criminal Reports=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1931 Allahabad.**

32 Criminal Law Journal & 129 to 134 Indian Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1931 Lahore.**

1931 Criminal Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1931 Nagpur.**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1931 MADRAS SECTION, with corresponding references of other REPORTS AND JOURNALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1931 MADRAS.
Column No. 2 denotes corresponding references of other JOURNALS.

A. I. R. 1931 Madras=Other Journals

A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals	A.I.R.)	Other Journals
1	33 *M L W* 210	36	129 *I C* 682	69	33 *M L W* 68	138	120 *I C* 511
	60 *M L J* 713	37	32 *M L W* 431		129 *I C* 625	140	60 *M L J* 56
	132 *I C* 311		1930 *M W N* 964	71	1930 *M W N* 955		33 *M L W* 95
6	32 *M L W* 662		59 *M L J* 529		130 *I C* 190		54 *Mad* 163
	59 *M L J* 918		128 *I C* 476	73	1930 *M W N* 1113		135 *I C* 17
	129 *I C* 249		54 *Mad* 24		32 *M L W* 827	147	32 *M L W* 814
8	32 *M L W* 694	38 (1)	59 *M L J* 892		130 *I C* 470		59 *M L J* 941
	59 *M L J* 953		32 *M L W* 742		60 *M L J* 450		129 *I C* 449
	129 *I C* 254		1930 *M W N* 1096		54 *Mad* 239	149	1931 *M W N* 18
10	1930 *M W N* 673		129 *I C* 462	78	125 *I C* 250		33 *M L W* 154
	32 *M L W* 446		54 *Mad* 237	81	1930 *M W N* 1245		60 *M L J* 239
	59 *M L J* 710	38 (2)	1930 *M W N* 719		60 *M L J* 219		130 *I C* 738
	129 *I C* 36		33 *M L W* 189		33 *M L W* 259		54 *Mad* 455
12	53 *Mad* 737		129 *I C* 255		130 *I C* 451	152	1931 *M W N* 73
	59 *M L J* 770	40	32 *M L W* 57	83	33 *M L W* 168		33 *M L W* 224
	33 *M L W* 113		128 *I C* 453		60 *M L J* 191		130 *I C* 721
	129 *I C* 235	42	1930 *M W N* 350		130 *I C* 177		54 *Mad* 364
16	1930 *M W N* 991		59 *M L J* 114		54 *Mad* 627		60 *M L J* 551
	128 *I C* 719		32 *M L W* 285	94	1930 *M W N* 358	170	33 *M L W* 60
	32 *Cr L J* 200		3 *M Cr C* 223		129 *I C* 824		54 *Mad* 198
	59 *M L J* 850		129 *I C* 229	97	1930 *M W N* 1217		130 *I C* 668
	32 *M L W* 513		32 *Cr L J* 262	FB	60 *M L J* 155		60 *M L J* 498
	3 *M Cr C* 370	43	33 *M L W* 201		130 *I C* 463	175	32 *M L W* 810
	54 *Mad* 331		130 *I C* 188		33 *M L W* 485		59 *M L J* 923
	15 *A I Cr R* 387	45	1930 *M W N* 1067	103	1930 *M W N* 568		129 *I C* 456
17	1930 *M W N* 1106		32 *M L W* 680		130 *I C* 458		54 *Mad* 416
	59 *M L J* 901		129 *I C* 245	106	1930 *M W N* 1011	177	1930 *M W N* 858
	32 *M L W* 36		60 *M L J* 701		33 *M L W* 86		32 *M L W* 527
	1931 *Cr C* 30		54 *Mad* 352		130 *I C* 460		3 *M Cr C* 291
	129 *I C* 458	49	1930 *M W N* 508	110	1930 *M W N* 1190		59 *M L J* 471
	32 *Cr L J* 355		59 *M L J* 913		33 *M L W* 78		54 *Mad* 75
	15 *A I Cr R* 434		33 *M L W* 12		130 *I C* 506		129 *I C* 645
	4 *M Cr C* 142		129 *I C* 462	111	4 *M Cr C* 166		32 *Cr L J* 448
18	1930 *M W N* 529	50	32 *M L W* 788	113	1930 *M W N* 1232		1931 *Cr C* 281
	1931 *Cr C* 32		1930 *M W N* 1196		130 *I C* 477	180	59 *M L J* 876
	129 *I C* 451		59 *M L J* 911	115	1930 *M W N* 816		32 *M L W* 940
	33 *M L W* 205		129 *I C* 251		130 *I C* 658		129 *I C* 252
	32 *Cr L J* 354	51	129 *I C* 828	118	130 *I C* 479		4 *M Cr C* 22
	4 *M Cr C* 139		33 *M L W* 284		33 *M L W* 607		32 *Cr L J* 357
	15 *A I Cr R* 452	55	1930 *M W N* 1091	120	1930 *M W N* 1059		1931 *Cr C* 284
19	32 *M L W* 957		32 *M L W* 760		33 *M L W* 109		15 *A I Cr R* 420
	129 *I C* 451		129 *I C* 225		130 *I C* 666	181	1930 *M W N* 907
	1931 *M W N* 155		60 *M L J* 456	122	60 *M L J* 260		3 *M Cr C* 376
	60 *M L J* 85		54 *Mad* 495		130 *I C* 509		33 *M L W* 133
22	1930 *M W N* 246	58	1930 *M W N* 966		1931 *M W N* 317		60 *M L J* 299
	33 *M L W* 186		32 *M L W* 555		33 *M L W* 497		1931 *Cr C* 285
	129 *I C* 454		128 *I C* 477	124	32 *M L W* 666		131 *I C* 156
24	33 *M L W* 206		54 *Mad* 153		1930 *M W N* 865		32 *Cr L J* 662
	130 *I C* 449		60 *M L J* 280		129 *I C* 814	183	60 *M L J* 133
	61 *M L J* 39	61	59 *M L J* 746		60 *M L J* 309		33 *M L W* 430
26 (1)	59 *M L J* 682		32 *M L W* 856	128	130 *I C* 661		1931 *Cr C* 287
	32 *M L W* 893		129 *I C* 242		1931 *M W N* 631		131 *I C* 158
	129 *I C* 681	65	1930 *M W N* 921		61 *M L J* 58	185 (1)	60 *M L J* 213
	1931 *M W N* 466		32 *M L W* 522		34 *M L W* 369		1931 *Cr C* 226
26 (2)	130 *I C* 187		59 *M L J* 839	133	1930 *M W N* 1236		33 *M L W* 405
28	1930 *M W N* 1028		128 *I C* 849		130 *I C* 657		1931 *M W N* 327
	32 *M L W* 905		54 *Mad* 409	135	32 *M L W* 945		131 *I C* 173
	129 *I C* 628	67	129 *I C* 826		60 *M L J* 137		4 *M Cr C* 101
	60 *M L J* 676		61 *M L J* 43		132 *I C* 117		32 *Cr L J* 688
	54 *Mad* 469		34 *M L W* 352	137	1930 *M W N* 1198	185 (2)	1930 *M W N* 1199
36	59 *M L J* 833	69	1930 *M W N* 656		130 *I C* 569		33 *M L W* 1
	33 *M L W* 92		59 *M L J* 899	138	33 *M L W* 540		131 *I C* 165
					33 *M L W* 75		54 *Mad* 654

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A.I.R.	Other Journals
185 (2)	62 *M L J* 45
192	1930 *M W N* 1187
	131 *I C* 171
194	53 *Mad* 367
	59 *M L J* 74
	32 *M L W* 92
	128 *I C* 525
198	31 *M L W* 76
	58 *M L J* 195
	122 *I C* 337
	53 *Mad* 245
199	32 *M L W* 943
	60 *M L J* 69
	54 *Mad* 59
	129 *I C* 655
	34 *M L W* 601
	1931 *M W N* 1121
200	1930 *M W N* 1228
	33 *M L W* 70
	131 *I C* 124
202	1930 *M W N* 65
	58 *M L J* 388
	124 *I C* 7
	53 *Mad* 405
	31 *M L W* 254
206	1930 *M W N* 1235
	131 *I C* 121
207	1930 *M W N* 601
	53 *Mad* 952
	60 *M L J* 13
	33 *M L W* 20
	129 *I C* 463
213	1930 *M W N* 515
	59 *M L J* 844
	32 *M L W* 978
	129 *I C* 630
216	1930 *M W N* 1242
	33 *M L W* 455
	60 *M L J* 709
	131 *I C* 175
	54 *Mad* 554
218	59 *M L J* 139
	32 *M L W* 188
	128 *I C* 701
225	1930 *M W N* 1041
	3 *M Cr C* 390
	1931 *Cr C* 321
	131 *I C* 458
	32 *Cr L J* 753
	35 *M L W* 98
227	1930 *M W N* 1215
	4 *M Cr C* 79
	1931 *Cr C* 323
	131 *I C* 454
	32 *Cr L J* 749
	16 *A I Cr R* 370
	34 *M L W* 975
228	32 *M L W* 754
	59 *M L J* 479
	4 *M Cr C* 11
	129 *I C* 635
	32 *Cr L J* 432
	1931 *Cr C* 324
	1931 *M W N* 641
231	1931 *M W N* 182
	4 *M Cr C* 60
	33 *M L W* 291
	60 *M L J* 336
	1931 *Cr C* 327
	131 *I C* 455
	54 *Mad* 515

A.I.R.	Other Journals
231	32 *Cr L J* 749
	16 *A I Cr R* 371
233 (1)	1931 *M W N* 118
	33 *M L W* 311
	4 *M Cr C* 92
	1931 *Cr C* 329
	131 *I C* 174
	32 *Cr L J* 689
	16 *A I Cr R* 330
233 (2)	1930 *M W N* 702
	3 *M Cr C* 238
	1931 *Cr C* 329
	131 *I C* 456
	32 *Cr L J* 751
	16 *A I Cr R* 374
	1930 *M W N* 790
235	3 *M Cr C* 308
	1931 *Cr C* 331
	131 *I C* 449
	32 *Cr L J* 743
	1930 *M W N* 841
236	3 *M Cr C* 395
	60 *M L J* 378
	1931 *Cr C* 332
	131 *I C* 449
	33 *M L W* 632
	32 *Cr L J* 744
	16 *A I Cr R* 361
	33 *M L W* 542
240	54 *Mad* 251
	1931 *Cr C* 336
	131 *I C* 624
	32 *Cr L J* 779
	4 *M Cr C* 141
	1931 *M W N* 766
	60 *M L J* 694
241	1930 *M W N* 914
	3 *M Cr C* 362
	1931 *Cr C* 361
	131 *I C* 493
	32 *Cr L J* 757
242	1930 *M W N* 849
	3 *M Cr C* 381
	60 *M L J* 370
	1931 *Cr C* 362
	131 *I C* 649
	33 *M L W* 640
	32 *Cr L J* 763
247	1930 *M W N* 694
	3 *M Cr C* 348
	1931 *Cr C* 367
	134 *I C* 57
	32 *Cr L J* 1116
249	1930 *M W N* 289
	58 *M L J* 623
	31 *M L W* 633
	53 *Mad* 716
	128 *I C* 156
251	1930 *M W N* 1077
	60 *M L J* 355
	134 *I C* 161
	61 *M L J* 805
	34 *M L W* 955
	131 *I C* 6
264	33 *M L W* 269
	131 *I C* 9
	1931 *M W N* 501
	61 *M L J* 19
	54 *Mad* 576
268	135 *I C* 13
270	130 *I C* 475

A.I.R.	Other Journals
270	60 *M L J* 471
	33 *M L W* 549
272	33 *M L W* 263
	131 *I C* 151
273	1931 *M W N* 811
	59 *M L J* 949
	129 *I C* 460
	33 *M L W* 378
274	1930 *M W N* 97
	31 *M L W* 336
	58 *M L J* 417
	131 *I C* 609
276	1930 *M W N* 1263
	1931 *Cr C* 353
	131 *I C* 848
	4 *M Cr C* 248
	32 *Cr L J* 809
277	60 *M L J* 267
	33 *M L W* 411
	130 *I C* 764
278	33 *M L W* 384
	130 *I C* 756
	1931 *M W N* 527
282	1931 *M W N* 299
	60 *M L J* 430
	33 *M LW* 457
	130 *I C* 845
284	33 *M L W* 681
	133 *I C* 507
	61 *M L J* 563
	54 *Mad* 793
300	60 *M L J* 315
	33 *M L W* 307
	130 *I C* 766
	1931 *M W N* 497
	54 *Mad* 671
302	131 *I C* 151
303	1931 *M W N* 48
	33 *M L W* 359
	131 *I C* 610
	60 *M L J* 628
313	132 *I C* 196
	34 *M L W* 995
317	33 *M L W* 323
	131 *I C* 481
	61 *M L J* 66
	54 *Mad* 739
	1931 *M W N* 1085
324	1931 *M W N* 199
	33 *M L W* 446
	131 *I C* 828
325	60 *M L J* 339
	33 *M L W* 448
	131 *I C* 150
326	33 *M L W* 554
	1931 *M W N* 254
	131 *I C* 829
328	131 *I C* 19
	54 *Mad* 532
335	60 *M L J* 302
	33 *M L W* 727
	131 *I C* 840
340	1931 *M W N* 193
	132 *I C* 124
343	33 *M L W* 159
	60 *M L J* 264
	1931 *M W N* 213
	54 *Mad* 266
	132 *I C* 127
344	1931 *M W N* 378
	33 *M L W* 620

A.I.R.	Other Journals
344	132 *I C* 134
	61 *M L J* 173
	54 *Mad* 823
352	60 *M L J* 293
	131 *I C* 621
	33 *M L W* 763
354	1931 *M W N* 302
	131 *I C* 669
357	60 *M L J* 229
	131 *I C* 643
	33 *M L W* 734
361	1931 *M W N* 126
	33 *M L W* 572
	131 *I C* 647
363	60 *M L J* 214
	1931 *M W N* 294
	33 *M L W* 407
	131 *I C* 641
366	33 *M L W* 468
	130 *I C* 753
	61 *M L J* 27
369	122 *I C* 174
370	123 *I C* 28
374	122 *I C* 348
375	1930 *M W N* 509
	132 *I C* 129
376	1930 *M W N* 514
	132 *I C* 128
377	1930 *M W N* 939
	32 *M L W* 592
	128 *I C* 695
	60 *M L J* 488
381	1930 *M W N* 729
	32 *M L W* 615
	128 *I C* 455
399	1930 *M W N* 1152
	32 *M L W* 919
	129 *I C* 818
	54 *Mad* 184
	60 *M L J* 721
404	32 *M L W* 704
	59 *M L J* 782
	1930 *M W N* 1165
	129 *I C* 801
	54 *Mad* 269
418	1930 *M W N* 582
	132 *I C* 296
419	1930 *M W N* 1271
	33 *M L W* 475
	1931 *Cr C* 467
	132 *I C* 319
	54 *Mad* 595
	32 *Cr L J* 895
	4 *M Cr C* 183
	60 *M L J* 495
420	1931 *M W N* 266
	130 *I C* 847
	32 *Cr L J* 623
	1931 *Cr C* 468
	4 *M Cr C* 187
	16 *A I Cr R* 253
	34 *M L W* 631
	60 *M L J* 393
422	1931 *M W N* 321
FB	33 *M L W* 425
	131 *I C* 145
	1931 *Cr C* 470
	32 *Cr L J* 657
	54 *Mad* 520
	4 *M Cr C* 94
	16 *A I Cr R* 284

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A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
424	33	*M L W*	254	465	34	*M L W*	824	490 (2)	1930	*M W N*	1103	560	1931	*Cr C*	624
	1931	*M W N*	269	468	1931	*M W N*	150		1931	*Cr C*	554		4	*M Cr C*	278
	60	*M L J*	462		33	*M L W*	312		133	*I C*	1		34	*M L W*	527
	131	*I C*	117		131	*I C*	153		4	*M Cr C*	261		33	*Cr L J*	145
	4	*M Cr C*	160	471	60	*M L J*	167		32	*Cr L J*	967		135	*I C*	542
	32	*Cr L J*	643		33	*M L W*	143		61	*M L J*	854	561 (1)	33	*M L W*	618
	1931	*Cr C*	472		1931	*M W N*	590		34	*M L W*	660		131	*I C*	832
427	4	*M Cr C*	44		54	*Mad*	337	492	1930	*M W N*	1109		61	*M L J*	34
	33	*M L W*	414		132	*I C*	654		4	*M Cr C*	30		54	*Mad*	887
	1931	*Cr C*	475	474	33	*M L W*	562		1931	*Cr C*	556	561 (2)	1931	*M W N*	23
	1931	*M W N*	652		1931	*M W N*	444		133	*I C*	3		60	*M L J*	662
	54	*Mad*	588		132	*I C*	297		32	*Cr L J*	969		33	*M L W*	771
	32	*Cr L J*	1212		54	*Mad*	727	494	1930	*M W N*	770		135	*I C*	349
	134	*I C*	801		61	*M L J*	774		3	*M Cr C*	221	570	1931	*M W N*	259
429	1931	*M W N*	325	478	33	*M L W*	619		1931	*Cr C*	553		135	*I C*	543
	33	*M L W*	570		60	*M L J*	615		133	*I C*	4	571	131	*I C*	2
	131	*I C*	174		132	*I C*	320		32	*Cr L J*	971		1931	*M W N*	549
	1931	*Cr C*	477		54	*Mad*	758	495	1931	*M W N*	554		61	*M L J*	52
	32	*Cr L J*	689	479	60	*M L J*	698		1931	*Cr C*	559		34	*M L W*	394
	4	*M Cr C*	218		132	*I C*	317		133	*I C*	5	574	133	*I C*	8
	16	*A I Cr R*	328		33	*M L W*	785		4	*M Cr C*	215		34	*M L W*	209
430	1931	*M W N*	167	481	1930	*M W N*	1142		32	*Cr L J*	972		61	*M L J*	117
	33	*M L W*	348		4	*M Cr C*	26	497	1931	*M W N*	329		54	*Mad*	928
	4	*M Cr C*	152		1931	*Cr C*	545		130	*I C*	750	575	33	*M L W*	419
	1931	*Cr C*	478		60	*M L J*	691		61	*M L J*	748		132	*I C*	122
	54	*Mad*	678		133	*I C*	7		34	*M L W*	943		54	*Mad*	561
	60	*M L J*	404		34	*M L W*	349	500	60	*M L J*	332		61	*M L J*	120
	33	*Cr L J*	115		32	*Cr L J*	973		131	*I C*	655	577	1930	*M W N*	874
	135	*I C*	337	482	60	*M L J*	433	502	33	*M L W*	294		133	*I C*	369
436	33	*M L W*	218		33	*M L W*	423	505	1931	*M W N*	8	580	60	*M L J*	527
	1931	*M W N*	393		1931	*M W N*	364		133	*I C*	193		33	*M L W*	576
	131	*I C*	147		131	*I C*	463	511	131	*I C*	14		132	*I C*	305
	1931	*Cr C*	484		1931	*Cr C*	546		34	*M L W*	531	586	1931	*M W N*	290
	32	*Cr L J*	659		54	*Mad*	558	512	1931	*M W N*	310		54	*Mad*	722
	54	*Mad*	504		4	*M Cr C*	171		133	*I C*	371		61	*M L J*	312
	60	*M L J*	616	484	1931	*M W N*	489		34	*M L W*	528		33	*M L W*	528
	4	*M Cr C*	174		33	*M L W*	671	513	131	*I C*	833		135	*I C*	460
439	1931	*M W N*	399		131	*I C*	844	520	132	*I C*	113	588	133	*I C*	12
	131	*I C*	461		4	*M Cr C*	145		60	*M L J*	600	590	33	*M L W*	604
	1931	*Cr C*	487		1931	*Cr C*	548		1931	*M W N*	428		60	*M L J*	659
	32	*Cr L J*	756		32	*Cr L J*	806		33	*M L W*	532		132	*I C*	289
	4	*M Cr C*	223		54	*Mad*	1025	525	132	*I C*	130		54	*Mad*	770
	16	*A I Cr R*	419		16	*A I Cr R*	381		1931	*M W N*	537	592	131	*I C*	487
440	1931	*M W N*	326		61	*M L J*	842		34	*M L W*	333		54	*Mad*	708
	33	*M L W*	571	487	1931	*M W N*	366		61	*M L J*	754		34	*M L W*	556
	131	*I C*	159		131	*I C*	654	529	33	*M L W*	615	597 (1)	1931	*M W N*	287
	1931	*Cr C*	488		1931	*Cr C*	551		60	*M L J*	695		34	*M L W*	547
	32	*Cr L J*	664		32	*Cr L J*	767		132	*I C*	120		135	*I C*	544
	4	*M Cr C*	182		4	*M Cr C*	275		1931	*M W N*	415	597 (2)	33	*M L W*	664
441	131	*I C*	817	488 (1)	33	*M L W*	553	531	131	*I C*	139		1931	*M W N*	417
FB	61	*M L J*	229		60	*M L J*	711	533	1931	*M W N*	390		133	*I C*	773
	1931	*M W N*	774		131	*I C*	621		131	*I C*	1	601	1931	*M W N*	261
	54	*Mad*	601		1931	*Cr C*	552	534	132	*I C*	301		135	*I C*	572
	34	*M L W*	282		32	*Cr L J*	779	538	1931	*M W N*	142	603 (1)	131	*I C*	15
	4	*M Cr C*	285		4	*M Cr C*	194		33	*M L W*	339		33	*M L W*	559
452	1931	*M W N*	353		1931	*M W N*	404		60	*M L J*	478	603 (2)	1930	*M W N*	973
	130	*I C*	761		54	*Mad*	1034		133	*I C*	198		133	*I C*	372
	34	*M L W*	214	488 (2)	1931	*M W N*	179	542	33	*M L W*	648	607	1931	*M W N*	546
	54	*Mad*	527		33	*M L W*	336		61	*M L J*	316		135	*I C*	459
	61	*M L J*	135		4	*M Cr C*	86		133	*I C*	497	608	133	*I C*	206
456	33	*M L W*	768		131	*I C*	5	550	34	*M L W*	598	609	1931	*M W N*	544
	60	*M L J*	521		60	*M L J*	524		1931	*M W N*	263		134	*I C*	55
	132	*I C*	316		32	*Cr L J*	635		135	*I C*	367	610	133	*I C*	202
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	132	*I C*	647	490 (1)	1931	*M W N*	495	553	1931	*M W N*	335	613	1931	*M W N*	508
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465	132	*I C*	141		32	*Cr L J*	851		61	*M L J*	139	619	1931	*M W N*	451
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	54	*Mad*	845
632	131	*I C*	461
634	60	*M L J*	467
	33	*M L W*	611
	131	*I C*	494
636	132	*I C*	292
	33	*M L W*	517
	61	*M L J*	556
	54	*Mad*	889
640	131	*I C*	16
641	60	*M L J*	590
	133	*I C*	207
	33	*M L W*	661
642	132	*I C*	290
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	135	*I C*	305
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659	34	*M L W*	185
	134	*I C*	42
	54	*Mad*	900
	61	*M L J*	648
668	61	*M L J*	381
	34	*M L W*	489
	134	*I C*	981
672	34	*M L W*	47
	133	*I C*	777
	54	*Mad*	1006
	61	*M L J*	812
674	34	*M L W*	317
	134	*I C*	188
679	34	*M L W*	69
	1931	*M W N*	1016
	133	*I C*	769
683	61	*M L J*	933
	1931	*M W N*	916
	134	*I C*	1137
	34	*M L W*	429
688	1931	*M W N*	392
	33	*M L W*	561
	60	*M L J*	588
	54	*Mad*	574
	133	*I C*	522
	4	*M Cr C*	210
	1931	*Cr C*	960
689	61	*M L J*	608
	34	*M L W*	128
	54	*Mad*	931
	1931	*Cr C*	929
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	134	*I C*	51
	54	*Mad*	943
	32	*Cr L J*	1095
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	61	*M L J*	770
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	134	*I C*	813
	1931	*Cr C*	942
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	1931	*M W N*	893
	134	*I C*	803
707	34	*M L W*	262
	61	*M L J*	430
	54	*Mad*	883
	135	*I C*	9
710	135	*J C*	11
712	34	*M L W*	378
	61	*M L J*	680
	134	*I C*	988
713	134	*I C*	1151
714	34	*M L W*	259
	1931	*M W N*	870
	61	*M L J*	434
	134	*I C*	1201
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	134	*I C*	816
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	134	*I C*	181
	54	*Mad*	980
	135	*I C*	529
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	61	*M L J*	357
	135	*I C*	32
724	34	*M L W*	94
	61	*M L J*	203
	134	*I C*	184
726	133	*I C*	381
	61	*M L J*	35
	34	*M L W*	365
729	34	*M L W*	143
	1931	*M W N*	937
	134	*I C*	169
	135	*I C*	318
740	61	*M L J*	395
743	34	*M L W*	915
	134	*I C*	984
	132	*I C*	641
745	34	*M L W*	105
	54	*Mad*	989
	61	*M L J*	820
	135	*I C*	345
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753	135	*I C*	24
	1931	*M W N*	830
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	135	*I C*	1
	62	*M L J*	199
	1931	*Cr C*	928
768	134	*I C*	1216
768	1931	*M W N*	713
	33	*Cr L J*	51
769	61	*M L J*	127
	34	*M L W*	211
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	32	*Cr L J*	1035
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	131	*I C*	176
	32	*Cr L J*	690
	54	*Mad*	598
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	61	*M L J*	222
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	133	*I C*	776
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	1931	*Cr C*	1028
	134	*I C*	990
772 (2)	33	*Cr L J*	14
	34	*M L W*	44
	1931	*M W N*	771
	61	*M L J*	123
	4	*M Cr C*	297
	54	*Mad*	842
	1931	*Cr C*	1028
	32	*Cr L J*	1278
	134	*I C*	990
773	1931	*M W N*	768
	34	*M L W*	171
	61	*M L J*	219
	54	*Mad*	759
	4	*M Cr C*	300
	1931	*Cr C*	1029
	134	*I C*	1215
	33	*Cr L J*	49
775	1931	*M W N*	857
	34	*M L W*	380
	4	*M Cr C*	342
	1931	*Cr C*	1031
	61	*M L J*	915
	134	*I C*	986
	32	*Cr L J*	1276
777	4	*M Cr C*	220
	61	*M L J*	474
	34	*M L W*	710
	1931	*M W N*	1310
	1931	*Cr C*	1033
	32	*Cr L J*	1279
	134	*I C*	991
778	34	*M L W*	377
	4	*M Cr C*	312
	1931	*M W N*	1061
	1931	*Cr C*	1034
	61	*M L J*	914
	134	*I C*	1137
	33	*Cr L J*	48
779	1931	*M W N*	715
	34	*M L W*	388
779	4	*M Cr C*	306
	1931	*Cr C*	1035
	62	*M L J*	71
	33	*Cr L J*	132
	135	*I C*	364
782	1931	*M W N*	902
	34	*M L W*	385
	61	*M L J*	884
	134	*I C*	809
784	1931	*M W N*	1014
	135	*I C*	315
785	34	*M L W*	266
	1931	*M W N*	906
	61	*M L J*	437
	54	*Mad*	973
	134	*I C*	1208
788	61	*M L J*	518
	34	*M L W*	761
	135	*I C*	31
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	135	*I C*	343
791	60	*M L J*	475
	1931	*M W N*	710
	133	*I C*	205
792	60	*M L J*	270
	33	*M L W*	741
	133	*I C*	378
795	1931	*M W N*	1002
	135	*I C*	347
797	34	*M L W*	117
	61	*M L J*	354
	134	*I C*	179
799	1931	*M W N*	957
	135	*I C*	540
801	133	*I C*	14
	34	*M L W*	254
	54	*Mad*	1011
	61	*M L J*	815
804	34	*M L W*	689
	1931	*M W N*	1169
	135	*I C*	903
808	1931	*M W N*	1097
	61	*M L J*	642
	34	*M L W*	719
	135	*I C*	311
812	1931	*M W N*	1079
	34	*M L W*	633
	61	*M L J*	931
	135	*I C*	344
813	34	*M L W*	496
	1931	*M W N*	1069
	61	*M L J*	920
	134	*I C*	1202
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	134	*I C*	63
	54	*Mad*	788
	32	*Cr L J*	1099
822	1931	*M W N*	1026
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MADRAS HIGH COURT

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* A. I. R. 1931 Madras 1

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Vaithilingam Pillai — Defendant — Petitioner.

v.

Kandaswami Pillai—Plaintiff — Respondents.

Civil Revn. Petn. No. 1126 of 1930, Decided on 31st July 1930, from order of remand of Dist. Court, South Arcot, D/- 25th September 1929, in Appeal Suit No. 277 of 1928.

*** (a) Civil P. C. (1908), S. 115—Plaintiff basing relief on one legal relation—Subsequently he applying for amendment allowing him to base his claim on another legal relation—On date of application, latter claim time barred—Trial Court rejecting application and deciding suit as originally framed—Lower appellate Court ordering remand allowing amendment—Remand order held to be vitiated with material irregularity of procedure and although no appeal could lie against it, High Court could and should interfere with it in revision**—(Per *Reilly, J.*) **—No appeal could lie against remand order, for trial Court's disposal could not be said to be on "preliminary point" within meaning of Civil P. C. (1908), O. 41, R. 23.**

Plaintiff brought his suit as a reversioner of the last male-holder for possession of certain moveables. Subsequent to the filing of the suit he applied to the Court to allow him to amend the plaint. He wanted to introduce a new ground into the plaint, viz., that the properties in suit were absolute properties held as stridhan by the widow in whose possession they were and that he was entitled to them as her heir. But when the application was made the claim on the latter ground was time barred and so the application was rejected by the trial Court, which then tried and decided the suit as it was originally framed. The lower appellate Court however held that the amendment should be allowed and remanded the case.

Held: that plaint could not properly be allowed to be amended as the amendment would change the fundamental character of the suit, for it would change a suit based on one legal relation into a suit based upon another one, or a suit based upon one legal title into a suit based upon another title when the plaintiff's claim on the second legal relation or title is time barred on the date on which the application for amendment was made. Hence in passing the order of remand the lower appellate Court acted with material irregularity in procedure. And although no appeal would lie against the order still the High Court could and should interfere in revision to set the order aside: 32 *Mad.* 334, *Ref.* [P 2 C 1, 2]

Held further: (Per *Reilly, J.*)—No appeal could lie against the order of the lower appellate Court as the disposal of the suit by the Court of first instance could not be said to be on the "preliminary point" within the meaning of O. 41, R. 23. For when a Court has disposed of the whole suit as it stood before it originally, it would be abuse of language to say that it disposed of the suit on a preliminary point merely because it did not deal with the further issues which might have arisen if the suit had been framed otherwise originally or if the amendment of pleadings had been allowed later in the history of the suit: *A.I.R.* 1922 *Mad.* 505 (*F.B.*), *Expl.* and *Dist.* [P 1 C 1, 2]

(b) Civil P. C. (1908), S. 115—High Court's power to interfere in revision stated.

Powers of revision can be properly exercised in cases where but for the High Court's intervention there would be multiplicity of proceedings, the time of the Cours would be unnecessarily taken and the parties put to unnecessary expense: 32 *Mad.* 334 and (1930) *M.W.N.* 584, *Foll.* [P 5 C 2]

M. Patanjali Sastri—for Petitioner.

K. Bhashyam Ayyangar—for Respondents.

Reilly, J.—In one respect I am prepared to go further than my learned brother. In my opinion no appeal lies in this case. As has been pointed out, the District Munsif disposed of the suit on all the issues framed by him, and it is not contended that those issues did

not cover the whole suit as it originally stood or omitted any contention raised by the defendant in his written statement or at the settlement of issues. When a Court has disposed of the whole suit as it stands before it in that way, to say that it has disposed of the suit on a preliminary point merely because it has not dealt with the further issues, which might have arisen if the suit had been framed otherwise originally or if an amendment of the pleadings had been allowed later in the history of the suit, appears to me to be almost an abuse of language. I am clear that nothing in the opinion of the Full Bench in *Raman Nayar* v. *Krishnan Nambudripad* (1), would justify us in going so far as that. Mr. Patanjali Sastri suggested at one stage of his arguments that the history of the litigation which led up to the Full Bench decision was very similar to the history of this case. But on an examination of the printed papers in that case that suggestion appears to be incorrect. The plaintiff in that case did not, as Mr. Patanjali Sastri at first suggested, by a subsequent pleading put in after the written statement, raise a new plea, and the District Munsif was not held to have decided the suit against him on a preliminary point because he refused to take into consideration the contents of any such subsequent pleading. He decided the suit, it was held, on a preliminary point because he dealt with it on his view that the plaintiff did not raise in his original pleadings a certain plea, which the Subordinate Judge on appeal found he did raise, and shut out some evidence. That is quite unlike the present case.

But I agree that, although there is no appeal in this case, it is one in which we should interfere in revision. The learned District Munsif's refusal to allow the plaint to be amended appears to have been quite correct. As is well known, a plaint may be amended at any stage of a suit, subject to proper provision as to costs, for the .purpose of bringing out the questions really in controversy between the parties or for correcting any mistake or error in the plaint which has obscured the plaintiff's real claim as intended by him; but plaints cannot properly be allowed to be amended if the amendment would change the fundamental character of the suit, should change a suit based on one legal relation into a suit based upon another one or a suit based upon one title into a suit based upon another title, when the plaintiff's claim on the second legal relation or title is time barred on the date on which the application for amendment is made. Now, as has been pointed out in this case, the plaintiff's claim as the heir to the stridhanam property of Rajamanikathammal was time barred on the date when he made his application for amendment to the District Munsif. If he had brought a suit on that basis on that date, he was bound to fail. But the learned District Judge has given him an opportunity nevertheless to sue on that time barred claim. It appears to me that in so amending and remanding the suit the learned District Judge undoubtedly committed an irregularity in procedure, and, if it was an irregularity, it was certainly a material one. Therefore in my opinion this is a case in which we can interfere in revision and should do so. I agree with the order proposed by my learned brother both as to the costs and otherwise.

Anantakrishna Ayyar, J.—The defendant has preferred this civil miscellaneous appeal against the order of remand passed by the learned District Judge of South Arcot in Appeal No. 277 of 1928 on his file, by which he reversed the decision of the District Munsif of Chidambaram and remanded the suit for fresh disposal.

When this appeal was opened by the learned advocate for the appellant, Mr. Bhashyam Ayyangar who appeared for the respondent plaintiff raised a preliminary objection that the appeal is not maintainable as it could not be said that the order of remand passed by the learned District Judge was passed under O. 41, R. 23, Civil P. C. The learned advocate argued that it must be taken that the order of remand in this case was passed under the inherent jurisdiction possessed by the appellate Court, and that in such cases no appeal would lie to this Court against .the order of remand. To the preliminary objection the learned advocate for the appellant answered by referring us to the decision of the Full Bench reported in *Raman Nayar* v. *Krishnan Nambudripad* (1). We were taken through the opinions delivered in

(1) A. I. R. 1922 Mad. 505=69 I. C. 828=45 Mad. 900 (F.B.).

that case by all the three learned Judges who heard the reference to the Full Bench and Mr. Patanjali Sastri for the appellant argued that the decision in the present case must be taken to be on a preliminary point within the meaning of the opinions of the learned Judges in the Full Bench case. Before dealing with this objection, I think it is necessary that I should refer to the course the present case took in the first Court as well as in the lower appellate Court.

The plaintiff alleging that he was the reversioner to the estate of one Dharmalingam Pillai who died about 20 years ago filed the suit to recover possession of certain moveables or their value on the ground that they belonged to the estate of Dharmalingam Pillai and that on his death the same came to Rajamanikathammal, his widow who died on 29th August 1924. The plaint, as we understand it, is based on the allegations that the properties belonged to the estate of the last male holder, that they were in the possession of his widow as a life-estate holder, and that on her death the defendant took possession of the same; and as the reversioner to the last male holder's estate the suit is laid by the plaintiff to recover possession of the moveables or their value. The plaint was filed on 29th August 1927. On 10th November 1927 the plaintiff filed an application to have the plaint amended by introducing a new cause of action. The plaintiff wanted to have the relief originally claimed in the plaint granted to him on the new ground that he put forward in the application, namely that the properties belonged absolutely and as stridhanam properties to Rajamanikathammal, and as she left no nearer heirs than the plaintiff, the plaintiff wanted relief also on the footing that as the nearest heir of Rajamanikathammal he would be entitled to those properties on the ground that they were the absolute stridhanam properties of that lady. The trial Court disallowed the plaintiff's request and dismissed that application and ruled that that was not a case where the plaintiff should be allowed to amend the plaint. The trial accordingly proceeded and the suit was, as originally laid (which was in fact the only plaint before the Court), tried on its merits on all the issues framed in the case, and the trial Court came to the conclusion that the properties referred to in the plaint did not belong to the last male holder but were the properties of Rajamanikathammal. The suit was accordingly dismissed by the trial Court. On plaintiff's appeal the learned District Judge agreed substantially with the findings of the trial Court. The learned District Judge held that it was not proved that the properties were the properties of the last male holder. He also agreed with the trial Court that the properties were the absolute properties of Rajamanikathammal. There was some difference of opinion as to whether all the items in suit were given to Rajamanikathammal by the defendant in the case or whether some were given to her by the defendant and some by Dharmalingam Pillai, but the lower appellate Court concurred with the finding of the first Court that the properties were not the properties of Dharmalingam Pillai.

The lower appellate Court also agreed with the finding of the trial Court that, according to the allegations in the original plaint, it could not be reasonably contended that the plaintiff claimed any relief in the present suit based upon the properties being the absolute properties of Rajamanikathammal. The lower appellate Court was not prepared to accept the plaintiff's contention that, even without an amendment and on the allegation in the plaint as it stood, the plaintiff was entitled to have this new question also tried in the present suit. However the learned District Judge thought that he should allow an amendment of the plaint by allowing the plaintiff to introduce into the plaint fresh allegations regarding the properties being the stridhanam properties of Rajamanikathammal and that the plaintiff was entitled to recover the same as the nearest heir of Rajamanikathammal. The defendant objected to the amendment. One of the grounds on which the defendant raised the objection was that on the date on which the application to amend the plaint was filed, the plaintiff's right to bring an independent suit claiming recovery of the properties on the footing of his being the heir to the stridhanam properties of Rajamanikathammal would be barred by limitation, and in the circumstances the defendant contended that the amendment should not be allowed. The learned District Judge however overruled the con-

tention of the defendant, and directed that the plaint should be amended, as in his view the two claims could not be said to be "inconsistent with one another." He accordingly reversed the decree of the trial Court and remanded the suit for fresh disposal after allowing the plaintiff to amend the plaint in the way he sought to do. It is against this order of remand that the present appeal has been brought by the defendant.

In answer to the preliminary objections the learned advocate for the appellant relied strongly on the decision of the Full Bench reported in *Raman Nayar* v. *Krishnan Nambudripad* (1) and he argued that all points should be taken to be preliminary where, if the decision was in one way, there would be no necessity to try other issues in the suit. I do not think it is necessary for purposes of this case to give a decided opinion on the question whether in the present case there would be a right of appeal or not; but before leaving this part of the case I should like to observe that in properly appreciating the point before the Full Bench in *Raman Nayar* v. *Krishnan Nambudripad* (1) it should be remembered that according to the pleadings in the plaint which was the subject of the reference before the Full Bench, the plaintiff had filed a suit to recover possession of certain immovable property and had alleged in the plaint that the defendants were holding the property on adimayavana tenure and that they had declined to render services, and that accordingly the plaintiff was entitled to recover possession of the properties along with the paddy rent that had been allowed in respect of the services. The documents on which the suit was instituted contained reference to this adimayavana. The trial Court however declined to go into that matter because, as it remarked, it was not mentioned in the plaint that there was a forfeiture, and therefore the plaintiff was not entitled to any relief based upon forfeiture by reason of the non-rendering of the services. The lower appellate Court, on appeal filed by the plaintiff in regard to the dismissal of the suit as regards possession, held that the allegations in the plaint were enough to enable the plaintiff to raise the question, and to make the matter clear the plaint might be amended accordingly. It accordingly reversed the trial Court's decree and remanded the case for fresh disposal. It is against that order of remand that an appeal was preferred to the High Court, in which a Full Bench reference was made. I make these observations because in understanding the observations of the learned Judges whose opinions were delivered in the case, it may probably be useful to remember exactly the facts of the case before them with reference to which they made those observations. In the case before me, it is not now pretended that the allegations in the plaint would entitle the plaintiff to have this new case tried by the Court. In fact both the trial Court as well as the District Judge on appeal in the present case agreed with the defendant's contention that the plaint as it stands, could not in any way be said to refer to this aspect of the case at all. That being so, can I say that the present is a case which has been disposed of by the trial Court on a "preliminary point" within the meaning of O. 41, R. 23, Civil P. C.?

It seems to me, as at present advised, that I cannot say that O. 41, R. 23, applies to the case before me. All the points that were actually raised before the trial Court were inquired into by that Court and findings have been recorded on all the issues framed; and the lower appellate Court has recorded an opinion in this case concurring with these findings of the trial Court. Taking it that it was open to the plaintiff to include in the original plaint the present cause of action also, does the fact that he omitted in the first instance to include this cause of action in the plaint but subsequently changed his mind and wanted to have the scope of the original suit enlarged by adding this particular cause of action also, which the trial Court did not allow him to do, enable us to say that the disposal by the trial Court was on a preliminary point? It seems to me difficult to say that it was. Our attention was drawn to some cases where this question of what is a preliminary point within the meaning of O. 41, R. 23 has been discussed. I must admit that on this question the cases are not uniform, and unless the case before us is covered by the Full Bench decision in which case of course we are bound by the same, it cannot be said that the matter is made clear by decided cases. As I

said, it is not necessary for me to say decidedly whether an appeal lies or not in the present case, but as at present advised I think that it cannot be said that the disposal of the present suit by the trial Court was on a preliminary point within the meaning of O. 41, R. 23. I have not thought it necessary to pursue this matter further, because I am clear that the present is a case where the High Court should interfere in its powers of revision.

Order 41, R. 23 limits the powers of the appellate Court in the matter of passing orders on remand in cases where the trial Court's decision proceeded upon a preliminary point and the same is reversed on appeal. Now in the face of an express provision of law defining the powers of appellate Courts to pass orders of remand, it seems to me at least doubtful whether Courts can rely upon the inherent power of remand in other cases. For the present I do not think it is necessary for me to give a decided opinion upon this point, because, even assuming that Courts have got inherent powers in such cases, such powers should not be exercised in a case like the present. Here the plaintiff who was (I assume) at liberty to include the present cause of action also in his original plaint did not choose to do so. On the other hand, certain statements made in the lower appellate Court would seem to suggest that the plaintiff omitted to do so for some purposes of his own. However, when he ultimately made up his mind to apply to the Court to have the plaint amended, admittedly a suit instituted on that new cause of action would be time barred. Courts should not ordinarily exercise their powers of discretion in such matters where their allowing the plaintiff to amend the plaint would prejudice the defendant by making the plea of limitation unavailable (most probably) to him. Courts have held that in passing orders regarding amendment this principle should not be lost sight of. There is also the further fact that the lower appellate Court in this case thought it fit to exercise its powers of amendment at a very late stage and after the suit had passed through the first Court and had been heard on the merits by the trial Court. In the circumstances, I think that it was at least an irregular exercise of its jurisdiction in the present case which we are entitled to correct by virtue of our powers of revision. The learned advocate for the respondent however argued that, even assuming that the defendant had all the rights that I have mentioned, the present is not a case where the High Court would be justified in interfering in revision. I am unable to agree. Courts have held that powers of revision can be properly exercised in cases where, but for the High Court's intervention, there would be multiplicity of proceedings, the time of the Courts would be unnecessarily taken and the parties put to unnecessary expense. In the case reported in *Sree Krishna Doss* v. *Chandookchand* (2), Miller, J., had a case where it was argued that the High Court should not interfere in its powers of revision because the matter could be set right at a later stage by the filing of a fresh suit. This is what His Lordship stated in answer to the contention:

"But here we have a case in which there is no doubt as to the rights of the parties and no remedy if I do not interfere, except by a suit to which there can be no defence and which therefore would merely multiply proceedings."

I may also refer to a recent decision of this Court reported in *Ramaseshayya* v. *Venkataramayya* (3) where Cornish, J., and I had a case in which after a suit had been tried on its merits by the trial Court the appellate Court ordered a remand for a new question to be tried whether the agreement relating to the exchange of two plots of land was opposed to public policy, a question not raised in either of the lower Courts and which could not possibly arise having regard to the pleadings in the case. While holding that there would be no appeal against the order of remand passed in such a case, the Court held that the High Court was not only entitled but in fact was bound to interfere in revision in such circumstances. It therefore seems to me that the present is pre-eminently a case in which we should interfere in revision; and accordingly I would set aside the order of remand passed by the lower appellate Court and dismiss the appeal No. 277 of 1928 preferred by the plaintiff to the lower appellate Court with costs in the lower appellate Court. I direct that the appeal before us be treated as a civil revision petition and I pass orders on that footing. There will be no

(2) [1909] 32 Mad. 334=4 I. C. 509.
(3) [1930] M. W. N. 584.

costs in the High Court. In the result, the District Munsif's decision will be restored.

P.R.S./S.N. *Remand order set aside.*

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* A. I. R. 1931 Madras 6

WALLACE AND BARDSWELL, JJ.

(*Adivi*) *Suryaprakasa Rao* and *others*—Defendants—Appellants.

v.

(*Timmalapalli*) *Sreeramulu* and *others*—Plaintiffs—Respondents.

Appeal No. 265 of 1925, Decided on 29th August 1930, from decree of Sub-Judge, Narsapur, in Original Suit No. 17 of 1923.

***(a) Civil P. C. (1908), O. 9, R. 13—Ex parte order against minor can be set aside only if by negligence of guardian minor has been prejudiced—Minor.**

Gross negligence of the guardian ad litem is not in itself a legal ground for setting aside a decree or order passed against the minor ex parte. It has further to be shown that the interests of the minors were thereby gravely prejudiced; in other words, that they had a prima facie good case to put forward which, owing to the negligence of their guardian, was not advanced before the Court. [P 7 C 1]

***(b) Civil P. C. (1908), O. 9, R. 13—Suit against joint family—Family consisting of adult as well as minor members — Suit decreed with future mesne profits—Minors suing for declaration that rate of future mesne profits excessive—Minors found prejudiced by negligence of adult members one of whom acted as guardian ad litem—Decree regarding future mesne profits should be set aside as against adult members as well as minors—Civil P. C. (1908), O. 41, R. 33.**

A suit for possession and mesne profits was brought against a joint family consisting of certain minor and certain adult members. The suit was decreed and certain rate of future mesne profits was allowed. Minors sued for declaration that rate allowed was excessive. It was found that the amount of future mesne profits was excessive and that the minor members were prejudiced owing to the negligence of the adult members, one of whom acted as their guardian ad litem.

Held: that the decree regarding the future mesne profits should be set aside not only as against the minor members but in toto, i.e. as against the adult members also, by applying the principle of O. 9, R. 13 and O. 41, R. 33: 31 *Mad.* 454; *A.I.R.* 1927 *Mad.* 620; *A.I.R.* 1922 *P.C.* 269 and 6 *C.L.J.* 226, *Rel. on.* [P 8 C 1]

V. Suryanarayana—for Appellants.

The Advocate-General and *A. Satyanarayana*—for Respondents.

Wallace, J.—This appeal is against the decision of the Subordinate Judge of Narsapur in a suit for a declaration that the order in Execution Petition No. 827 of 1920 in the Additional District Munsif's Court of Bhimavaram and the proceedings consequent are not binding on the plaintiffs, and for other consequential reliefs. Plaintiff 1 is the father of plaintiffs 2 to 5. Defendant 1 sued the plaintiffs for certain property with mesne profits in O. S. No. 319 of 1917 on the file of the Additional District Munsif's Court, Bhimavaram, and got a decree for delivery with past mesne profits at Rs. 250 per annum and furture mesne profits at the same rate. The decree was appealed against by the plaintiffs and the judgment of the appeal Court in A. S. No. 147 of 1929, Temporary Sub-Court, Masulipatam, is the final judgment in that suit. The appeal Court confirmed the decree for delivery and past mesne profits, but directed that future mesne profits should be determined in execution. Defendant 1 accordingly brought Execution Petition No. 827 of 1920 dated 20th October 1920 for the purpose of determining future mesne profits. Plaintiff 3 who was minor during the trial of the suit had then attained majority, but still remained on record as a minor; and he and plaintiffs 4 and 5, also minors, were represented in execution petition by the plaintiff 1, their father and guardian ad litem. He and plaintiff 2 allowed the execution petition to be decreed ex parte, and the order passed on the execution petition was that defendant 1 do recover mesne profits at the rate of Rs. 857-8-0 per annum with interest at 12 per cent. per annum. Plaintiffs 3 to 5 here plead that this order is not binding on them because it was obtained owing to the gross negligence of their guardian ad litem in allowing the proceedings to be adjudged ex parte. Plaintiffs 1 and 2 contend that the decree in the execution petition was obtained by fraud and consequently is not binding upon them. They also maintain that, since it is not binding on plaintiffs 3 to 5, it cannot be enforced against them, i.e., plaintiffs 1 and 2, either, all being members of one joint family.

The lower Court has held that the minor's interests were grossly prejudiced by the negligence of the guardian and has given the declaration sought for in the plaint and has decided that a fresh inquiry should be held into the amount of future mesne profits. As regards plaintiffs 1 and 2, it has decided that the order in the execution petition is not binding upon them either. Defendants 1, 2, 6 and 7 appeal.

In the execution proceedings the plaintiffs appeared by a pleader and filed a counter, and the petition stood posted for hearing from 2nd May 1921 to 22nd June 1921. Between these two dates their pleader died. On 22nd June 1921 none of the plaintiffs appeared. Someone, it is not clear who, or on whose behalf, asked for a week's adjournment and that was granted. On 29th June 1921 the plaintiffs again put in no appearance and the petition was ordered ex parte. The fraud alleged by the plaintiffs, set out at some length in para. 7 of the plaint, where it is not merely a plea of negligence on the part of plaintiffs 1 and 2, is merely to the effect that defendant 1 took an unfair advantage of the fact of their pleader's death and the illness of plaintiffs 1 and 2 in order to obtain the ex parte order. No evidence of fraud is adduced and the plea has not been proved here. It is embodied in issue 1. The substantial point for determination is issue 2:

"Whether the interests of the minors suffered from any gross negligence on the part of the guardian."

That the guardian was grossly negligent is obvious. It is not very clear whether the guardian appeared in Court on 2nd May 1921. The Subordinate Judge says he did appear, but the evidence of plaintiff 2 seems to indicate that he did not. If he did, he must have been aware personally of the adjourned date of hearing and ought to have appeared then. If he did not, he was negligent in not appearing even on that date to instruct his pleader and to conduct the case. He did not appear on 22nd June 1921 and merely pleads a vague illness of which there is no satisfactory proof. Obviously he was entirely negligent of the minor's interests. This was also the finding of both the Courts which had to deal with an application by him to set aside the ex parte order: see Exs. 4-A and 4-B.

However, gross negligence is not in itself a legal ground for setting aside a decree or order. It has further to be shown that the interests of the minors were thereby gravely prejudiced; in other words, that they had a prima facie good case to put forward which, owing to the negligence of their guardian, was not advanced before the Court. On this point also we have, on the facts, no doubt. Defendant 1's claim for mesne profits in his possession suit was for Rs. 535 per annum both for past and for future years: see Ex. A. The trial Court in that suit decreed past and future mesne profits at Rs. 250 per annum. Now, although the present plaintiffs appealed against the decree, defendant 1, the plaintiff in that case, put in no memorandum of cross-objections against the figure decreed and filed no appeal of his own. He was thus apparently quite satisfied with the amount of mesne profits decreed at Rs. 250 per annum for future years; and, if the present plaintiffs had not appealed, defendant 1 would have got no more than that figure. It was on the present plaintiff's case in appeal that the mesne profits awarded were too high, that the appellate Court directed the amount to be determined in execution. In execution, as has been noted, defendant 1 obtained an ex parte order for mesne profits at the rate of Rs. 857-8-0 per annum which is a much higher figure than he had even claimed in his possession suit and is more than three times the figure with which he was satisfied when it was awarded him by the decree of the trial Court. We cannot doubt that, if these facts had been brought before the Judge trying the execution petition, he would have felt bound to regard them as extremely important points to be considered before he arrived at his decision. From these facts alone we are constrained to agree with the lower Court that the interests of the minors have been gravely prejudiced by the gross negligence of their guardian.

It is argued for the appellants that the actual evidence produced now as to mesne profits is vague and inconclusive and does not amount to proof that the demand of Rs. 857-8-0 is exorbitant and that the lower Court has not recorded any finding that it was so. But we do not think it necessary to pronounce on the character of the evidence now. What the minors have to establish is that there was a prima facie good defence which was not put forward owing to the neglect of their guardian; and the fact that defendant 1 had not even in his suit estimated the mesne profits at as high a figure as he has now been awarded and that he himself was previously satisfied with the figure of Rs. 250 is in itself a prima facie good defence. It is better not to prejudge the fresh inquiry by a decision now as to whether the figure of Rs. 857-8-0 is or is

not exorbitant. Neither side has evidently put forward its full case yet. In particular, the evidence about the price of paddy for the years in question is defective on both sides. We are therefore not prepared to interfere with the decree of the lower Court so far as the minors are concerned.

The next question is on issues 3 and 5, whether on that finding it should follow that the order in execution has to be set aside against the adult plaintiffs also. In the absence, as we have held, of proof of fraud, they are, of course, prima facie bound by the order in execution, as it is res judicata. But there are cases in which a Court setting aside a decree or order in part is constrained by the logic of circumstances to set it aside in toto; and the necessity for this in certain cases is recognized by Civil Procedure Code in O. 9, R. 13, and O. 41, R. 33. Neither of these rules applies directly to the present case as it stood before the trial Court. But that Court has applied the principles of these rules and set aside the execution order as a whole on the ground that the amount of liability of the adult plaintiffs cannot be separated from, and cannot be different from, that of the minors. The argument seems to us to be a sound one and is based on the principle accepted by this Court in *Valia Panga Achan* v. *Marutha Veera Kavundan* (1) and *Ramalingam Chettiar* v. *Subramania Chettiar* (2), and set out by the Privy Council in *Venkata Row* v. *Tuljaram Row* (3), and by a Bench of the Calcutta High Court in *Jadubansa Narain* v. *Hari Charan Bharati* (4). The original suit for possession and mesne profits was framed against the joint family of the plaintiffs as such. The figure of mesne profits then is the cash value of the annual profit which the joint family might reasonably have made during their possession; and, from that point of view, the amount must be a fixed figure for each member of it. It is impossible for this Court to hold in one and the same proceeding that the amount of profit made by the joint family is both, say, Rs. 250 and Rs. 857 per annum. The joint liability for mesne profits of all the plaintiffs is one and indivisible, and the decree against all the plaintiffs is based on a common ground. Each member of the joint family is entitled to claim that the amount payable by the joint family shall not be more than is payable by every member of it. It is thus impossible to do justice to the minor members of the joint family unless we reopen the matter of the whole liability of the joint family, that is, of the adult members also. In this view the lower Court's decree on this point also is correct. We see no reason to interfere,and dismiss this appeal with costs of respondents 1 to 5. The note attached to the decree of the lower Court will stand as part of the decree. Pleader's fee Rs. 200.

P.R.S./S.N. *Appeal dismissed.*

(1) [1908] 31 Mad. 454.
(2) A.I.R. 1927 Mad. 620=103 I.C. 394=50 Mad. 614.
(3) A.I.R. 1922 P.C. 69=74 I.C. 765=49 I.A. 91=45 Mad. 298 (P.C.).
(4) [1907] 6 C.L.J. 226.

* A. I. R. 1931 Madras 8

RAMESAM, J.

P. Varada Pillai—Petitioner.

v.

P. V. Thillai Govindaraja Pillai—Respondent.

Civil Revn. Petns. Nos. 1771 of 1928, 110 of 1929 and 708 of 1929 and Civil Misc. Petns. Nos. 59 and 85 of 1929, Decided on 6th March 1930, against orders of Dist. Munsif, Poonamallee, D/- 9th October 1928, in Original Suit No. 173 of 1928.

*** (a) Civil P. C. (1908), O. 7, R. 10 — Plaint returned for presentation to proper Court can after amendment be re-presented to same Court.**

The trial Court passed an order on the plaint returning it to be presented to the proper Court, and the plaintiff got the plaint into his own hands. He amended the plaint himself by striking off one relief and re-presented it before the same Court alleging that after the changes he had made, it would lie in that Court. The Court now held in his favour though the defendant took the objection that the plaintiff was not entitled to amend the plaint and re-present it in the same Court :

Held : that the order of the lower Court was correct : 33 *Mad.* 262, *Rel. on*; 41 *Mad.* 701 and *A. I. R.* 1928 *Mad.* 559, *Cons.*; 54 *M. L. J.* 12 *s. n.*; *A. I. R.* 1928 *Mad.* 384, *Dist.* [P 9 C 2]

(b) Civil P. C. (1908), S. 115—Scope.

Lower Court's order that the court-fee paid is correct is not revisable : *A. I. R.* 1929 *Mad.* 191, *Foll.* [P 10 C 1]

M. Salva Ayyangar—for Petitioner.

A. C. Sampath Iyengar and *T. R. Srinivas Ayyar*—for Respondent.

Judgment.—The facts out of which this Civil Revn. Petn., arises may be stated as follows: The suit was filed in the District Munsif's Court of Poona-

mallee. An objection was taken by the defendant that the suit as framed did not lie in the District Munsif's Court. The District Munsif decided against the objection. On a revision petition filed in the High Court, my brother, Jackson, J., held in *Civil Revn. Petn. No.* 1263 *of* 1927 that the objection was well founded and the suit as framed did not lie before the District Munsif. He observed in the course of his judgment that the plaintiff might try his chance at amendment in the lower Court. When the case went back to the District Munsif 'the plaintiff applied for amendment of the plaint, he undertaking to amend the plaint in such a way as to make it cognizable by the District Munsif. The District Munsif rejected this application. He passed an order on the plaint returning it to be presented to the proper Court, and the plaintiff got the plaint into his own hands. He amended the plaint himself by striking off one relief and represented it before the District Munsif alleging that after the changes he had made, it would lie before the District Munsif. The District Munsif now held in his favour though the defendant took the objection that the plaintiff was not entitled to amend the plaint and re-present it in the same Court. The defendant presents this revision petition against the order of the District Munsif.

The learned advocate for the petitioner contends that the effect of the order returning the plaint to be presented to the proper Court is that unless he presents it to the Court which is the proper Court for the original plaint, the court-fees cannot be any more utilized, that if the plaintiff makes further changes in his plaint it is practically a fresh plaint and if the plaintiff wants to file such a fresh plaint he may do so on payment of fresh court-fees and the old court-fees cannot be utilized for filing the plaint with alterations before the original Court. The District Munsif relied on *K. Pandra Pandaram* v. *A. Ponnapandaram* (1), for holding that the plaint will lie in the circumstances. I think the decision of the District Munsif is right. In *K. Pandra Pandaram* v. *A. Ponnapandaram* (1) the order was :

"the plaint should be returned to the proper Court after valuation had been corrected."

In that case the valuation had been improperly made. If it was properly made the suit will lie in a different Court. The plaintiff after taking back the plaint struck off some of the properties and re-presented it before the District Munsif, who admitted it. It was held by Abdur Rahim, J., that the order is right. At the end of the judgment he observed :

"I do not think that when an amendment is made by the plaintiff and sanctioned by the Court, it can be said that the Court had no power to allow or accept the amendment. As will be seen from other cases which will be presently referred to, even this condition does not seem to be necessary. It seems to me that in all such cases the plaintiff having got the plaint into his own hands can make such alterations in the plaint as he pleases so as to make the case cognizable by the same Court and re-present it. There is no question of the Court allowing or accepting the amendment. If, after amendment, the plaint lies before the Court, the Court is bound to accept it."

On Letters Patent appeal the order of Abdur Rahim, J., was confirmed by Benson and Sundara Iyer, JJ. This case was relied on in *Kannuswami Pillai* v. *Jagathambal* (2) and the learned Judges held that once a Court holds that it has no jurisdiction over a suit it ought not to permit an amendment and Sadasiva Iyer, J., distinguished the decision in *K. Pandra Pandaram* v. *Ponnapandaram* (1). This decision shows that there is no question of a Court directing an amendment or allowing the amendment or accepting the amendment. The Court has no business to deal with the amendment. It is the party that makes the alterations and presents the plaint. The point came up again in *Ramachandrayya* v. *Venkataratnam* (3). Odgers, J., after some hesitation found that the two decisions in *K. Pandra Pandaram* v. *Ponnapandaram* (1) and *Kannuswami Pillai* v. *Jagathambal* (2) are reconcilable and I agree with him that they are reconcilable. The point again came up before Devadoss, J., in *Manikyam* v. *Sreeramulu, A.I.R.* 1928 *Mad.* 559. He there pointed out that the proper course for the Court to take is not to direct amendments so as to make the suit cognizable but to return the plaint leaving the party to make the amendment. All these cases show that the course pursued by the District Munsif is right. Two decisions are referred to by the learned advocate for the petitioner. One is

(1) [1910] 33 Mad. 262=3 I. C. 725.

(2) [1918] 41 Mad. 701=46 I. C. 265.
(3) A. I. R. 1926 Mad. 133=92 I. C. 800.

Muthu alias *Guruswami Nayaken* v. *Muthu Nayaken* (4) and the other case *Gonvindaraju Naicker* v. *Kassim Sahib* (5) is in the same volume, p. 409. But these are cases where the Court granted an amendment after holding that it had no jurisdiction. It was held that the order was improper. These are like *Kannuswami Pillai* v. *Jagathambal* (2). I think that the lower Court's order is right. The petition fails and is dismissed with costs.

Civil Revn. Petn. No. 110 *of* 1929.—In this case after the order of the District Munsif in the other revision petition was passed the defendant still objected that the court-fee paid is not a proper court-fee. He repeated his objection that the old court-fee should not be utilized. The latter objection is really covered by the judgment in the former case. As to the former objection as to what the proper amount of court-fee is, the District Munsif found that the court-fee paid was right and I may observe that the objection to court-fee did not also lead to any objection as to jurisdiction. That being the case I am at present content to follow the decision in *Muhamad Ellaiyas* v. *Rahima Bee* (6). This revision is dismissed with costs. Pleader's fees Rs. 10 and all other costs.

(Civil Revn. Petn. Nos. 59, 85 and 708 of 1929 were also dismissed.)

P.R.S./S.N. *Petitions dismissed.*

(4) [1928] 54 M. L. J. 12 (s. n.).
(5) A. I. R. 1928 Mad. 384=108 I. C. 542.
(6) A. I. R. 1929 Mad. 191=114 I. C. 842.

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RAMESAM, J.

Selvan Chettiar—Petitioner.

v.

Y. P. N. Venkatachalam Chettiar and *others*—Respondents.

Civil Revn. Petn. No. 969 of 1928, Decided on 19th March 1930, from order of Dist. Judge, Madura, D/- 16th March 1928, in Civil Misc. Appeal No. 11 of 1928.

(a) Provincial Insolvency Act (5 of 1920), S. 75 (1)—Application to set aside alienation by insolvents pending—Period given for discharge expiring—Court suo motu annulling adjudication without notice to insolvents or creditors — Creditor authorized to conduct alienation proceedings applying for review —Court modifying order of annulment and vesting properties in dispute in creditor—Alienee appealing—Alienee was party aggrieved and his appeal was competent—Order vesting properties in creditor was irregular —Provincial Insolvency Act (1920), S. 37.

While the petition for setting aside alienation made by the insolvents was pending, the period given to the insolvents for applying for an order of discharge expired and on the expiry of the period the Court suo motu passed an order annulling the adjudication without giving notice either to the insolvents or to the creditors. One of the creditors who was specially authorized to conduct the proceedings in respect of the alienations, filed an application for review of the order annulling adjudication and the Court passed an order modifying order of annulment and ordering that the right, title and interest of the insolvents in the properties alienated shall vest in that creditor. The alienee appealed against this order.

Held: that the alienee was a party aggrieved by the order and so could appeal against it. [P 11 C 1]

Held further: that the order vesting the properties in the creditor was irregular. Until the alienation to the alienee would be found bad, the properties would belong to the alienee and nothing in S. 37 would justify such an order. [P 11 C 1]

(b) Provincial Insolvency Act (5 of 1920), S. 27 (2)—Insolvent failing to apply for discharge within prescribed time—Effect being to prevent inquiry into fraudulent conduct—Court can extend time.

Whenever the effect of the insolvent's failure to apply for discharge within the time prescribed is to prevent an inquiry into allegation of fraudulent conduct, the Court can take hold of the fact and extend the time for applying for discharge: *A. I. R.* 1930 *Mad.* 389, *Foll.* [P 11 C 2]

T. L. Venkatarama Ayyar—for Petitioner.

T. M. Krishnaswami Ayyar—for Respondents.

Judgment.—The facts of this civil revision petition may shortly be stated. Certain persons were declared insolvents. They were adjudicated in 1926 on an application filed in 1925. M. P. No. 229 of 1926 was filed for the purpose of setting aside the alienation made by the insolvents in favour of Selvan Chetti, who is the petitioner before me, under Ss. 53 and 54 of the Act. While the petition was pending, the period given to the insolvents for applying for an order of discharge expired and on the expiry of the period the Court passed suo motu an order annulling the adjudication. No notice was given either to the insolvents or to the creditors or to one of them specially authorized to conduct the proceedings in respect of the alienations. The particular creditor who was so authorized then filed an application for review of the order annulling adjudication. This is M. P. No. 447 of 1927 in I. P. No. 1 of 1926. On this petition

the Subordinate Judge passed an order modifying the order of annullment and ordering that the right, title and interest of the insolvents in the properties in dispute in M. P. No. 229 of 1926 shall vest in the petitioner before the Subordinate Judge. The alienee filed an appeal before the District Judge. A preliminary objection was taken before the District Judge that he was not a party aggrieved by the order of the Subordinate Judge. The District Judge upheld the objection and observed:

"It is true that one consequence of the order of the learned Subordinate Judge will be that the appellant will have to defend M. P. No. 229 of 1926 on the file of the Sub-Court, Dindigul, but that is merely an incidental consequence."

The alienee files this revision petition before me against the order of the District Judge.

The first question is whether the appeal to the District Judge lay. I agree with the petitioner in thinking that the petitioner was a party aggrieved by the order of the Subordinate Judge. The whole object of the modification of the annulment of the adjudication and the specific terms of the order of the Subordinate Judge are all aimed at the petitioner. The District Judge concedes that one consequence of the order of the Subordinate Judge is that the petitioner will have to defend his title. It is difficult to say that this is merely an incidental consequence. The whole order of the Subordinate Judge was aimed at him and was intended to produce this particular result. I therefore think that the petitioner before me was a party aggrieved by the order of the Subordinate Judge and his appeal before the District Judge ought not to have been dismissed.

There is another part of the order which is complained of before me, namely, the order vesting the properties in dispute in M. P. No. 229 of 1926 in the creditor who is carrying on these proceedings. I do not think that this is an order contemplated by S. 37. S. 37 was intended to vest the insolvent debtor's admitted properties in some third person for the purpose of making them available to the creditors while in the meanwhile avoiding the debtor being called an insolvent. But in the present case until the alienation to the petitioner is found bad, the properties belong to the petitioner and nothing in S. 37 justifies an order vesting these properties in the creditor. The order therefore is irregular.

The only question that now arises before me is what order I should pass. One alternative is that I should set aside the order of the District Judge and of the Subordinate Judge and direct the review petition to be re-heard and disposed of according to law. But I think there is another alternative. The Subordinate Judge was certainly inclined to review the order of annulment, at any rate to the extent of permitting an inquiry into M. P. No. 229 of 1926. Apparently the District Judge also agrees with this. But both the lower Courts, certainly the Subordinate Judge, felt compelled to pass the order which they have actually passed, because at that time the law was supposed to be that if an insolvent did not apply for discharge within the time prescribed, the adjudication ought to be automatically annulled. This matter has been the subject of consideration by a recent Full Bench decision reported in *Palani Goundan* v. *Official Receiver of Coimbatore* (1). There the Full Bench has held that a Court is not bound to annul adjudication automatically and if there are circumstances justifying an extension of time for applying for discharge, it may be done. The effect of the law as laid down formerly, that is, before the Full Bench decision, was that insolvents were deliberately avoiding to apply for discharge within the time prescribed, with the result that adjudications got annulled and fraudulent alienations became valid to the advantage of the alienees. The result of the Full Bench decision, however is that it need not be.

Whenever the effect of the insolvent's failure to apply for discharge within the time prescribed is to prevent an inquiry into allegation of fraudulent conduct, the Court can take hold of the fact and extend the time for applying for discharge. In the present case the object of the lower Courts was that M. P. No. 229 of 1926 should be heard and for that purpose and to that extent they are willing to review. I do not see why I should interfere with the discretion of the lower Courts in permitting such review. The only thing I wish to say is that the order is not properly framed,

(1) A. I. R. 1930 Mad. 389=124 I. C. 61=53 Mad. 288 (F. B.).

I therefore substitute the following for the order passed by the Subordinate Judge:

"The order of annulment is set aside and the time for applying for discharge is extended up to such a time as is necessary for disposing of M. P. No. 229 of 1926, M. P. No. 229 of 1926 will be inquired into and heard."

My objection in passing this order is not to invalidate any inquiry into M. P. No. 229 of 1926 that has been made as a result of the order of the Subordinate Judge. I am told that some order has been passed on that M. P. and it is the subject of an appeal. These proceedings will take their own course. An order will issue in the modified form. Costs of the appeal before the District Judge will abide the result. Each party will bear his own costs in this civil revision petition.

P.R.S./S.N. *Order accordingly.*

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KUMARASWAMI SASTRI AND WALSH, JJ.

Prasanna Venkatesa Rao and *others* — Plaintiffs—Appellants.

v.

K. Srinivasa Rao and *others* — Defendants—Respondents.

Civil Appeal No. 219 of 1925, Decided on 20th November 1929, from decree of Sub-Judge, Chittoor, in Original Suit No. 4 of 1921.

(a) Civil P. C. (1908), S. 92—Majority of a body cannot alter fundamental objects of that body unless such power is specially reserved—Corporate body.

The majority of a body cannot alter the fundamental principles of the body upon which it is founded unless such a power is specially reserved.

An association for the uplift of the Madhwa doctrine was started in the year 1878 at Chirutanur. The Memorandum of Association and the rules and regulations of the Sabha gave power to make by-laws not inconsistent with the fundamental objects, and to alter or modify them by majority at the annual general meeting. A resolution was passed in the year 1921 by majority declaring that one of the mutts was superior in the Sabha to others and giving first thirtham to the representative of that mutt:

Held that the resolution giving first thirtham to the representatives of one mutt was ultra vires, and this would not be altered by any practice of giving first thirtham to the representative of that mutt having grown up: *Milligan* v. *Mitchell*, (1837) 3 *My. & Cr.* 72; *Free Church of Scotland* v. *Overtoun* (*Lord*), (1904) *A. C.* 515; *Attorney-General* v *Anderson*, (1888) 57 *L. J. Ch.* 548, *Rel. on*; *Cooper* v. *Gordon*, (1869) 8 *E. Q.* 249, *not Appr.*; 15 *Bom.* 599; 19 *Bom.* 507; 40 *Mad.* 941 and 36 *Mad* 364, *Dist.*

[P 16 C 1]

(b) Civil P. C. (1908), S. 92 — Charitable corporations being trustees of the corporate properties are subject to jurisdiction of Court.

As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property, whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not. Accordingly, like other trustees charitable or otherwise, they are subject to the jurisdiction of the Court. [P 14 C 2]

A. Krishnaswami Ayyar and *K. Balasubramania Ayyar*—for Appellants.

T. R. Venkatarama Sastriar, L. S. Veeraraghava Ayyar, T. Rangachari, P. Panini Rao, S. Panchapagesa Ayyar, T. V. Ramanatha Ayyar, L. A. Govindaraghava Ayyar, A. C. Sampath Ayyangar, T. R. Srinivasa Ayyar and *C. Hanumanatha Rao*—for Respondents.

Kumaraswami Sastri, J. — This appeal arises out of a suit filed under S. 92, Civil P. C., with the previous sanction of the Advocate-General for the settlement of a scheme and for directions for proper administration of an association called "The Madhwa Siddhanta Onnahini Sabha" (an association for the uplift of the Madhwa doctrine) which was started in the year 1878 at Chirutanur, also called Tiruchanur, near Tirupati, a sacred place about 90 miles from Madras, and registered under Act 21 of 1860 in the year 1910. (After holding on the evidence that theorigin, objects and the practice of the Sabha were as stated by the plaintiffs in their plaint, his Lordship continued):

On the evidence, oral and documentary, I have no hesitation in coming to the conclusion that prior to 1910-11 there was no precedence given to the Uttarathi Mutt.

The next question is whether the resolution of 1912 giving precedence to the Uttarathi Mutt must be held to be binding on the other mutts because it was passed at a general meeting. It is sought to bring this within R. 14 of the Memorandum of Association and the Rules and Regulations of the Sahba which I have set out giving the council power to frame such bye-laws, not inconsistent with the rules and regulations, as it may consider necessary for the conduct, miantenance, and upkeep of the Sabha and a like power to alter, modify or rescind any such bye-laws, so long as such bye-laws are passed at the annual general meeting of the Sabha. If the matter related merely to the internal management without in any

way affecting the fundamental basis on which the Sabha was started the majority decision would bind the minority however galling it may be ; but it seems to me that in a case like the present, this resolution is fundamentally opposed to the constitution of the Sabha whose very existence depends upon the co-operation of the disciples of the various mutts on a basis of equality. I have already shown that this was the dominant policy of the Sabha from its foundation. And the events of 1911 and 1912 have shown how vital it is in the interests of the Sabha that no distinction should be made between the various mutts. I do not think that in a Sabha constituted like the present, it is open to the majority to pass any resolution giving precedence to their own Guru and override the claims of the minority for equal treatment. There can be little doubt that this Sabha which was founded by the disciples of all the mutts and whose property was acquired by contributions from all the mutts, possesses substantial property at present, moveable and immovable. The annual report of the year 1920, the year preceding the date of the present suit shows that Rs. 77,167/14/6, was standing to the credit of the Sabha with its bankers. This would be in addition to the immovable properties which the Sabha possesses. The disciples of one mutt though they formed majority, have no right virtually to drive the other members out of the Sabha by passing a resolution which would give their Guru priority.

It is argued that if priority is not given to the Uttarathi Mutt Guru, the disciples of that mutt who are in a majority would not continue to be in the Sabha. But we find from the evidence of Karpur Srinivasa Rao, D. W. 7, that even among the disciples of the Uttarathi Mutt there are many who are prepared to remain in the Sabha in spite of the interdict of the Uttarathi Mutt Guru if a proper scheme is framed preventing the abuses he refers to.

A memorandum of objections has been filed by defendants 1, 3, 5, 6 and 14 who are disciples of the Uttarathi Mutt and the third ground of objections runs as follows:

"The lower Court ought to have held that the Memorandum of Association and the Rules and Regulations of the Sabha clearly contemplate an equal treatment of all Madhwas irrespective of their being the disciples of any particular Mutt; and any way a preferential treatment of one Mutt is distinctly a violation of the essential object of the Sabha which is to promote the study of Sanskrit and in particular of the Dwaita philosophy of Sri Madhwacharya amongst the Madhwas as a whole."

At the hearing, respondent 5's advocate wanted to withdraw from this but the other respondents pressed this objection through their advocate Mr. Venkatarama Sastri and wanted a scheme to be framed. However this may be, it seems to me that justice has to be done to the parties and mere expediency cannot entitle the Court to deny justice to the minority.

It is clear that it is not open to the majority to alter the fundamental principles upon which the Association is founded. I may refer to *Milligan* v. *Mitchell* (1) and *Free Church of Scotland* v. *Overtoun* (*Lord*) (2).

In *Milligan* v. *Mitchell* (1) it was held that it was not competent to the members of the Association to alter

"the fundamental principles upon which the Association was formed and destroy the trust upon which the property was held, but only to altering the laws or making new laws so far as might be consistent with such principles and trust."

In that case, a chapel was erected and dedicated exclusively as a place of worship for Presbyterians who conformed to to the discipline and doctrines of National Church of Scotland. Then there was a resolution passed subsequently, whereby other preachers were allowed to preach and the question was, how far the resolution passed by the general body was valid. In *Free Church of Scotland* v. *Overtoun* (*Lord*) (2) Lord Davey, observed p. 645:

"The question in each case is what were the religious tenets and principles which formed the bond of union of the Association for whose benefit the trust was created ? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the Association is not vital, essential or fundamental, unless the parties have themselves declared it not to be so. The bond of union however, may contain within itself a power in some recognzied body to control, alter or modify the tenets and principles at one time professed by the Association. But the existence of such a power would have to be proved like any other tenet or principle of the Association."

(1) [1837] 3 Myl. & Cr. 72=40 E. R. 852,
(2) [1904] A. C. 515=91 L. T. 394.

I may also in this connexion, refer to *Attorney-General* v. *Anderson* (3). It was held in that case that where property was directed to be held in trust to be used as a meeting house for Protestant Dissenters of the Presbyterian or Independent denomination, a resolution to transfer the chapel and congregation to the Presbyterian Church of England though passed by a majority was invalid.

In the view I take, that the giving of precedence in the matter of thirtham will be a fundamental alteration of the principles on which the Sabha was founded and is not a matter of mere internal management, it is unnecessary to refer to *Cooper* v. *Gordon* (4)(at p.258) and the other cases cited by the respondent's advocate, as to the Court not interfering in affairs of internal management decided upon by the majority of members.

As the decision of the Subordinate Judge on the preliminary issues to the maintainability of the suit under S. 92, Civil P. C., or the suit being not cognizable by a civil Court was not seriously disputed before us, I do not think it necessary to refer to the decisions cited by the Subordinate Judge in his preliminary judgment. I agree with him in deciding the preliminary issue in plaintiff's favour.

The next question is as to what relief is to be granted. I think the plaintiffs are entitled to a declaration that it is not competent to the majority of the members to make any distinction between the mutts as regards thirtham or any other honours or to give priority to the head of any one mutt over the rest in the distribution of thirtham or any honour. (After holdingthat the articles and rules of the Association provided sufficient safeguards for its proper working in the future, his Lordship gave certain directions for the conduct of the meeting of the Sabha in future, held that the framing of a scheme was unnecessary and proceeded as follows:)

I would reverse the decree of the lower Court and pass a decree in the terms above stated. The Sabha (represented by its committee) and respondent 12, the Guru of the Uttarathi Mutt, will pay the appellant's costs both here and in the lower Court. We fix the vakil's fee in this Court at Rs. 500. The decree I pass disposes of the memorandum of objections. No costs.

Walsh, J.—(After dealing with the facts and discussing the evidence, his Lordship continued):

I hold that the defendants have failed to prove that there was any custom by which the Uttarathi Mutt received first thirtham and that the evidence both oral and documentary is distinctly in favour of the contention of the plaintiffs that there was no such custom. Even admitting that in practice any such thing arose, I should be inclined to agree with the learned Advocate-General in holding that legal recognition of such a claim would be subversive of the objects of the society and that even a majority resolution in its favour cannot be given effect to. There is a vast difference between mere practice in a matter of this sort and recognition of this practice as a right conferring a superior status in a society whose basic object is equality. The right to first thirtham may be, and is no doubt, considered as a mark of superiority in temples and other places ; but that will not mean that there is to be superiority in a society of this sort. If I might quote a sort of analogy, I suppose it is likely that when His Majesty, the King-Emperor attends a celebration of the Sacrament, he would be communicated before the other members of the congregation; yet, I feel little doubt that to recognize any such priority as of right would be fundamentally opposed to the entire conception of the Sacrament and would be in contravention of its basic idea.

It was suggested that the Sabha are not trustees and can therefore act as they pleased. This does not appear to be correct: vide Halsbury, Vol. 4, S. 557, which says:

> "As charitable corporations exist solely for the accomplishment of charitable purposes, they are necessarily trustees of their corporate property, whether the beneficiaries are members of the corporation, as in the case of hospitals and colleges, or not. Accordingly, like other trustees, charitable or otherwise, they are subject to the jurisdiction of the Court."

A corporation can no doubt do what is incidental to the purpose of its business, but it connot travel outside this: Vide *Dundee Harbour Trustees* v. *D. J.*

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(3) [1888] 57 L. J. Ch. 543=58 L. T. 726=36 W. R. 714.

(4) [1869] 8 Eq. 249=38 L. J. Ch. 489=20 L. T. 732=17 W. R. 908.

Nicol (5). As to the power of a majority to change the fundamental purposes and principles of the main body, *Free Church of Scotland* v. *Overtoun* (*Lord*) (2) may be referred to where the majority of the Free Church of Scotland united with a body known as the United Presbyterian Church and it was held that, because the tenets of the latter body on the question of the establishment, principle and the Westminster confession were not identical with those under which the Free Church held the property in dispute, the minority which adhered to the orginal view of the Free Church were entitled to the property : vide remarks at pp. 613, 645 and 648. In such a case one dissentient is enough : *Attorney-General* v. *Anderson* (3) (at p. 550,) and there is no power to alter the central conditions of the society : vide *Milligan* v. *Mitchell* (1), unless there is such power specially reserved, which must be proved. Of the cases quoted on the other side, there is only one that appears to be relevant and the remark there is obiter. This is the remark in *Cooper* v. *Gordon* (4) (at p. 257.) In that case, by the trust deeds of a congregation of Independents, a chapel, a house and other property were vested in trustees for the use of the congregation, and to permit the minister for the time being to occupy the house. The deeds contained no express provision for the appointment or removal of a minister. In 1866, the Rev. Samuel Clarke Gordon was invited by a resolution of the Church members of the congregation to become co-pastor with the then minister. In 1868, a majority of the Church members resolved that Gordon be dismissed, and the majority of the trustees concurred in this resolution. Gordon claimed to hold his office for life, in the absence of immorality, or preaching contrary to the tenets of the denomination, which was not charged. It was held that he was duly dismissed. That case would present no difficulty, but there is a remark by Sir John Stuart, V. C., to the following effect :

"In his answer, Mr. Gordon says that, in the absence of any special usage or rules, the will of every such congregation is in all cases ascertained and their powers exercised by the votes of the majority of the persons in church fellowship worshipping at the particular chapel; and he adds this qualification, that the minority are bound by the majority on all points so long as such majority are consistent with the fundamental doctrines and principles held by the whole body. Such a qualification is futile, because as soon as the fundamental doctrines are contravened by the majority, they cease to be the fundamental doctrines of the whole body, and unless the minority submit there is no longer a united body, held together by fundamental doctrines and principles."

It appears to me that this remark which was apparently unnecessary for the determination of the case cannot be reconciled with the ratio decidendi of *Free Church of Scotland* v. *Overtoun Lord* (2), quoted above, where the Lord Chancellor quoted at p. 616 with approval the dictum of Smith, B., in *Dill* v. *Watson* (6) at 91 where he said :

"We do not coerce our neighbour by calling for his signature to our profession or articles of faith. We leave him free to adopt or to repudiate that faith, according as his reason, his conscience, and the grace of God may direct him. We but say to him, if you agree with us, affix your signature to certain articles, or in some way notify your recognition of their truth ; or if you disagree, withhold such signature or declaration. And we say of him in the former case, that he is and in the latter case that he is not, of our religion. We do not compel him to hold our faith ; we but ask him to inform us by certain acts, whether he does hold it or does not ; and we ask this, only if he claims to be enrolled as one of our body, and to be in religious communion with us. In the absence of such a test our establishment would not be a rock, cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a butt nominally united, while really unconnected mass ; fraught with nothing but internal dissimilitude and mutual and reciprocal contradiction and dissension."

Raghunath Damodhar v. *Janardhan Gopal* (7) and *Lalji Shamji* v. *Walji Wardhman* (8), are cases relating to caste decisions where it was held that the decision was in the power of the majority of the caste for their own comfort and convenience and not a matter in which the Court could interfere. *Hasan Raza Sahib* v. *Hasan Ali Sahib* (9) was merely a matter of election to a committee and *Ramadoss* v. *Hanumantha Rao* (10) dealt with the right of the majority of the villagers to manage the temple. There

(5) [1915] A. C. 550=84 L. J. P. C. 74=112 L. T. 697=31 T. L. R. 118.

(6) [1836] 2 Jones. Rep. (Ir. Ex.) 48.
(7) [1891] 15 Bom. 599.
(8) [1895] 19 Bom. 507.
(9) [1917] 40 Mad. 941=38 I. C. 528.
(10) [1913] 36 Mad. 364=12 I. C. 449.

is nothing in these cases to show that the majority of a body can alter the fundamental objects of the body unless such a power is specially reserved.

I therefore hold that the resolution is ultra vires and that this would not be altered by any practice having grown up of giving first thirtham to the representative of the Uttarathi Mutt. I further hold that by the constitution the majority have no power to declare one mutt superior in the Sabha to any other mutt. (His Lordship then held that in the circumstances of the case the framing of a scheme was unnecessary and proceeded): I agree with the other directions which my learned brother proposed to give as to the conduct of meetings. I concur with him that the decree of the lower Court should be reversed and a decree in the terms stated by him passed. I also agree as regards costs and memorandum of objections.

P.R.S./S.N. *Decree reversed.*

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CURGENVEN AND BHASHYAM AYYANGAR, JJ.

M. Namberumal Chetty—Appellant.

v.

M. Mainiappa Mudali—Respondent.

Original Side Appeal No. 39 of 1929, Decided on 31st July 1930, from order of Beasley, J., D/- 25th January 1929.

(a) Criminal P. C. (1898), S. 476-B—Appeal lies even where complaint is filed by Court suo motu.

The terms of S. 476-B provide for an appeal even where a complaint is filed by a Judge, not at the instance of an applicant, but suo motu: 30 *Cr. L. J.* 163, *not Appr.* [P 16 C 2]

(b) Criminal P. C. (1898), S. 476—Complaint under — Proceedings embodied in single document — Document serving dual purpose of finding as well as of complainant sufficiently complies with requirements of S. 476.

Although under S. 476 there should be, not only a finding to the effect that it is expedient in the interests of justice that an inquiry should be made, but also a complaint, still, where the proceedings are embodied in a single document which serves the dual purpose of a finding and also of a complaint, there is no reason why it should not be held sufficiently to comply with the requirements of that section: *A. I. R.* 1927 *Cal.* 628, *Rel. on.* [P 17 C 1]

Subramaniam and *Ra'agopal* — for Respondent.

Curgenven, J.—This is an appeal against an order of Beasley, J., as he then was, under S. 476, Criminal P. C., making a complaint under S. 195 (i) (b) of the same Code against one M. Namberumal Chetty in respect of an offence punishable under S. 193, I. P. C. The appellant is not represented before us. We have perused his memorandum of appeal and the order of the learned Judge, and we have heard the learned advocate for the respondent, who has raised the preliminary point that no appeal will lie in the circumstances of this case.

The complaint was filed not at the instance of any applicant, but suo motu by the learned Judge, and the learned advocate's argument is that in such circumstances the terms of S. 476 (b) do not provide for an appeal. As an authority for this position he refers us to *Mt. Satto* v. *Emperor* (1), which is a decision by a single Judge of the Lahore High Court based upon what he terms the genesis of the present section. He appears to read the words in that section "such a complaint" as meaning not merely a complaint under S. 476 or S. 476 (a) but, further, a complaint on an application by some person; but we are of opinion that any analogy which is to be drawn between the terms of the present sections and those of the corresponding sections of the old Code is likely to be misleading inasmuch as the procedure has been radically altered and whereas, under the old Code, a Court could give sanction to prosecute, and that sanction to prosecute on application could be made the subject of an appeal, all that has now been swept away and it is for the Court itself in all cases, whether of its own accord or on application, to make a complaint. We cannot see accordingly why the appealability of an order should depend upon the special circumstances of an application having been made; nor do we think that the terms of the section itself support that view.

Coming to the merits: the learned Judge has delivered a very detailed and comprehensive order containing all the materials from which the offence in his view may be established; and the only criticism that we can discover in the grounds of appeal is that under the terms of S. 476 there should be not only a finding to the effect that it is expedient in the interests of justice that an inquiry should

(1) A. I. R. 1929 Lah. 9=113 I. C. 537=30 Cr. L. J. 163.

be made, but also a complaint. In the present case it appears that the proceedings are embodied in a single document. But we think that that document itself serves the dual purpose of a finding and also of a complaint, because a mere perusal of it will show that the learned Judge has set forth the particulars in respect of which he considers that false evidence was given and the nature of the proofs that that evidence is in fact false and, since these particulars serve the double purpose of a finding and a complaint, we see no reason why they should not be held sufficiently to comply with the requirements of the section, although in that form.

We have been referred to one case: *Bhuban Chandra Pradhan* v. *Emperor* (2), where the objection was raised that the learned Judge who made the complaint had not recorded a finding that it was expedient in the interests of justice to complain, and this was disposed of with the observation that

"the order showed clearly the learned Judge's opinion that the appellant had given false evidence before him. That order by itself, and in view of the proceedings started under S. 476, carries the implication that the learned Judge must have felt that the ends of justice required that an inquiry before a Magistrate should take place."

We think that the same implication is clearly to be gathered from the order which the learned Judge has passed in this case; and we can find no grounds for interfering with it in appeal. The appeal is accordingly dismissed.

P.R.S./S.N. *Appeal dismissed.*

(2) A. I. R. 1927 Cal. 628=104 I. C. 111=28 Cr. L. J. 789=55 Cal. 279.

A. I. R. 1931 Madras 17

JACKSON, J.

V. K. Vaiyapuri Chetti—Petitioner.

v.

Sinniah Chetty—Respondent.

Criminal Revn. No. 212 of 1930 and Criminal Revn. Petn. No. 199 of 1930, Decided on 10th October 1930, from order of Dist. Magistrate, South Arcot, D/- 11th December 1929, in Criminal Revn. Case No. 38 of 1929.

Criminal P. C. (5 of 1898), S. 517 — Possession — No crime made out — Property should be returned to the party from whom it was taken unless there are special circumstances rendering that course unjustifiable.

Where no crime is made out, the Magistrate should return the property to the party from whom it was taken unless there are special circumstances which would render such a course unjustifiable. Though the Magistrate has a discretion to decide the question of possession, he cannot be allowed to try the civil cause, to weigh evidence, and to estimate probabilities etc. : 2 *Weir* 667; 1 *Bom.* 630; 34 *Mad.* 94; 1 *I. C.* 103 and *A. I. R.* 1927 *Mad.* 797, *Rel. on.* [P 18 C 1]

V. L. Ethiraj—for Petitioner.

K. S. Jayarama Iyer and *G. Gopalaswami*—for Respondent.

Order.— The petitioner seeks in revision to set aside the order of the Second Class Magistrate, Tittagudi, under S. 517, Criminal P. C., confirmed by the District Magistrate, South Arcot, under S. 520, Criminal P. C., giving possession to counter-petitioner of an omnibus taken from the petitioner by the police. The charge of theft lodged by the counter-petitioner against the petitioner under S. 379, I. P. C., was found to be unsustainable. The case law on this subject is as follows:

In *Syed Mohidin Sahib, In re* (1) it is laid down that the property should ordinarily be delivered to the person by whom it has been produced; and if there is a bona fide dispute the Magistrate may impose conditions upon that person. This is followed in the next case, and purports to be followed in the next after that, where *In re Annapurnabai* (2), is cited to the same effect.

In *Kanagasabai* v. *Ramamani* (3), it is ruled that the Magistrate has jurisdiction to decide the question of possession, and *In re Sadashiv* (4) supports that rule. *Srinivasamurti* v. *Narasimhalu Naidu* (5) lays down that in the absence of special circumstances the property must be returned to the person from whom it was taken.

The general effect of these rulings is that the Magistrate has a discretion to decide the question of possession, but it is very rarely that that discretion if properly exercised will go beyond restoring the property to the party from whom it was taken. But probably the question how far a Magistrate's discretion under S. 517, Criminal P. C., should extend, is better answered by reference to fundamental principle than by any attempt to piece together a coherent system from

(1) 2 Weir 667.
(2) [1875] 1 Bom. 630.
(3) [1911] 34 Mad. 94=5 I. C. 468.
(4) [1909] 9 Cr. L. J. 162=1 I.C. 103.
(5) A. I. R. 1927 Mad. 797=104 I. C. 719=28 Cr. L. J. 879=50 Mad. 916.

various rulings. It is manifest that criminal Courts are not expected to try civil causes. The one exception is when, in order to prevent a breach of the peace, a Magistrate decides prima facie the question of possession. But it would be an odd extension of that exception if a section were to be drafted into the Code: Whenever a Magistrate is satisfied that the police have erroneously attached property where no offence has been committed, he shall require the parties claiming possession of that property to put in their respective claims. Merely from a practical point of view, apart from principle, a provision of that sort would obviously be a direct stimulus to false charges, for parties would jump at the opportunity of setting claims of possession so expeditiously and so cheaply.

It may seem therefore that the simple rule should be that if no crime is made out the Magistrate should return the property to the party from whom it was taken. But that rule is just too simple. Suppose, to take a common example, the accused person whom the Magistrate acquits, has pleaded that the property was foisted upon him. There would then be no sense in the Magistrate telling him to keep it. Other instances can no doubt be imagined, but, except in these special cases, the Magistrate should return the property to the person from whom it was taken. The same rule is laid down in *Srinivasamurti* v. *Narasimhalu Naidu* (5), in almost identical terms on p. 919. It should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable. The mere fact that two parties are quarrelling about possession is not one of the special circumstances which take a case out of the general rule.

In this case therefore the Magistrate should simply have returned the omnibus to the accused from whom it was taken, and the brief order of the District Magistrate that there had been a proper exercise of discretion would then be unexceptionable. But if on the other hand the Magistrate is to be allowed to try the civil cause, to weigh evidence, and to estimate probabilities the District Magistrate when moved under S. 520 would have to show that he had applied his mind to the same matters. Otherwise it would not only be a civil cause decided by a criminal Court, but one decided without privilege of appeal.

In the light of the above observations it is unnecessary to go into the merits of this case, but it may be observed that the dispute is not one which admits of ready solution, and it is quite possible that the Sub-Magistrate has erred. He finds in his last paragraph that the omnibus was obviously in possession of P. W. 1 on the date of the offence; overlooking that on his own finding there has been no offence at all. What he should have said is that the omnibus was obviously in possession of the accused when the police intervened. In his para. 5 he points out how flimsy is the case of P. W. 1. The sale deed is not produced, the alleged payment to Addison & Co., is not proved, and to get over his own signature in Ex. 1, P. W. 1 has to fall back upon the time-worn plea that he signed a blank sheet which the accused has filled up, confessing at the same time that no one was present when he signed it. But the Magistrate says that even by D. W. 1's evidence the accused had to pay Rs. 200 to P. W. 1 before the retransfer of the omnibus. D. W. 1 does not say so. He says that he saw P. W. 1 sign Ex. 1, and accused promised to pay him Rs. 200 in a short time. There is no suggestion that pending the payment P. W. 1 was to keep the omnibus.

The Second Class Magistrate's order cannot therefore be supported on its merits; and furnishes a good example of the advisability of keeping these civil disputes out of criminal Courts. For the above reasons the orders of the lower Courts are cancelled and the omnibus is ordered to be delivered to the petitioner. The petition is allowed.

P.R.S./P.N. *Order set aside.*

A. I. R. 1931 Madras 18

PANDALAI, J.

In re Veerasami Naicken—Accused—Petitioner.

Criminal Revn. No. 231 of 1930 and Criminal Revn.Petn. No. 218 of 1930, Decided on 19th March 1930, from judgment of Sub-Divisional Magistrate, Tiruvalur, in Criminal Appeal No. 17 of 1929.

(a) Penal Code (1860), S. 379—Removing cattle from pound without paying fee amounts to theft.

Where a person, whether he is the owner or a stranger, removes cattle from the pound where

they are secured, without paying the legitimate fee, he has undoubtedly the dishonest intention of saving himself the fee, and his act amounts to theft: 1 *Weir* 716, *not Appr.* [P 19 C 1]

(b) Criminal Trial—Offender punishable under two penal enactments can be punished under one or other but not under both.

Where an act is punishable both under the Penal Code as well as some other penal enactment, the offender can be punished under one or the other, but not under both the penal enactments. [P 19 C 1, 2]

T. Anantha Rao—for Petitioner.

Judgment.—The petitioner was convicted by the Stationary Sub-Magistrate of Tiruvalur of offences under Ss. 457 and 380 and sentenced to imprisonment till the rising of the Court and a fine of Rs. 50. This conviction and sentence were confirmed on appeal by the Sub-divisional Magistrate. The facts found against the petitioner are that on 21st January 1929 P.W. 3 took a cow belonging to the petitioner because it trespassed into his property, and took it to the village pound and secured it there and got a receipt for it from the village Munsif, P.W. 1. The next morning the pound was found broken open and the cow was found with the petitioner. His mother said that he had broken into the pound and taken the cow inadvertently and offered to pay the fee. Both the Courts found that he had done so. On his behalf it is argued that the act of the petitioner does not amount to theft but only to an offence under S. 24, Cattle Trespass Act. For this, reliance is placed upon a decision reported in *In re*: *Pacha Sahib* (1), where on similar facts it was held that a person who had removed bulls from a cattle pound and returned them to the true owner, could not be found guilty of theft because there was no dishonest intent. I am not able to agree with that view. A person who removes cattle from a pound where they are secured, without paying the legitimate fee, has undoubtedly the dishonest intention of saving himself the fee, and it makes no difference whether the man who so removed, is the owner himself as in this case, or a stranger as it was in the case cited. The truth is that this is a case where the same act falls under two different penal enactments. No doubt the petitioner might have been convicted under S. 24, Cattle Trespass Act. But his act amounted to theft and was therefore punishable under the Penal Code also; and where that is the case, the offender may be punished under the one or the other, but not under both the penal enactments: see S. 26, General Clauses Act. This was so held quite recently by a Bench of which I was a member along with the learned Chief Justice in which an act which fell under the special provisions relating to electoral offences under the Local Boards Act was also punishable under the Penal Code, and it was held that the offender could be punished under the Penal Code although the conditions necessary for the purpose of his prosecution under the Local Boards Act were not present. The petition is dismissed.

P.R.S./S.N. *Revision dismissed.*

(1) 1 Weir 716.

A. I. R. 1931 Madras 19

MADHAVAN NAIR, J.

Appayya Banga and *others*—Defendants—Appellants.

v.

Koraga—Plaintiff—Respondent.

Second Appeal 305 of 1927, Decided on 4th August 1930, from decree of Dist. Judge, South Kanara, in Appeal Suit No. 478 of 1924.

Cosharers—Partition—Plaintiff suing for possession of property or alternatively for partition of properties *X* and *Y*—He proving that *X* belonged to his father who put defendant in possession of it and that defendant by his misconduct mixed up boundaries of *X* with his property *Y* so that plaintiff now was unable to identify *X*—Plaintiff was entitled to invoke Court's equitable interference and partition could be decreed in his favour.

Plaintiff sued for possession of property *X* which was in the possession of defendant, or the alternative for partition of properties *X* and *Y*. He proved that the property *X* belonged to his father who had put defendant in possession of it, and further that the defendant by his misconduct had mixed up property with his own property *Y* so that plaintiff could not identify *X*. The trial Court passed decree for partition.

Held: that although as between independent proprietors confusion of boundaries per se does not furnish ground for Court's interposition, still plaintiff in this case had a right to complain inasmuch as he proved that the defendant by his misconduct brought about confusion of boundaries of the property after he obtained possession of it from plaintiff's father, and therefore he was entitled to invoke the equitable interference of the Court on his behalf. The trial Court was therefore right in passing decree for partition: *Wake* v. *Conyers*, 1 *White & Tudor's L.C.* 167; *Speer* v. *Crawter*, 35 *E.R.* 997; *Miller* v. *Warmington*, 37 *E. R.* 452 and 29 *Bom.* 73, *Rel. on.* [P 21 C 1, 2 P 22 C 2]

B. Sitarama Rao—for Appellants.

K. Y. Adiga—for Respondent.

Judgment.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff to recover possession of plaint item 1 with mesne profits or in the alternative for partition of plaint items 1 and 2 into two equal shares and for delivery of one such share to him with mesne profits. The plaintiff's case is that plaint items 1 to 3 belonged to his father and his two brothers, the defendant and one Tammaya Banga, that there was an oral division of these items between the three brothers in which item 1 fell to the plaintiff's father's share, item 2 to the defendant and item 3 to Tammaya Banga. Tammaya Banga has been in separate enjoyment of his share of the property. As regards item 1, the plaintiff alleged that when his father became the yajman of the family, the defendant was allowed to remain in possession of that item on behalf of his father, and as his father's rights had been sold to him he now claims possession of that item or a half-share of items 1 and 2 as the defendant has mixed up the two items. The defendant on the other hand contended that all the properties were gifted to his mother and, as her surviving son he is now absolutely entitled to the properties by right of survivorship. He also disputed the validity of the assignment of the plaintiff.

The lower Courts found that there was an oral partition between the plaintiff's father and the other two brothers as alleged by the plaintiff and that his father's share was validly assigned to him. It was also found that the plaintiff's father put the defendant in possession of item 1 also, that he remained in possession of both items 1 and 2 and while so "he mixed up his share with plaintiff's father's share." In consequence of these findings, and as it was not possible to identify the item which belonged to his father, the lower Courts gave a decree for partition of both the items 1 and 2 into two equal shares and for delivery of one share to the plaintiff. I may state here that no plea of adverse possession to the plaintiff's father's share of the property was set up by the defendant. The defendant admitted that he was in possession of the two items, but stated that he had been holding them under a maintenance allotment which he has not been able to prove. It is clear that the defendant has not been able to put forward any valid title to the plaint item 1, and it is also clear that possession of the plaint item 1 from the plaintiff's father is admitted by him. The question is, in such circumstances, whether the plaintiff is entitled to get partition of both the items on the ground that he is not able to identify item 1 as the defendant has mixed up his share with the plaintiff's share, which in other words means that the defendant has obliterated the boundaries of the two items and made it impossible for the plaintiff to identify his share.

Mr. Sitarama Rao's argument for the appellant shortly stated is this, that, in a suit for ejectment, so long as the plaintiff is unable to identify the property from which he desires to eject the defendant, he is not entitled to a decree for partition and that the Courts have no jurisdiction to grant the plaintiff's prayer in such a case "unless some equity is super-induced by the act of the parties." In support of this proposition reliance has been placed on the leading decision in *Wake* v. *Conyers* (1) and the subsequent cases *Speer* v. *Crawter* (2) and *Miller* v. *Warmington* (3). These cases have been referred to in *Kavasji* v. *Hormasji* (4). Reference has also been made to *O'Hara* v. *Strange* (5) and Story's Equity Jurisdiction, Vol. 2, S. 840, and Hunt on Boundaries, 256, etc. On the strength of these authorities it is argued that confusion of boundaries per se is no ground for interference by the Court and that the plaintiff in this case is not entitled to claim any relief as he is not able to show that the defendant is his tenant, agent or bailiff, or is a person in a fiduciary position towards the plaintiff which makes it incumbent on him to co-operate with him in re-establishing his title. It is admitted that the plaintiff and the defendant are not joint tenants or tenants-in-common or coparceners. The question is whether in such circumstances the plaintiff is entitled to the relief of partition granted to him by the lower Courts.

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(1) 1 White & Tudor's L. C. 167.
(2) 35 E. R. 997.
(3) 37 E. R. 452.
(4) [1905] 29 Bom. 73=6 Bom. L. R. 762.
(5) 11 Ir. Eq. R. 262.

In *Wake* v. *Conyers* (1) it was pointed out

"that the Court has no power to fix the boundaries of legal estates unless some equity is superinduced by the act of parties as some particular circumstance of fraud or confusion where one party has ploughed too near the other, or the like; nor has this Court a power to issue such commissions, of course, as here prayed."

In *Speer* v. *Crawter* (2) the Master of the Rolls, after referring to the case of *Wake* v. *Conyers* (1), stated thus:

"In the same case of *Wake* v. *Conyers* (1) Lord Nortington says, that in his apprehension this Court has simply no jurisdiction to settle the boundaries even of land, unless some equity is super-induced by the act of the parties. I concur in that opinion, and think that the circumstances of a confusion of boundaries furnishes per se no ground for the interposition of the Court"

"The present bill, in point of statement, laid a sufficient ground for such interposition, for it alleged the confusion to have taken place by the fault or the neglect of the owners of Imworth while lessees of Weston. But that is not only not made out, but it is disproved. If the ancient boundaries of the two manors be really unknown, as the plaintiff alleges they are, how are commissioners to ascertain them? or what is to be done if they cannot be ascertained? When it is through the default of a tenant or copy-holder that boundaries are confused, the Court provides for the case of its being impossible to ascertain them, by directing so much of the defendant's own land to be set out, as shall be equal to the quantity originally granted or leased. But because the owner of a manor can no longer find all the wastes that may once have belonged to it, he is not to have the deficiency made good out of his neighbour's estate."

In *Miller* v. *Warington* (3) the following observations appear:

"But if the difficulty of finding the boundaries were established, it is clear that the plaintiff does not stand in a predicament that gives him a right to apply for a commission. This is the case of persons claiming by an adverse title; there is no connexion between them to serve as a foundation for the Court to proceed on in ordering a commission. This subject was very luminously considered by the late Master of the Rolls in *Speer* v. *Crawter* (2), and that case has settled that you must lay a foundation for this species of relief, not merely by showing that boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them. But the Court will not interfere between independent proprietors, and confusion of boundaries per se is no ground to support such a bill."

The decision in *Kavasji* v. *Hormasji* (4), after referring to the above leading decisions, declined relief to the plaintiff as the learned Judges found that the litigants were independent proprietors and it was impossible to regard them as individuals having such relations the one to the other as would entitle the Court to treat the whole of the land in their possession as a common fund capable of adjustment in giving each party a specified proportion of the property.

Having regard to the principles enunciated in the above cases it is necessary in this case to examine in what circumstances item 1 came into the possession of the defendant, and how it was being held by him during all these years in order to find out whether the plaintiff can rely on any equity in his favour.

I have already stated that the property belonged to the plaintiff's father and his two brothers of whom the defendant is one. After division of the property between the brothers, plaintiff's father was in possession and enjoyment of Item 1. It was then that he put the defendant in possession of that item. The fact that the defendant obtained possession of that item from the plaintiff's father is in my view a very important circumstance in this case. No doubt the defendant's case when he admitted possession of the property was that he was put in possession of the property as an allbtment for maintenance but this has been found against by both the lower Courts. The defendant has not put forward any adverse title to the property. So it comes to this that the plaintiff has clearly established his title to the property in question and has proved that his father put the defendant in possession of it and that the defendant has not any title to it at all. The plaintiff has also proved that the defendant has by obliterating the boundaries made it impossible for him to identify the item belonging to him.

In the above circumstances can it be said that there is no equity in favour of the plaintiff which would require the Court to order partition? In my opinion, the parties cannot in this case be said to be independent proprietors in the sense in which that term has been used in some of the cases above referred to. On principle one can understand why in a simple case of two independent proprietors who own adjoining lands with respect to which confusion of boundaries has taken place, the Courts refuse to help the plaintiff if he is not able to prove by

evidence the boundaries of his estate. Of course, if he is able to prove that the defendant is a joint tenant or a tenant-in-common or a coparcener or holds his land as his agent, trustee, or occupies a fiduciary position towards the plaintiff with respect to the land, then it is agreed that when the boundaries have been obliterated the equitable jurisdiction of the Court may be invoked in favour of the plaintiff to grant him partition. But do these cases of well-recognized legal relationship exhaust the category of equities which would make it incumbent on the defendant to co-operate with the plaintiff in establishing his title? I think not. In my opinion the principle that in a case of confusion of boundaries the Courts will not interfere unless some equity is super-induced by the act of the parties, has to be applied with reference to the special features of each case. If the list of relationship is strictly limited to the classes mentioned above, which is the contention very strongly urged before me, then it seems to me manifest injustice may be done, in cases like the present. I do not think the principles enunciated in the cases referred to above, preclude the Courts from interfering in cases where obviously refusal to interfere will cause injustice to the plaintiff on account of misconduct on the part of the defendant with respect to property which he holds from him and to which he has no title.

In this case it is noteworthy that from the year 1887 to 1908 the property was being leased sometimes in the name of the plaintiff's father or in the defendant's name simply and at other times in their joint names. After the death of the father in 1919, though by that time partition had been effected between the brothers, the patta of Item 1 had been transferrerd to the joint names of the plaintiff and the defendant and, from the year 1908 to as recent a date as 1920, it was the defendant that paid the assessment on behalf of the pattadar of plaintiff's father. It is true that the plaintiff has not been able to prove a specific case that the defendant was his lessee which he alleged in this and some other prior litigations; but the facts that I have just mentioned are sufficient to show, in my opinion, that the defendant who has admitted possession of the property from the plaintiff's father may (if necessary) be said to be his agent so far as that item is concerned. In *Miller* v. *Warmington* (3), already referred to, speaking of *Speer* v. *Crawter* (2), the Master of the Rolls stated (this passage is quoted above) that :

"that case has settled that you must lay a foundation for this species of relief, not merely by showing that the boundaries are confused, but that the confusion has arisen from some misconduct on the part of the defendant, or those under whom he claims, of which you have a right to complain, and which renders it incumbent on him to co-operate in re-establishing them."

This is all what the plaintiff has to prove in order to succeed in cases of this description. I think the plaintiff in this case has a right to complain inasmuch as he has proved that the defendant by his misconduct brought about a confusion of the boundaries of the property after he obtained possession of it from his father, and that therefore he is entitled to invoke the equitable interference of the Court on his behalf. I would therefore uphold the judgment of the Courts below and dismiss the second appeal with costs.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1931 Madras 22

VENKATASUBBA RAO, J.

Thiagaraja Pillai—Plaintiff — Appellant.

v.

Appavoo Pillai and *others*—Defendants—Respondents.

Second Appeal No. 1658 of 1926, Decided on 17th February 1930, from decree of Sub-Judge, Sivaganga, in Appeal Suit No. 39 of 1925.

Adverse Possession— Cosharers—Property purchased from co-tenant openly and with knowledge of other co-tenants—Purchaser's possession is adverse.

Where a purchaser of property held in common by several tenants-in-common purchases it from one of such tenants-in-common openly and with the knowledge of the other co-tenants, he must be taken to have repudiated the title of the others, there and then, and possession becomes adverse from the time of his purchase : *A. I. R.* 1928 *Mad.* 652 ; *A. I. R.* 1927 *Mad.* 111 ; *A. I. R.* 1924 *Mad.* 741 ; 35 *Cal.* 961 and *other cases discussed.* [P 23 C 2]

K. Bhashyam Iyengar and *T. R. Srinivasan*—for Appellant.

R. Kuppuswami Iyer —for Respondents.

Judgment.—There were four items of property each belonging to a different person. The suit properties were adja-

cent to those four items and the four persons mentioned above owned them as tenants-in-common. In execution of a decree passed against one of the four men whom I shall call *C*, defendant 1 purchased the items covered by the suit in 1899. At that time *C*, as I have said, was only one of the four proprietors who owned the items as tenants-in-common. But as the lower Courts have rightly held, what defendant 1 purported to purchase was not merely the one-fourth share of *C*, but the items as a whole. The plaintiff files this suit on the strength of a sale deed executed in his favour in 1923 by another co-tenant whom I shall call *F*. The plaintiff's case is that he is entitled to recover from defendant 1 the one-fourth share which he (the plaintiff) purchased from *F*. The lower Courts have rejected the plaintiff's claim. The question is whether defendant 1 has acquired title to the suit plots by adverse possession.

When one of the co-owners does any act, the law will not presume that it was done in exercise of ownership adversely to the other co-owners, the reason being "possession is never considered adverse if it can be referred to a lawful title :" see *Thomas* v. *Thomas* (1) at p. 83, cited in *Corea* v. *Appuhamy* (2). The result is that those acts which, in the case of a stranger, would amount to assertion of a hostile title, would not be, in the case of a co-tenant, acts of dispossession ; for, in his case, they are susceptible of explanation consistent with his recognizing the rights of the other co-owners. The possession then by one co-owner being in law prima facie the possession of all, he cannot put an end to that possession by any secret intention in his mind. As Lord Macnaughten observes in the case already quoted, *Corea* v. *Appuhamy* (2):

"nothing short of ouster or something equivalent to ouster could bring about that result."

The following passage from the judgment in *Jogendra Nath Rai* v. *Baldeo Das* (3) brings out this point very clearly :

"A co-tenant will not be permitted to claim the protection of the statute of limitation unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him ; it must further be established that the fact of adverse holding was brought home to the co-owner either by information to that effect given by the tenant-in-common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature, as to give notice to the co-tenant that an adverse possession and disseisin are intended to be asserted."

I may also refer to my judgment in *Venkatachalam* v. *Annapurna* (4) (at p. 227 *of* 55 *M. L. J*). I made observations to the same effect. In this case defendant 1 being a purchaser from a co-owner does he stand in a different position ? In other words, can he rely upon acts which may amount to adverse possession in the case of a stranger but may fall short of it in the case of a co-tenant ? On this point some cases have been cited. The effect of the decisions is set forth very clearly in the judgment of Odgers, J., in *Govindasami* v. *Kothandapani* (5). I agree with that learned Judge that the point cannot be said to have been decided definitely by this Court. As Odgers, J., observes, the conflict is as regards the following point : in the case of a purchaser from one co-owner can title by adverse possession be acquired against the other co-owners without their being put on notice either actual or constructive, that adverse possession is running against them ? I may however note that a further distinction is attempted in one case, namely as regards the effect of notice or want of notice of a certain fact, on the part of the purchaser : *Venkataramа Ayyar* v. *Subramania Sastri* (6). So far as that distinction is concerned, no other case seems to advert to it. But it is unnecessary for me to pursue this enquiry. Nor is it material to discuss which of the two sets of cases referred to by Odgers, J., decides the point correctly.

In this case what was purported to be sold and bought was the entire property. The sale was made openly and, as the lower Courts find, the other co-tenants were clearly aware of it. Defendant 1 must be taken to have repudiated the title of the others then and there. They had notice of this hostile assertion and ever since the purchase defendant 1 has been dealing with the property as exclusively belonging to himself. Those elements which would in the case of co-owners be necessary exist in this case.

(1) [1856] 2 K. & J. 79=25 L. J. Ch. 159 = 1 Jur. (n. s.) 1160=4 W. R. 135.
(2) [1912] A. C. 230=81 L. J. P. C. 151 =105 L. T. 836.
(3) [1908] 35 Cal. 961 = 6 C. L. J. 735 = 12 C. W. N. 127.
(4) A. I. R. 1928 Mad. 652=109 I. C. 553.
(5) A. I. R. 1927 Mad. 111=99 I. C. 158.
(6) A. I. R. 1924 Mad. 741=78 I. C. 37.

The second appeal fails and is dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1931 Madras 24

CURGENVEN, J.

(*Hanumangadi*) *Venkatalal* and *others* —Plaintiffs—Petitioners.

v.

(*Dammangi*) *Kosaldasu Bavaji* and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 1132 of 1928, Decided on 6th January 1930, from order of Sub-Judge, Bapatla, D/- 23rd July 1928, in Civil Suit No. 102 of 1927.

Court-fees Act (7 of 1870), S. 7 (4) (c) and Art. 17-B—Person suing as beneficiary under certain trust to recover certain properties forming subject matter of trust which had been alienated by certain trustees — Case comes under S. 7 (4) (c) and not under Art. 17-B.

A person brought a suit as beneficiary under a certain trust, the primary object of which was to provide for the wants of Bhairagis but in which he possessed a beneficiary interest in the surplus income in order to recover certain properties forming the subject-matter of the trust which had been alienated by the trustees. The alienations being made, one by sale, one by mortgage and the remainder by lease.

Held : that the case did not fall under Art. 17-B but the court-fee must be paid under S. 7 (4) (c) read with the proviso added to it by the Madras Court-fees Amendment Act (5 of 1920) and should be calculated in the manner provided by para. 5 of the section : 28 *All.* 112; 41 *Mad.* 124 and 5 *I. C.* 901, *Rel. on*; *A. I. R.* 1925 *Mad.* 722 and 7 *I. C.* 92, *Expl.* and *Dist.*

[P 25 C 2]

K. S. Sankara Iyer—for Petitioners.

V. S. Narasimhachari — for Respondents.

Judgment.—Plaintiffs, 1, 2 and 4 of whom are now the petitioners before me, brought the suit as beneficiaries under a certain trust, the primary object of which was to provide for the wants of Bhairagis but in which they possessed a beneficiary interest in the surplus income, in order to recover certain properties forming the subject matter of the trust which had been alienated by the trustees, who are defendants 1 and 2, to the remaining defendants. The alienations were made, one by sale, one by mortgage and the remainder by lease. The plaintiffs offered to pay a court-fee of Rs. 100 under Art. 17-B, Sch. 2, Court-fees Act, on the ground that the subject matter of the suit was incapable of valuation. This was contested by the defendants in their written statement and the learned Subordinate Judge took up the question of court-fee as a preliminary issue. He came to the conclusion that it must be paid under S. 7, (iv) (c), Court-fees Act, read with the proviso added to it by the Madras Court-fees Amendment Act (Act 5 of 1920), on half the market value of the suit properties, that is to say, on Rs. 20,000. It is against this decision that the revision petition has been preferred.

The plaintiffs adhere to their contention that the case falls within the terms of Art. 17-B as being a plaint where it is not possible to estimate at a money value the subject matter in dispute and which is not otherwise provided for by the Act. Two questions arise out of the terms of the article : whether it is possible to estimate the money value of the subject-matter and whether the case is otherwise provided for by the Act. It has been contended that the subject matter in dispute must here be deemed to be the benefit accruing to the person suing but I do not think this is at all a tenable proposition. My own view is that it is purely an irrelevant question, and that we must look to the nature of the suit and the nature of the decree to be passed in it. The real question indeed is the second one, whether any other article of Sch. 2 or whether any other provision in the Court-fees Act can be applied to a suit of the nature in question. I have been referred to rulings relating to suits falling under S. 92, Civil P. C., and notably to *Sudalimuthu* v. *Peria Somasundaram Pillai* (1) which was a case decided under the old Court-fees Act by Krishnan, J. The suit was one to recover trust moneys said to have been embezzled by the trustees and following *Ramrup Das* v. *Sitaram Das* (2), the learned Judge held that Art. 17 (vi) of the old Act, corresponding to Art. 17-B of the new Act should be applied. He decided the case rather on authority than on any express line of reasoning except that he gave expression to the view that

"it would be a hardship to worshippers who bring suits under S. 92 in order to see that the trusts are properly carried out and that the trustees do not misappropriate the moneys belonging to the trust or abuse the trust, to have to pay court-fees upon such large sums of money."

The authority followed, *Ramrup Das* v. *Sitaram Das* (2), dealt with a suit of

(1) A. I. R. 1925 Mad. 722=87 I. C. 25.
(2) [1910] 7 I. C. 92.

the same character. The reliefs prayed for comprised the appointment of a certain person as trustee, the removal of the trustees and the rendering of accounts by them. I find it very difficult to follow the line of reasoning adopted on p. 215 (*of* 12 *C. L. J.*) of the judgment, where it is said that the suit was not one involving value of any portion of the idol's property and again where, as I understand the learned Judges, they say that the amount of court-fee payable depends upon whether any part of the reliefs sought is due to the plaintiffs, I do not think it necessary to further examine these cases because my view is that the nature of such suits is different from that of the suit now in question. It has been explained in *Ghazaffar Hussain Khan* v. *Yawar Hussain* (3) what were the limits of a suit under old S. 539, Civil P. C., corresponding to the present S. 92. In such a suit no possession can be given against alienees of the trust property, and from the observations made by the learned Judges I think it is clear that they were of opinion that a suit for such a remedy against alienees would be nothing short of a suit for possession and subject to a court-fee fixed upon that basis: see the remarks of Stanley, C. J., on pp. 117 and 118 and Burkitt, J., on p. 120. The latter says:

"When such a plaintiff prays to recover possession of immovable property he must (like any other plaintiff in a similar suit) pay the court-fee chargeable on that relief."

The learned advocate for the respondents have drawn my attention to two cases decided under Art. 144, Limitation Act: *Chidambaranath Tnambiran* v. *Nallasiva Mudaliar* (4) and *Subramania Ayyar* v. *Nagaratna Naicker* (5). The question arising in those cases was as to the nature of a suit brought in their representative capacity by the worshippers for possession on behalf of the trust of property alienated by the trustees whether it was a suit for possession as contemplated by the article in question. Seshagiri Ayyar, J., says:

"The beneficiaries sue only in the right of the trustee. They are only the aliases for the trustees. Under the common law of England, the beneficiaries were compellable to use the name of the trustee as plaintiff. Consequently the beneficiaries derive their right to sue through the trustee. It is his action that they are prosecuting. In this view, what is adverse to the trustee is also adverse to the persons who derive their right to sue through him. Art. 144 therefore applies."

Similarly, in *Subramania Ayyar* v. *Nagaratna Naicker* (5) the view taken as to the nature of a suit of this character was that it was brought to enforce the claims of the temple against persons who held the temple property, that is to say, that the suit was for possession based upon title. If this is the correct view, I think there can be no question that the decision of the lower Court that the case as regards court-fee does not fall under Art. 17-B. but is provided for by S. 7 of the Act is correct.

It is then contended that even so the learned Subordinate Judge is wrong in bringing it under S. 7 (iv) (c), which relates to a suit for a declaratory decree where consequential relief is prayed. It is said that so far as the property sold is concerned it should fall under S. 7 (v); so far as the property mortgaged is concerned under para. (ix) and so far as the leases are concerned under para. (xi). I am unable to accept these two latter contentions because para. (ix) appears to relate to redemption or foreclosure by a party to the mortgage and para. (xi) is restricted to suits between landlord and tenant, whereas here the whole basis of the plaint is to upset the lease on the ground that the so-called tenants have no better title than ordinary trespassers. The only alternative, so far as I can see, would be to bring the whole subject matter under para. (v), but inasmuch as this would entail upon the plaintiffs a heavier court-fee than that already imposed upon them, it is unnecessary to consider this alternative. I think therefore that there are no grounds for me to interfere with the lower Court's order otherwise than upon one point, which is the direction that the court-fee should be assessed upon half the market value of the property. According to the proviso which applies to this Presidency it should be calculated in the manner provided by para. (v) of the section. To the extent therefore that the order requires amendment in this respect, I allow the petition and set aside the order, directing the lower Court to amend it accordingly. As the petitioner has substantially failed, he must pay the respondents their costs of this petition.

P.R.S./P.N. *Order accordingly.*

(3) [1905] 28 All. 112=(1905) A. W. N. 208.
(4) [1918] 41 Mad. 124=42 I. C. 366.
(5) [1910] 5 I. C. 901.

A. I. R. 1931 Madras 26(1)

RAMESAM AND WALLACE, JJ.

K. T. Muthuveerappa Pillai — Petitioner—Appellant.

v.

Revenue Divisional Officer, Melur—Respondent.

Appeal No. 427 of 1928, Decided on 29th April 1930, from order of Sub-Judge, Madura, D/- 6th February 1928, in Land Acquisition Case No. 67 of 1926.

Land Acquisition Act (1 of 1894), S. 27 (2) —Once proper reference is made to District Judge, his final order on it is an award.

Once a proper reference comes before the District Judge, his final order on it is an award whether he gives an additional amount or he gives no additional amount or whether the acquisition officer's award is not upheld for some other reason, and an appeal over such an order is competent: 39 *I.C.* 637; *A.I.R.* 1927 *Cal.* 533 and 46 *Cal.* 861, *Dist.* [P 26 C 1]

T. L. Venkatarama Iyer—for Appellant.

Government Pleader—for Respondent.

Judgment.—A preliminary objection is taken that the appeal does not lie. It is contended that the order appealed against is not an award and *Dembeswar Sarma* v. *Collector of Sebsagar* (1) and *Bansidhur Marwari* v. *Secy. of State* (2) and *Sarat Chandra Ghose* v. *Secy. of State* (3) are relied on. In the first of these cases the application for reference was made beyond the time allowed. No reference ought to have been made in that case and the District Judge refused to make an award on that ground. The High Court held properly that no appeal lay. In *Bansidhur Marwari* v. *Secy. of State* (2) the appeal was against an order refusing to restore a case dismissed for default. In *Sarat Chandra Ghose* v. *Secy. of State* (3), the order was made under S. 49 of the Act. All these cases are distinguishable.

Once a proper reference comes before the District Judge, his final order on it is an award whether he gives an additional amount or he gives no additional amount or whether the acquisition officer's award is not upheld for some other reason like the one in this case; S. 27 (2), Land Acquisition Act, supports this conclusion. The words are "where the award of the Collector is not upheld." This is such a case, the reason being that the Government backed out of the acquisition. We overrule the preliminary objection.

As to the amount, it is stated before us and we have no reason to disbelieve the statement that Rs. 188 represents the total costs incurred including vakalat, stamp, pleader's fee and witness batta. Seeing that out of the ten adjournments which the case received, three were at the instance of the appellant and seven at the instance of the Government, we think Rs. 120 for batta and other expenses and Rs. 20 for pleader's fee, that is Rs. 140, is all the sum to which the appellant is properly entitled. We accordingly modify the order of the Court below by directing that the respondent will pay Rs. 140 towards the appellant's costs. The respondent will pay the appellant's costs of the appeal.

P.R.S./S.N. *Order modified.*

(1) [1917] 39 I.C. 637.
(2) A.I.R. 1927 Cal. 533=102 I.C. 479=54 Cal. 812.
(3) [1919] 46 Cal. 861=50 I.C. 732.

A. I. R. 1931 Madras 26(2)

CURGENVEN, J.

(*Cherukat Madhathil Etakramancheri Illath Karnavan*) *Narayanan Nambudri* and *another*—Defendants—Appellants.

v.

(*Peruvampura Devaswam Samudayi Kizhakkiniyakath Polancheri Illath*) *Damodaran Nambudri* and *others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1892 of 1925, Decided on 11th December 1929, from decree of Sub-Judge, South Malabar, in Appeal Suit No. 102 of 1924.

Civil P. C., S. 47, and O. 21, R. 2—Execution—Anomalous agreement not to execute—Suit on basis of such agreement for recovery of money realized in execution is barred by S. 47.

Where an agreement is anomalous in character, i. e., while in point of time it is post-decree, in point of character and intention it is pre-decree, having been executed in ignorance of the fact that a decree had already been passed, it should be treated as a pre-decree agreement, not coming within the terms of O. 21, R. 2, Civil P. C., but falling under S. 47; and a suit brought on the basis of such an agreement for recovery of money realized in execution of the decree is barred by S. 47 : 40 *Mad.* 233 ; 5 *Mad.* 397 (*F.B.*) and 42 *Mad.* 338, *Ref.* [P 27 C 1, 2]

K. P. Ramakrishna Iyer—for Appellants.

P. A. Ananta Iyer—for Respondents.

Judgment.—The first question arising in this appeal is whether a suit lay to recover money realized by defendant 1, in execution for costs contrary, it is said,

to the terms of the agreement, Ex. A. The circumstances were somewhat peculiar. Defendant 1, as managing trustee of a Devaswom, sued to recover certain properties from the present plaintiffs 4 and 5, who were tenants of the Devaswom. He lost his case in the two lower Courts and plaintiffs 4 and 5 realized their costs from him. Then he filed a second appeal and apparently, while all the parties thought it was still pending, the agreement above referred to was concluded. The relevant part of the text of this agreement is translated in para. 6 of the Subordinate Judge's judgment. In it defendant 1 agreed with another of the trustees on behalf of the remainder not to prosecute the litigation further, including Second Appeal 1606 of 1916, described as still pending before the High Court. This was on 16th September 1918 and in point of fact judgment in the second appeal had been delivered on 18th April 1918. It resulted in a decree for defendant 1, and he executed it for his second appeal costs against plaintiffs 4 and 5, obtaining from them the sum which it is now sought to recover. The first question arising is, assuming that both defendant 1 on the one hand and plaintiffs 4 and 5 on the other were parties to this agreement and that by it defendant 1 undertook not to proceed further against these plaintiffs, can they enforce its terms by suit, and are they not precluded from suing by the terms of S. 47, Civil P. C.

The agreement is anomalous in character because, while in point of time it was post-decree, in point of character and intention it was pre-decree. If it was wholly pre-decree or wholly post-decree no difficulty would have arisen. It has been held by a Full Bench in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) that an agreement originating before a decree, and relating to execution, can be dealt with by the execution Court under S. 47, and accordingly that no suit to enforce it will lie. A post-decree agreement, if the application to record be within the ninety days provided by Art. 174, Lim. Act, may be dealt with under O. 21, R. 2, Civil P. C., and if time barred may form the basis of a suit for damages: *Viraraghava* v. *Subbakka* (2) and *Krishna Ayyar* v. *Savurimuthu Pillai* (3).

It has not been argued before me, and I do not think it can be contended, that the suit agreement did not relate to the execution, discharge or satisfaction of the decree. An agreement not to let a pending appeal proceed to decree must include, if it turns out that a decree has been passed, an agreement not to take out execution under it. So far therefore as the subject matter is concerned, this agreement would fall within the scope of of S. 47. The contention is, however, that it comes within the terms of O. 21, R. 2. I find it very difficult to reconcile the terms of that rule with the nature of the agreement. In the Full Bench case referred to above, it was held that the rule would not apply to adjustments made before the decree is passed. Abdur Rahim, Offg. C, J., says :

> "Order 21, R. 2, which speaks of a decree being adjusted in whole or in part, assumes the existence of the decree at the time of adjustment;"

and Phillps, J., who differed from the other two members of the Bench on the main question, agreed with them in this. I do not think it can make any difference to the applicability of O. 21, R. 2, that the decree had actually been passed if the parties to the agreement drew up their agreement in ignorance of that circumstance. R. 2 says nothing about post-decree agreements. What it does say is that when money payable under a decree is paid out of Court, or when the decree is otherwise adjusted, etc., the fact shall be certified. A decree cannot be adjusted before the parties know of its existence and what it consists in. They can at the most say what is to happen if and when a decree is passed. The agreement in the present case resembles in type the pre-decree agreement in the Full Bench case, where the defendant was to allow the plaintiff to get his decree and the plaintiff was to agree to certain arrangement for its satisfaction. It is so far from the post-decree type of agreement that it in fact provided that no decree against plaintiffs 4 and 5 should be obtained. It appears to me that the reasoning in the Full Bench case is as applicable to the agreement here as to the agreement there, and that it was open to the executing Court to

(1) [1917] 40 Mad. 233=37 I. C. 836 (F.B.).
(2) [1882] 5 Mad. 397 (F.B.).
(3) [1919] 42 Mad. 338=50 I. C. 584.

determine its effect under S. 47. Upon this view the suit would be barred.

It is worth remark that an attempt was in fact made to resist execution on the strength of this agreement. The District Munsif's order is Ex. 9. In it he refers to the adjustment as having taken place before the High Court decree was passed (which presumably must have been the belief even then of the parties), and it seems likely, upon the view he took, that a reference to *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) might have led him to adopt a different attitude. He found however other grounds as well for dismissing the application, and no appeal was filed against his decision.

The point has been argued that, because they made this application to the executing Court, plaintiffs 4 and 5 were estopped from bringing the suit. I can find no ground for this view, more especially as the District Munsif seems to have deemed their agreement, though pre-decree, to have required action under O. 21, R. 2. It is unnecessary for me to go into the question how far an agreement between defendant 1 and plaintiffs 4 and 5 has been established, because I hold that the suit must fail in view of the nature of its subject matter.

So far as the illom which defendant 1 represented as karnavan is concerned, it was decided by Jackson, J., in C. M. P. 3488 of 1929 that the second appeal had abated. The lower appellate Court's decree will therefore stand as against the illom. Against defendant 1's personal representative that decree is set aside and the suit dismissed with costs throughout.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1931 Madras 28

ANANTAKRISHNA AYYAR AND SUNDARAM CHETTY, JJ.

(*Muthyala*) *Narayanappa*—Plaintiff—Appellant.

v.

(*Muthyala*) *Ramachandrappa*—Defendant—Respondent.

Civil Misc. Appeal No. 272 of 1930 and Civil Revn. Petn. No. 1034 of 1930, Decided on 28th August 1930, from order of Sub-Judge, Bellary, D/- 10th March 1930.

Civil P. C. (1908), Sch. 2, Paras 17, 18 and 9—Two brothers referring disputes to arbitration—Agreement specifying three arbitrators, but not providing for in case one died—One arbitrator dying before completion of proceedings—One brother filing suit and other applying for stay of it under para 18—As provisions of paras 1 to 16 cannot be applied to arbitration out of Court except in so far as they are consistent with provisions of agreement to refer, Court could not add third arbitrator in lieu of one who died, and so suit could not be stayed.

The provisions of paras 1 to 16, Sch. 2, cannot be applied to an arbitration outside Court except in so far as they are consistent with the provisions of the agreement between the parties filed under para 17. [P 32 C 1]

Two brothers entered into an agreement to refer their disputes to arbitrators. The agreement specified three persons as arbitrators, but made no provision if one of them died. Before the completion of the proceedings however one of the arbitrators died and one of the brothers filed a suit in the Court. The other brother applied under para 18 to have the suit stayed.

Held: that the Court had no jurisdiction to appoint an arbitrator in lieu of one who had died, nor could it make an order of reference to two out of the three arbitrators for that could not be in accordance with the provisions of the agreement. Consequently the Court should try the suit and should dismiss the application for stay of suit: 33 *All.* 743 (*P.C.*), *Disc.* and *Dist.*; 17 *Mad.* 498; *A. I. R.* 1926 *Mad.* 1183; 17 *I.C.* 389; *A.I.R.* 1921 *Bom.* 458; 50 *I.C.* 879; 12 *B. L. R.* 13; 42 *I. C.* 911 and 71 *P. R.* 1918 *Rel. on*; 12 *M.I.A.* 112 and 27 *Mad.* 112, *Dist.*; *M. L. J.* 833 and *A. I. R.* 1922 *All.* 133, *not Foll.* [P 32 C 1]

V. S. Narasimhachariar—for Appellant.

B. Somayya and *Kasturi Seshagiri Rao*—for Respondent.

Anantakrishna Ayyar, J.—The parties to these cases before us are brothers. By an agreement dated 31st October 1926, the parties agreed to have their disputes relating to partition settled by three specific arbitrators. During the course of the arbitration proceedings one of the arbitrators died. One of the brothers filed O. S. 8 of 1929 on 22nd March 1929 against his brother. Defendant 1 in O. S. 8 of 1929 applied under para 18, Sch. 2, Civil P. C., to have the suit stayed. The Court held that the arbitration could go on with a fresh arbitrator 'that may be appointed by the Court. The plaintiff in O. S. 8 of 1929 preferred an appeal against that order, and the learned District Judge set aside that order, holding that the arbitration agreed to between the parties could not go on, as one of the arbitrators was dead, and as there was no provision in the agreement regarding the appointment of a substitute in the place of the arbitrator

who is dead. Against the decision of the learned District Judge directing the suit to proceed, defendant 1 has preferred Civil Revision Petition No. 1034 of 1930.

Defendant 1 in O. S. 8 of 1929 subsequently filed O. S. 27 of 1929 in August 1929 for enforcing the arbitration after the appointment of a fresh arbitrator in the place of the deceased one. Having regard to the view taken by the learned District Judge in Civil Miscellaneous Appeal 19 of 1929 (which is the subject matter of the revision petition before us already referred to), the learned Subordinate Judge dismissed the suit. Civil Miscellaneous Appeal 272 of 1930 has been filed by the plaintiff in O. S. 27 of 1929 against the decision of the learned Subordinate Judge, in O. S. 27 of 1929. The substantial question for decision in the two cases being the same, they were heard together in this Court.

The decision of the dispute between the parties turns on the construction of the particular agreement dated 31st October 1926 entered into by them, and on the proper meaning to be attached to paras. 17 to 19, Sch. 2, Civil P. C.

From a perusal of the provisions contained in Sch. 2, Civil P. C., it seems to me, that when a suit is referred to arbitration when all parties interested agree to the same, the Court has got larger powers, in some respects, in order to complete and effectuate the matter of arbitration. Para 1, Sch. 2, enacts that where in a suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may at any time before the judgment is pronounced apply to the Court for an order of reference. The underlying idea in para 1, Sch. 2, is that the parties interested are anxious to have the suit settled by arbitration, and not by Court. The details regarding the personnel, etc., of the arbitration in such a case are all taken to be merely secondary and incidental to the matter, the main intention being settlement by arbitrators and not by Court. Seeing that the parties are entitled to apply, at any time in the course of the suit, even after the trial has been closed and the matter is pending judgment, to have the suit referred to arbitration, it seems reasonable that the attempt at arbitration should not prove futile and abortive simply because one of the arbitrators declined to act or one of the parties declined to appoint the arbitrator or to proceed with the same. Settlement by arbitration being taken in such a case to be the dominant idea of the parties, the matter of details regarding appointment of arbitrators, etc., are left to be worked out by the Court in case parties do not agree. Of course, if the parties agree as to the manner in which the arbitrators are to be appointed, the Court is bound to adopt that procedure: para 2. The Court is entitled to make provisions for various matters referred to in paras. 4 and 5; where an arbitrator or an umpire dies, or where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or where the person appointed refuses to accept the office of the arbitrator or refuses to act, etc., provision is made for the Court to appoint an arbitrator after giving notice to the parties. In the case of reference to arbitration of matters in a pending suit, therefore, there is no question of reference to specified arbitrators only in the sense that if any such arbitrators decline to act or dies, the arbitration comes to an end.

Where however parties agree to refer their differences to arbitration, there being no proceedings in Court, at that time, then, power is given to the parties to the agreement or to any of them to apply to the Court to have the agreement filed in Court; whereas in the case of a pending suit the consent of all the parties interested is necessary before the application could be made to the Court, for an order of reference. In the second class of cases mentioned above, such application may be made either by all the parties to the agreement, if they join the application, or by any of them. In the latter case, notice should be issued to the other parties to the agreement to show cause why the agreement should uot be filed. When no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, and it is only in cases where there are no such provisions, and the parties cannot agree, that the Court could appoint any arbitrator. Thus the provisions contained in the agreement regarding the arbitrators have to be followed and the Court is not entitled to go behind such provisions.

This, it seems to me, is made clear by Cl. 4, para 17, Sch 2. Para 18 relating to stay of suit enacts that the Court should be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration before a suit filed after such agreement could be stayed. Para. 19 makes it clear that the provisions of Sch. 2 shall apply only so far as they are consistent with any agreement filed under para 17. Thus if the provisions of Sch. 2, Civil P. C., are not consistent with the agreement of the parties, such provisions of the schedule shall not be applicable to such arbitration. In a case coming under para 1 of the schedule, the Court passes an order of reference to arbitration. In a case coming under para 17 of the schedule, the Court orders the agreement to be filed, and makes an order of reference to the arbitrator appointed in accordance with the provisions of the agreement &c. The provisions of the agreement thus govern the arbitration all through under para 17 and the provisions contained in the Sch. 2 of the Code come in so far as they are consistent with the agreement filed under para 17, whereas under para 1 of the schedule, the agreement between the parties brings about the order of reference the subsequent proceedings being lost to Court, the Court being directed to respect the unanimous wish of the parties in certain respects only. It should also be noticed that agreements to refer to arbitration future difference also come within the scope of para 17.

One can understand the reason for the difference in the policy underlying the distinction that exists in the two classes of cases mentioned above. The question of construction of the particular agreement of the parties is one for the Court before which the question is raised. The Court should decide, whether any, and which, of the provisions in Sch. 2, Civil P. C., are consistent with the terms of the agreement.

In the case before us, the reference is to three specified persons. We are not able to gather that the main intention of the parties to the present case was to have their disputes settled by arbitration in any event, and that the question of the personnel of the arbitrators was only a subsidiary and incidental matter. As I understand the agreement before us, it is a reference to three specified persons only, with a further provision that the award to be binding should be unanimous award of all the three.

In this view, seeing that one of the arbitrators in the present case died prior to the commencement of these proceedings in Court, I think that the present is not a case where the proceedings in the suit (O. S. 8 of 1929) should be stayed under para. 18, Sch. 2, Civil P. C., or where the agreement should be ordered to be filed or any order of reference made under para. 17, since the Court could not make an order of reference to the arbitrators appointed in accordance with the provisions of the agreement when one of such arbitrators died prior to the commencement of proceeding in Court.

Coming to decided cases, it seems to me that the decision in *Sadik Husain* v. *Kanaiz Begam* (1) does not touch this exact point. It is a decision of the Privy Council, and if the question now before us has been decided directly or even indirectly by the Privy Council, then there would be an end to all discussion. But after having carefully read that decision, I am not able to say that their Lorsdhips have expressed any opinion on the question now before us. All that was decided in that case is this, that the expression "refusal to act" occurring in the Code includes also a case where an arbitrator never accepted the arbitration, but refused to have anything to do with the arbitration; and it is not confined to the case of an arbitrator accepting the arbitration but subsequently refusing to act. If I understand the facts of the case correctly, a decree already passed by a Court on compromise was to be worked out by arbitrators who were to allot to the parties properties in a compact block if possible appertaining to their shares. There was reference to arbitration regarding proceedings in a matter of which the Court had seisin already, and which should be taken only through Court. Substantially there was an order of reference by Court. It is not a case coming under para. 17, Sch. 2.

The decision in *Bala Pattabirama Chetti* v. *Seethrama Chetti* (2) decided that the words "occurring in S. 524 of the Code of 1882 corresponding to R. 19 of

(1) [1911] 33 All. 743=38 I. A. 181=12 I. C. 15 (P. C.).
(2) [1894] 17 Mad. 498.

Sch. 2 of the present Code," do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act in order that a Judge may act in conformity to it. The learned Judge held that the reasonable construction of the said 'provision was that the action of the Judge under S. 510 should not be inconsistent with the agreement, A Bench of this Court in *Ramayya* v. *Bapayya* (3) on the other hand laid down that the provisions of the schedule would apply only so far as they are consistent with the agreement filed under para. 17. In that case one of the parties who referred their dispute to the arbitration of three named arbitrators applied to the Court under para. 17 (1), Sch. 2, Civil P. C., to have the agreement filed in Court. This was done ; but in making the order of reference under sub-Cl. (4) the Court added a further direction that in case of disagreement among the arbitrators the opinion of the majority should prevail. The question arose whether the said direction was legal or not, as it was not consistent with the agreement which was construed to require the unanimous decision of all the three arbitrators (and not simply of a majority) in order that the award may be binding on the parties. The learned Judges held that the Court could not give any directions which are not consistent with the agreement to arbitration. The reasoning of this decision directly applies to the case before us, and the provisions of paras. 1 to 17, Sch. 2, would apply only so far as they are consistent with the agreement filed under para. 17 of the schedule. As we construe the agreement before us, provisions of Sch. 2 are not consistent with the agreement, regarding the appointment of arbitrators by Court.

The agreement was to refer to the arbitration of three specified persons. There is no provision as to what is to happen in case if any of the three died. In such a case the Court has no jurisdiction to appoint an arbitrator in lieu of one who died, and consequently a suit filed by a party to the agreement should be tried by the Court: see *Ramayya* v. *Bapayya* (3), and the English decisions referred to therein, and *Jaitum Bi* v. *Nabi Saheb* (4).

(3) A. I. R. 1926 Mad. 1183=97 I. C. 824.
(4) [1913] 17 I. C. 389.

The decision in *Mohan Lal* v. *Damodar Das* (5), *Ma Bu U* v. *Maung Pe Lan* (6), and *Brooke* v. *Surdyal* (7), were also referred to as supporting the above view. The decisions of the Allahabad High Court do not seem to be uniform: see *Ahmad Noor Khan* v. *Abdur Rahman Khan* (8), *Bhagawan Das* v. *Gurdyal* (9), and *Fazal Ilahi* v. *Prag Narain* (10).

The only decision of the Bombay High Court to which our attention was drawn *Laxman* v. *Manjunath* (11), supports the view I am inclined to take. There the agreement provided for arbitration by two specified persons. Subsequently one of the arbitrators expressed his unwillingness to act. A suit having been instituted by one of the parties, an application for stay of the suit was made to Court under para. 18, Sch. 2. The lower Court, having held that the suit was barred by the agreement to refer it to arbitration stayed the suit. The High Court reversed that order being of opinion that the lower Court should have removed the stay and decided the suit on its merits. Sir Norman Macleod, C. J., and Justice Shah observed as follows :

" The other arbitrator stated that he refused to act as an arbitrator. A case therefore had arisen for an application to the Court to remove the stay of the suit, if the parties did not come to an agreement to remove the difficulties which had arisen so as to enable the arbitration to proceed. Here the suit was stayed to enable the arbitrators to proceed. Facts were proved to show that there were difficulties in the way of the arbitration proceeding. However it is obvious that the Court ought to have proceeded to deal with the suit and decide on the merits as the arbitration had become impossible owing to the parties failing to agree to any particular course being followed after one arbitrator refused to act."

The High Court accordingly directed that the suit should not be stayed but tried by the lower Court and disposed of in accordance with law. The case before us is substantially on all fours with the case before the Bombay High Court though the question is not discussed in that case.

The only decision of the Calcutta High Court to which our attention was drawn

(5) [1918] 71 P. R 1918=44 I. C. 866.
(6) [1917] 42 I. C. 911.
(7) 12 B. L. R, App. 13.
(8) [1920] 42 All. 191=54 I. C. 366.
(9) A. I. R. 1921 All. 188=64 I. C. 459.
(10) A. I. R. 1922 All. 133=67 I. C. 739=44 All. 523.
(11) A I. R. 1921 Bom. 458=64 I. C. 289=45 Bom. 1181.

is that reported in *Shasimukhi Debi* v. *Purbaty Sunkar Roy* (12). Facts are not fully clear from a perusal of the report, but so far as one could gather the Court would seem to have been of the opinion that the agreement of the parties should prevail in such cases. However too much reliance could not be placed on this case for the reasons stated already.

The present is not a case where one of the parties to the agreement revoked the agreement without just and sufficient cause, so the decision reported in *Pestonjee Nusserwanjee* v. *Manockjee & Co.* (13) and *Perumalla Satyanarayana* v. *Perumalla Venkatarangayya* (14) do not, in my view, apply. No doubt a mere arbitrary revocation by one party of the authority conferred by the agreement of all the parties will not be permitted. Further, the death of the arbitrator in this case occurred before any proceedings were taken in Court, and before any order of reference was made by Court. The basis of the decision of the Privy Council in the case reported in *Pestonjee Nusserwaji* v. *Manockjee & Co.* (13) seems to be that the agreement of the parties in that case was taken really to incorporate the provisions of S. 326 also of the Civil P. C., relating to arbitration, though it expressly referred only to S. 327 of the Code (Act 8 of 1859).

In my view the balance of authority is in favour of the view that the provisions of paras. 1 to 16, Sch. 2 could not be applied to an arbitration outside Court, except in so far as they are consistent with the provisions of the agreement between the parties filed under para. 17. We have already come to the conclusion that on a proper construction of the agreement before us, it is a reference to the arbitration of three specified persons. One of the said three specified persons having died, the Court could not refer the matter to the arbitrators as provided in the agreement of the parties; and the Court had no power itself to appoint an arbitrator in such a case in the place of the arbitrator who is dead. The suit filed by the other party to the agreement in the ordinary civil Court could not in such a case be stayed under para. 18, Sch. 2, as the arbitration could not go on in the circumstances as the parties declined to appoint an arbitrator in the place of the one who died. We therefore uphold the order of the lower Court for the reasons mentioned above, and dismiss Revision Petition No. 1034 of 1930. For similar reasons the Miscellaneous Appeal No. 272 of 1930 will also be dismissed. We make no order as to costs in these cases in the circumstances. C. M. P. No. 2485 of 1930 is dismissed.

Sundaram Chetty, J.—The appellant and the respondents are brothers. They executed an agreement (muchilika) dated 31st October 1926 in favour of three specified arbitrators, referring their disputes regarding the partition of their joint family properties to the arbitration of the said three persons and agreeing to abide by their decision. The arbitration was proceeded with to some extent, but before its completion one of the arbitrators died. Thereupon the respondent (Muthyala Ramachandrappa) filed O.S. No 8 of 1929 for partition of the joint family properties, impleading his brother, the present appellant as defendant 1. In the course of that suit, defendant 1 put in an application under para. 18, Sch. 2, Civil P.C., for a stay of the suit (I. A. 96 of 1929). The learned Subordinate Judge passed an order on 13th August 1929 directing the stay of the suit for a specified time. Against this order an appeal was preferred by the present respondent (the plaintiff in the suit) and the learned District Judge set aside the order staying the suit, and dismissed the application, holding on the strength of the decision in *Jaitumbi* v. *Nabe Saheb* (4), that the reference to arbitration became inoperative and of no effect, on the death of one of the arbitrators, there being no provision in the agreement to appoint a substitute, if some such contingency should arise. Against this order, the present C. R. P. has been filed. In view of this order of the learned District Judge, the application by defendant 1 under para. 17, Sch. 2, Civil P. C., to have the agreement filed and a reference made to the arbitrators (which was numbered as a suit) was also dismissed by the Subordinate Judge. Against that order of dismissal, defendant 1 has filed the present C. M. A. In both, the questions involved are substantially the same.

Exhibit 1 is the agreement to refer the dispute to the three arbitrators specified

(12) [1919] 50 I.C. 879.
(13) [1867] 12 M.I.A. 112=10 W.R. 51=2 Suth. 164=2 Sar. 820 (P.C.).
(14) [1904] 27 Mad. 112.

therein, for effecting the partition of the joint family properties. The parties agreed to abide by their decision. There is no provision in the muchilika for the appointment of substitutes, in case of death of any of them, or if any of them refuses to act. In this case it is admitted that one of the arbitrators named in Ex. 1 had died before the application was made under para. 17, Sch 2, for an order that the agreement be filed in Court.

The question involved in both these cases is almost the same. In order to direct the stay of trial in O. S. No. 8 of 1929 under para. 18, the Court must be satisfied that there is no sufficient reason to decline to refer the matter in accordance with the agreement (Ex. 1) to refer to arbitration. With respect to the application under para. 17, if no sufficient cause is shown why the agreement should not be filed, the Court should order the agreement to be filed, and make an order of reference to the arbitrator or arbitrators appointed in accordance with the provisions of the agreement. Now that one of the arbitrators named in the agreement is dead, is the application under para. 17 for an order contemplated therein sustainable, and is the Court bound to make an order staying O.S. No. 8 of 1929? Learned arguments have been addressed by the advocates on both sides and the difficulty of deciding this question is enhanced by the conflict of views expressed in judicial decisions. Before referring to those decisions, I wish to make a few observations. The Court's jurisdiction to order a reference to arbitration is derived from the agreement of the parties, and an order of reference has to be made by the Court in accordance with the provisions of the agreement, and, at any rate, it should not be inconsistent with the intention of the parties disclosed by the agreement, on a proper construction of its terms. That being so, it seems to me, that one way of showing sufficient cause why the agreement should not be filed (within the meaning of para. 17) would be, that on account of the happening of a contingency, or an account of altered circumstances subsequent to the agreement, it would not be possible to the Court to make an order of reference in accordance with such intention. Where the agreement is to refer the matter to the decision of three named arbitrators, and one of them subsequently dies, if on an application by one party under para. 17, when opposed by the other party, the Court chooses to order the agreement to be filed and make an order of reference to the remaining two arbitrators, such a reference would not be in accordance with the provisions of the agreement. Until after the order of reference is made, the Court cannot apply para. 5, and exercise the power of appointing a new arbitrator in the place of the arbitrator who has died or refused to act. This is clear from para. 19, Sch. 2, which runs thus :

"The foregoing provisions, so far as they are consistent with any agreement filed under para. 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon."

The Court not having the power to appoint a new arbitrator in the place of the one who died or refused to act, before making the order of reference under para. 17, it must be taken that sufficient cause is shown for holding that an order of reference could not be made to the arbitrators appointed in accordance with the provisions of the agreement : (vide Cl. 4, para .17). It must also be noted that there is no provision in Ex. 1, for the appointment of new arbitrators, in case of death or refusal to act of one or other of the arbitrators specified therein. If what I have stated above is the correct view, on a strict interpretation of the provisions of paras. 17, 18 and 19, Sch. 2 the order of the learned District Judge refusing to stay the suit, and the order of the learned Sub-Judge, dismissing the application put in under para. 17, must be taken to be correct.

A number of decisions relied on by the learned advocate for the respondent go to support the view I have taken. In the case in *Dentache Springstoff Actien Gessellechaft* v. *Bristol* (15), the agreement was to refer the matter to two named arbitrators or their umpire. It was held that if there was no subsisting agreement to refer capable of being carried into effect the proceedings in the suit could not be stayed under S 11, Common Law Procedure Act of 1854. This principle was followed by a Division Bench of this Court in the case reported in *Jaitum Bi* v. *Nabi Saheb* (4). The agreement in that case was to refer the matter to three named arbitrators, without any provision in the muchilika for the appointment of new

(15) 20 Q. B. D. 177.

arbitrators in their place. Two of them having declined to arbitrate, it was held that the agreement ceased to be operative and therefore did not bar the suit. In a recent decision reported in *Ramayya* v. *Bappayya* (3) the learned Judges have construed an agreement to refer the matter to three named arbitrators (similar to Ex. 1) as implying an intention to be bound by the decision of all the three and not merely of a majority, and in this view it was held that the Court had no power to order under para. 4 that the parties should abide by the decision of the majority because, according to para. 19, the provisions of paras. 4 and 5 could be applied only so far as they are consistent with the agreement filed. If according to the construction of the agreement adopted in the aforesaid decision the parties wanted to abide by the decision of all the the three specified arbitrators, any reference made by the Court to two of them only or after substituting a new arbitrator in the place of one who subsequently died, would not be valid, as it would not be consistent with the provisions of the agreement.

The contention of the respondent, is lent support by the decisions of some other Courts also. The case in *Brooke* v. *Sardyal* (7) was decided under the old Code Act (8 of 1859). Two points were decided. One is that the power of appointing a new arbitrator in the place of one who refused to act, could not be exercised under S. 319, before making the order of reference. The other is, that by reason of one of the arbitrators named in the agreement having refused to act, the agreement to refer to arbitration as intended by the parties no longer subsists so as to enable the Court to direct that it should be filed: vide also *Ma Bu U* v. *Maung Pe Lau* (6). In another case decided by the Punjab Chief Court an agreement to refer to five named arbitrators (without any provision for substiting fresh arbitrators) was held to be inoperative by the death of two of them, before the application was made for filing the agreement in Court. This was regarded as a sufficient reason for refusing to file the agreement under para. 17 : *Mohan Lal* v. *Damodar Lal* (5). The same view has been expressed by the Lahore High Court in *Sri Ram* v. *Soraljji* (16). But in that case there was a distinct provision in the agreement itself that in case of resignation or death of any arbitrator named therein, another may be appointed in his place. In the case reported in *Ahmad Nur Khan* v. *Abdur Rahman Khan* (8), the application under para. 17 for an order that the agreement be filed was dismissed, as the arbitrator refused to act for some reason.

On behalf of the appellant, some decisions were relied on as supporting his contention. Two of them are the decisions of the Allahabad High Court. In the case reported in *Bhagwan Das* v. *Gurdyal* (9), one of the three named arbitrators is alleged to have declined to act. Then one of the parties filed an application under para. 17, to have the agreement filed and a reference made. The learned Judges seem to concede that the Court has no power to utilize the provisions of para 5 where no order of reference has been made under para. 17. But the fact of one of the three arbitrators refusing to act is taken to be no bar to the Court passing an order under para. 17. It is observed that an order of reference should be made under para. 17 to pave the way for the next step which is the appointment of another arbitrator. But it seems to me, that such an order of reference (more clearly in the case of death of one of the arbitrators) cannot be deemed to be warranted by Cl. 4, para. 17, if its terms are strictly construed. The view taken in the above case has been fully endorsed in the decision in *Fazal Ilahi* v *Prag Narain* (10). Reliance has been placed on the decision of the Privy Council in *Sadiq Husain* v. *Kanaiz Begam* (1). If the facts in that case are carefully considered, it would appear that the agreement of the parties to refer the matter of settling and allocating the shares etc., to two arbitrators was the razinamah petition filed in Court on which a decree was passed. This itself amounts to the Court having filed the agreement. Then, one of the arbitrators declined to act. It was held that the Court should have appointed another arbitrator under S. 510 of the old Civil P. C. (Act 14 of 1882). That was not strictly a case of an application for the filing of the agreement in Court after one of the arbitrators had refused to act. This decision of the Privy Council does not really help the appellant's contention in the present

(16) [1919] 155 P. R, 1919=51 I. C. 636.

case. There remains the decision in *Bala Pattabirama Chetti* v. *Seetharama Chetti* (2). It turned mainly on the construction of the words "so far as they are consistent with any agreement so filed" occurring in S. 524 of the old Civil. P. C. (corresponding to para 19, Sch 2 of the present Code). According to the view taken in that case, S. 524 should be read as if it contained the words "in the absence of anything in the agreement to the contrary;" but a different view has been taken in the matter of construing a similar agreement with reference to para. 19, Sch. 2, in the later decision of this High Court in *Ramayya* v. *Bappayya* (3).

As regards the construction of the agreement (Ex. 1) reliance has been placed on the decision of the Privy Council in *Pestonjee Nuserwanjee* v. *Manockjee & Co.* (13). In that case, their Lordships had to deal with the jurisdiction of the Court under S. 326 of the old Code (Act 8 of 1859), to direct an agreement of parties to arbitration to be made a rule of Court. It was held that no party to the agreement can revoke the submission to such arbitration unless for good cause. In construing that agreement, their Lordships have remarked that the submission to arbitration must be deemed to be under and subject to the sections contained in the Code relative to the subject, unless the provisions of the Code were expressly excepted by the parties to the agreement: vide p. 130. The view taken in *Bala Pattabirama Chetti* v. *Seetharama Chetti* (2) is in accordance with this principle. S. 326 referred to in the judgment of the Privy Council corresponds to paras. 17 and 19, Sch. 2 to the present code. Adopting the rule of construction of the agreement as laid down by the Privy Council the parties to Ex. 1 should be deemed to have agreed to abide by the provisions of paras. 17 and 19, inasmuch as there is no express provision in the agreement indicating that these provisions were excepted by the parties. Taking the agreement to be subject to the provisions of para. 19, the Court can exercise the power of appointing a fresh arbitrator in the place of the deceased arbitrator under para. 5 only after the order of reference has been made under para. 17. There is no provision in para. 17 empowering the Court to make such an appointment before the agreement is made a rule of Court, and an order of reference is actually made. Thus it is clear that even on the construction of the agreement in this case in the aforesaid manner, the Court cannot fill up the vacancy by appointing a substitute before ordering the agreement to be filed.

The next question is whether under para. 17 the Court can order the agreement to be filed, in spite of the death of one of the three arbitrators named therein and make an order of reference to the two surviving arbitrators alone. Would this be in accordance with what is laid down in Cl. 4, para. 17? The words in this clause:

"and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator,"

indicates to my mind, that when the agreement is to refer the matter to a named arbitrator, or named arbitrators, the Court shall make an order of reference to such arbitrator or arbitrators but where the agreement has not named the arbitrators, it should be taken that there is no such provision in the agreement as to limit the appointment to a specified person or persons in which case the Court itself may appoint an arbitrator or arbitrators, if the parties cannot agree as to the personnel, and then make an order of reference. That it is so would be clearer from the corresponding clause in S. 523 of the previous Code. viz.:

"and shall make an order of reference thereon and may also nominate the arbitrator when he is not named therein and the parties cannot agree as to the nomination."

The position in the present case, in view of the terms of Ex. 1 comes to this. The Court cannot make an order of reference to two out of the three named arbitrators in Ex. 1, for such an order would not be in accordance with the provisions of the agreement (within the meaning of Cl. 4, para. 17). Nor has the Court power to appoint a fresh arbitrator in the place of the deceased man unless an order of reference has been made under para. 17. When the Court is thus unable to order the agreement to be filed and make an order of reference under Cl. (4), para. 17, the application made under this paragraph has to be dismissed.

The preponderance of authority is in favour of the contention put forward by the respondent. I have to state with due respect that the view expressed in the

two decisions of the Allahabad High Court relied on by the appellant is one I am unable to accept, as the provisions of paras. 17, 18 and 19, Sch. 2 have to be strictly complied with. For these reasons I agree with my learned brother in dismissing the C. M. A., and the C. R. P. As to costs, I agree with the order made by him.

P.R.S./S.N. *Order confirmed.*

A. I. R. 1931 Madras 36

VENKATASUBBA RAO, J.

G. R. Naidu and *others* - Petitioners.

v.

(*Kota*) *Savitramma* and *others* — Respondents.

Testamentary Original Side No. 1 of 1929, Decided on 5th August 1930.

Civil P. C. (1908), O. 40, R. 2—Estate possessed of 1930 bonds deposited with Imperial Bank—Parties applying to Master to authorise Bank directly to convert bonds into bonds of new Government of India Loan—Receivers held not entitled to commission.

The estate in suit was possessed of certain 1930 bonds which were deposited with the Imperial Bank of India. Some of the parties to the suit apprehending that the receivers would for the purpose of earning commission receive money for the old bonds and reinvest it in the new Government of India Loan, applied to the Master to authorize the Bank directly to make the conversion instead of paying cash to the estate. The Master passed an order accordingly. The receivers put in their claim for the commission.

Held: that the receivers were not entitled to claim the commission: *Haigh* v. *Grattan*, 1 *Beav.* 201, *Foll.* [P 37 C 1]

G. Lakshmanna, *P. Satyanarayana*, *A. Suryanarayana* and *W. S. Krishnaswami Naidu*—for Petitioner.

P. Venkataramana Rao and *D. Venkatasubbayya*—for Respondents.

V. Radhakrishnayya—for Receivers.

Judgment.—I do not think I can accede to Mr. Radhakrishnayya's contention. The short point is: Can the receivers claim commission on the 1930 bonds which have been directed by the Master to be converted into 6 per cent 1933-36 bonds under the Government of India Loan just announced? The estate is possessed of 1930 bonds of the face value of Rs. 1,10,000. They have never been handled by the receivers and are in deposit with the Imperial Bank of India, Madras, as security against an overdraft. These bonds would, in the ordinary course, mature on 14th August 1930, and it has been notified that the subscriptions for the new loan might not only be in cash but also inter alia in 6 per cent bonds, 1930. The request for conversion should, I understand, be made before 6th August. Certain of the parties to the suit, apprehending that the receivers would, for the purpose of earning commission, receive money for the old bonds and reinvest in the new loan, applied to the Master to authorize the Bank directly to make the conversion instead of paying cash to the estate. The Master has made an order accordingly.

Two of the three joint receivers question the correctness of the Master's order, urging that their right to receive commission on the sum of Rs. 1,10,000 should not be affected by the transaction. Mr. Radhakrishnayya's argument may be put thus. It must be assumed that cash is received for the old bonds and that the same amount is reinvested in the new loan. The act thus involves, he contends, first a collection and then an investment. Under the order of appointment, the receivers are entitled to remuneration on collections and it follows (so he contends) that they can claim commission on the amount in question. I cannot accept this contention which involves a double fiction, to import which there is absolutely no warrant. To adopt the receiver's argument would be to strain language and no Court would countenance it merely for benefiting the receivers at the expense of the estate. Then it is stated that the original order directs that all moneys shall be collected by Mr. A. K. Ramachandran, one of the joint receivers. Does this confer on him a right to insist on receiving cash for the bonds merely to entitle the receivers to commission? I feel no doubt that the answer must be clearly in the negative. But if authority be needed, there is a direct decision on the point. In *Haigh* v. *Grattan* (1), although a party offered to bring in the money, the receiver claimed that he should be allowed to collect the amount and then pay it into Court; and it was urged for him that to prevent him from doing so would be to deprive him of the poundage. Langdale, M. R., overruled the contention observing that the receiver had no vested interest entitling him to collect the amount. The facts are parallel and I declare that the

(1) 1 Beav. 201=8 L. J. Ch. 249.

receivers are not entitled to the commission claimed.

I should further observe that even granting that as a question of construction the matter admits of any doubt, it is open to the Court to give such directions as the justice of the .case may require. It is strongly urged that having regard to the fact that the receivers have already taken by way of commission about Rs. 25,000 it would be inequitable to burden the estate with a further sum of Rs. 5,500 (this is the amount now claimed) when the transaction involves no work and no labour on their part. I have no hesitation even on this ground in holding that they are not entitled to this commission.

There has been some discussion as to in whose names the new bonds are to be taken. Mr. Venkataramana Rao suggests that they should be taken in the name of the Registrar, in order to avoid any claim being preferred by the receivers to commission, when the bonds have to be reassigned to the party to be declared in the suit as entitled to the bonds. As I am prepared to give a ruling at once that the receivers have no such right, I direct that the bonds may be taken in the name of Mr. A. K. Ramachandran, Joint Receiver, as this appears to me the course most in conformity with the previous orders made in this case. It is unnecessary in the view I have taken to decide the effect of the provision in the order dated 20th December 1928 which refers to commission on Government promissory notes and war bonds. This appeal against the Master's order fails and is dismissed but without costs.

P.R.S/S.N. *Appeal dismissed.*

A. I. R. 1931 Madras 37

RAMESAM AND CORNISH, JJ.

Komalangiammal—Appellant.

v.

M. K. Sowbhagiammal and *another*—Respondents.

Original Side Appeal No. 27 of 1928, Decided on 11th February 1930, from judgment of Venkatasubba Rao, J., D/- 24th January 1928, and reported in *A. I. R.* 1928 *Mad.* 803.

Succession Act (1925), S. 284—Fact that testator disposed of by will jewels belonging to caveator does not amount to interest in deceased's property which would entitle caveator to oppose grant of probate.

The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate. Hence where the caveator alleged that certain jewels disposed of by the testator by his will belonged really to the caveator, that fact was held to be not an interest which would entitle the caveator to oppose the grant of the probate : *A. I. R.* 1928 *Mad.* 803, *Affirmed.* ; 6 *Cal* 460 and *A. I. R* 1926 *Mad.* 1193, *not Appr.* ; 34 *Mad* 405 ; 28 *Cal.* 441 and 11 *Cal.* 492, *Dist.* ; 34 *Bom.* 459 and 39 *I. C.* 573, *Rel on.* [P 38 C 1]

B.C. Seshachala Ayyar—for Appellant.

V. Radhakrishnayya and *A. Kuppuswami Ayyar*—for Respondents.

[*For Facts, please see A. I. R.* 1928 *Mad.* 803.]

Ramesam, J.—Most of the decisions of all the High Courts are against the appellant. They are referred to by the learned trial Judge and need not be repeated. The learned advocate for the appellant relies on *Hanumantha Rao* v. *Latchamma* (1). This case has been considered by the trial Judge. It is based on *In the matter of the Petition of Bhobosoondari Dabee* (2), a case which has not been followed in the Calcutta High Court ever since and certain other decisions. The cases in *Arakal Bastian Ansap* v. *Narayana Ayyar* (3), and *Kishen Dei* v. *Satyendra Nath Dutt* (4), also referred to in it, are cases of judgment-creditors of a son of the testator. In *Arakal Bastian Ansap* v. *Narayana Ayyar* (3) the will was revoked and it was not necessary to rely on *In the matter of the Petition of Bhobosoondari Dabee* (1). The decision in *Brinda Chowdhrain* v. *Radhica Chowdhrain* (5) is the case of a widow entitled to maintenance against her husband's estate, the husband being the alleged testator. I do not see how *Kishen Dei* v. *Satyendra Nath Dutt* (4) supports the decision in *Hanumantha Rao* v. *Latchamma* (1). It is unnecessary for us to say whether *Hanumantha Rao* v. *Latchamma* (1) is correctly decided or not, and we are not to be taken as agreeing with all the observations in it.

In a case of the kind before us all the authorities are agreed that the caveator has no interest to oppose the grant of the probate. In so far as the claim that the jewels dealt with in the will are hers it

(1) A I. R. 1926 Mad. 1193 = 98 I. C. 259 = 49 Mad. 960.
(2) [1881] 6 Cal. 460.
(3) [1911] 34 Mad. 405=8 I C. 351.
(4) [1901] 28 Cal. 441.
(5) [1885] 11 Cal. 492.

is not an interest in the estate of the deceased according to all the authorities. Whether the will is genuine or not her right to the jewels cannot be affected. In so far as she claims to be the wife of one of the grandsons, and can claim to be supported from the estate, her position under the will is no worse than if the will did not exist. The case of *Kipping* v. *Ash* (6) does not help the appellant. The appeal is dismissed with costs.

Cornish, J.— I agree that the appeal should be dismissed. The interest which entitles a person to lodge a caveat must be an interest in the estate of the deceased, that is to say, there must be no dispute as to the title of the deceased to the estate : see *Phirozshah Bikkaji* v. *Pestonji Merwanji* (7), and *Kalajit Singh* v. *Permeshar Singh* (8). But here the caveator is alleging that the jewels which the testator has disposed of by his will are her own property. In other words, she is setting up a title adverse to the testator's title to the property. It is impossible to say that she has an interest in the deceased's estate when she is claiming that the property in question does not form part of the deceased's estate. It has long been settled that it is not the province of a Court of probate to determine questions of title to a property which a testator purports to dispose of by his will, the reason being that the grant of probate does no more than establish the factum of the will and the appointment of the executors (if any) named in the will. The grant of probate will not therefore prevent the appellant from bringing a suit, if she should be so advised, to recover from the executors, or any other persons in possession, the jewels which she claims as her own property.

P.R.S./S.N. *Appeal dismissed.*

(6) Robert Sons Rep. 270.
(7) [1910] 34 Bom. 459=6 I. C. 523.
(8) [1917] 39 I. C. 573.

A. I. R. 1931 Madras 38 (1)

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Balasubramania Pandya Talavar—Appellant.

v.

Subramanian Chettiar—Respondent.

Appeal No. 204 of 1930, Decided on 8th September 1930.

Civil P. C. (1908), S. 47—Appeal.

Where the High Court orders that a person might draw some amounts from the District Court on giving security to the satisfaction of the District Court, appeal does not lie from the finding of the District Judge arrived at after an elaborate enquiry that the security offered is sufficient for a certain amount: *Hoare & Co.* v. *Morshead*, (1903) 2 *K.B.* 359, *Rel. on.*

[P 38 C 2]

T. M. Krishnaswami Iyer and *T. M. Ramaswami Iyer*—for Appellant.

N. Srinivasa Iyengar—for Respondent.

Judgment.—A preliminary objection is raised that no appeal lies in this case. In C.M.P. No. 1612, 1613 & 1616 of 1929 Ramesam and Jackson, JJ. ordered that the respondent in this appeal might draw some amounts from the District Court on giving security to the satisfaction of the District Court. After an elaborate enquiry the District Judge found the security offered sufficient for a certain amount. This appeal is to the effect that the District Judge ought not to have been satisfied that the security was worth so much. No decision has been brought to our notice that an appeal lies in such a matter. On the contrary the principle of *Hoare & Co.* v. *Morshead* (1), is against it. Without discussing other reasons why the finding of the District Judge, that the security offered is worth a certain amount, does not come within S. 47, Civil P. C., on the ground that the question was left to him by the order that the security must be to his satisfaction we uphold the preliminary objection. In our opinion it makes no difference in this connexion that the words used by the learned Judges were "to the satisfaction of the District Court "instead of" to the satisfaction of the District Judge." This appeal is dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

(1) [1903] 2 K.B. 359=72 L. J. K. B. 724=89 L. T. 125=52 W. R. 87.

A. I. R. 1931 Madras 38 (2)

ANANTAKRISHNA AYYAR, J.

Thandayuthapani Chetty—Petitioner.

v.

Alagar Chettiar and *another*—Plaintiffs.—Respondents.

Civil Revn. Petn. No. 296 of 1929, Decided on 30th April 1930, from order of Sub-Judge, Dindigul, D/- 23rd January 1929, in E. P. No. 223 of 1928.

Civil P. C. (1908), O. 21, R. 46—Personal covenant in othi deed to pay money debts—Such money debts can be attached by Small Cause Court—It can also decide the question

who is real owner of money so secured—Jurisdiction—Small Cause Court.

It is open to the decree-holder, in cases where there are personal covenants in othi deeds for the payment of money debts, to attach the money debts evidenced by such deeds as simple money debts. The Small Cause Court has jurisdiction to attach such othi debts and also to hold inquiry as to who is the real owner of the money secured under the othi document: 37 *Mad.* 51; 26 *I.C.* 508 and 39 *Mad.* 389, *Rel. on.* [P 39 C 2]

V. Ramaswami Ayyar—for Petitioner.

B. Sitarama Rao and *S. R. Muthuswami Iyer*—for Respondents.

Judgment.—One Alagar Chettiar obtained a money decree against Nallu Boyan and Tirupathi Boyan and in execution of that decree he sought to attach the money due under a usufructuary mortgage executed by Suppayya Goundar in the name of Thayammal, wife of Nallu Boyan, on the allegations that the said mortgage though standing in the name of Thayammal was really for the benefit of Nallu Boyan, that there was a personal covenant to pay in the document, and that under the Madras decisions the decree-holder was entitled in execution of a Small Cause decree through process issued by the Small Cause Court to attach the money debt thus due. Thandhayuthapani Chetti, who is the petitioner before me, claiming to be the assignee of the rights under the usufructuary mortgage under Ex. 2, dated 11th October 1928, objected to the procedure taken by the decree-holder. The plea of the decree-holder with reference to the assignment was that the othi in the name of Thayammal was taken in her name benami for Nallu Boyan, her husband, and that the assignment by Thayammal to Thandayuthapani was not binding on the decree-holder. The learned Subordinate Judge of Dindigul exercising small cause powers held that under the rulings of the Madras High Court reported in *Nataraja Iyer* v. *South Indian Bank of Tinnevelly* (1), *C. Peethikayil Namad* v. *Othenam Nambiyar* (2) and *Ramaswami Mooppan* v. *Srinivasa Iyer* (3) the amount of money debt due under the said usufructuary mortgage could be attached by the Small Cause Court under O. 21, R. 46. Then the next question arose whether a Small Cause Court could proceed to inquire into the allegation whether the othi deed was taken benami in the name of Thayammal but the debt really belonged to her husband and into the other allegations of the decree-holder. The learned Subordinate Judge answered this question in the following terms:

"As under the rulings of the Madras High Court the othi debt evidenced by Ex. 1 is liable to be attached on the small cause side, the questions whether that othi was really benami for defendant 1 and whether the assignment is valid cannot be shirked. I therefore direct that the said questions may be inquired into in this petition itself. The parties may adduce necessary evidence. Adjourned to 14th February 1929."

The present revision petition has been filed by Thandayuthapani Chetti the assignee under Ex. 2, against that order.

The learned advocate for the petitioner pressed before me the point that the Small Cause Court has no jurisdiction to enquire into the question, who really is the owner of certain rights secured under an othi document. He argued that the rights created by othi deeds are really rights in immovable properties which could not be adjudicated by Small Cause Courts; and he contended that, unless the preliminary question as to who is the owner of the othi rights be determined, the subsequent question, on which alone the Madras High Court have held against him, would not arise. I am unable to accept this contention. As I understand the Madras rulings relied on by the Subordinate Judge, it is open to the decree-holder, in cases where there are personal covenants in othi deeds for the payment of money-debts to attach the money-debts evidenced by such deeds as simple money-debts. The Small Cause Court has been held to have jurisdiction to do so. If there is no objection to that being done by the Small Cause Courts, because the document by which the money debt was secured is an othi document, then it would seem to follow that consistently with that line of cases, the Court could also hold an inquiry as to who is the real owner of the money so secured. It therefore seems to me that the learned Subordinate Judge was right in his opinion that, when the other question as to the liability of such moneys to be attached by Small Cause Courts has been decided by the Madras High Court in favour of the decree-holder, the Small Cause Court should not shirk the inquiry as to who is the real owner of the money. I hold that the learned Subordinate Judge was right

(1) [1914] 37 Mad. 51=13 I.C. 91.
(2) [1914] 26 I.C. 508.
(3) [1916] 39 Mad. 389=28 I.C. 284.

in his view and accordingly dismiss the revision petition with costs.

P.R.S./S.N. *Revision dismissed.*

A. I. R. 1931 Madras 40

SUNDARAM CHETTY, J.

Elayaperumal Thalaivar—Plaintiff—Appellant.

v.

Vellaikannu Thevar and *another*—Defendants—Respondents.

Second Appeal No. 1782 of 1925, Decided on 9th August 1929, against decree of Addl. Sub-Judge, Ramnad, in Appeal Suit No. 38 of 1925.

Civil P. C., O. 21, R. 63—Claim petition rejected without investigation—Claimant suing under R. 63—Defendant pleading that plaintiff's title was based on nominal transaction intended to defraud creditors—Burden of proving fraud is on defence.

Where a person, whose previous claim petition was rejected without investigation on the ground that it was late, brings a suit under R. 63, and the attaching creditor resists the suit on the ground that the plaintiff's title was based upon a nominal transaction intended to defraud creditors, the burden of proving fraud is on the defence: *A. I. R.* 1927 *P. C.* 237; *A. I. R.* 1928 *Pat.* 434, *Foll.*; *A. I. R.* 1928 *Mad.* 1259, *Dist.* [P 41 C 1 2,]

V. Ramaswami Iyer and *S. Nataraja Nadar*—for Appellant.

S. Narayana Iyengar—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant for a declaration that the plaint-mentioned property belongs to him by right of purchase under the sale deed, Ex. A, obtained from one Guruvammal who had previously purchased from defendant 2 under the sale deed, Ex. B, for Rs. 500. Defendant 1 who obtained a money decree against defendant 2 in O. S. No. 570 of 1917 on the file of the District Munsif's Court, Srivilliputtur, caused the suit property to be attached as that of the judgment-debtor, the present defendant 2. The plaintiff intervened in the execution proceedings setting up his claim to the attached property on the strength of the sale deed Ex. A, but without making any investigation of the claim, the executing Court rejected the claim petition as being late: vide Ex. F. Thereupon, he instituted the present suit under O. 21, R. 63, Civil P. C., and his suit was resisted by the attaching creditor (defendant 1) on the ground that the original sale by defendant 2 in favour of Guruvammal under Ex. B was a nominal transaction intended to defraud the creditors. The trial Court in a well-considered judgment has found that the sale deed Ex. B, dated 19th August 1915, evidences a real transaction fully supported by consideration. On the strength of this finding the plaintiff, who is only a subsequent purchaser from the vendee under Ex. B, was given a decree in his favour. In the appeal, preferred by defendant 1 against that decree the learned Judge reversed the finding of the District Munsif and dismissed the plaintiff's suit.

It is urged by the learned advocate for the appellant in this Court, that the judgment of the lower appellate Court is vitiated by an erroneous assumption that the burden of proof lay heavily on the plaintiff to show that the sale in favour of Guruvammal was a real transaction and that it was not for the attaching creditor to show in the first instance that the sale was fraudulent or collusive. In fact the learned Subordinate Judge has distinctly stated in para. 4 of his judgment what view he took as regards the onus of proof in a case of this kind. To quote his own words, the Subordinate Judge says thus:

"The observation of the District Munsif in para. 8 of his judgment that the burden of showing that Ex. B. evidences a sham transaction, brought into being by defendant 2 and his wife with a view to defraud his creditors, had not been made out on the side of defendant 1 is not correct law. The burden of proof lay heavily upon the plaintiff to show that the sale deed relied upon by him is a real transaction supported by consideration, let alone the defendant's oral evidence."

In this view as regards the onus of proof, the Subordinate Judge approached the evidence adduced in the case and came to the conclusion that the plaintiff had failed to discharge the onus of proof that lay on him. If his view of the law is correct this Court sitting in second appeal would hesitate a great deal before interfering with the finding arrived at by him. It is urged on behalf of the appellant that the recent decision of the Privy Council reported in *V. E. A. R. M. Firm* v. *Maung Ba Kyin* (1), lays down the rule as to the burden of proof in a suit of this kind. It that case, the suit was by a defeated claimant under O. 21, R. 63, Civil P. C. and their Lordships observe thus at p. 855 (*of* 5 *Rang.*):

"Now they being the ostensible owners of the property, under a duly registered deed and

(1) A. I. R. 1927 P. C. 237=105 I. C. 788=5 Rang. 852 (P.C.).

a deed of transfer, obviously, the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration."

After laying down this dictum, their Lordships proceeded to deal with the evidence as regards the adequacy or otherwise of the consideration and came to the conclusion that there was not enough warrant to draw the conclusion that it was a fraudulent sale. The principle of this decision was followed by the Patna High Court in *Gillu Mal* v. *Firm Manohar Das Jai Narain* (2). In that case it was contended that inasmuch as the claim under O. 21, R. 58 was dismissed without decision on the merits, it was for the defence to show that the debt was fictitious and not really what it appeared to be. There is some discussion in that judgment as to whether there would be any difference as regards the initial burden of proof between a case where the claim was dismissed after investigation and the case wherein a claim was dismissed for non-prosecution or without investigation. The decision of the Privy Council in *V. E. A. R.M. Firm* v. *Maung Ba Kyin* (1). was referred to and on the authority of this decision it was held that the burden of proof was on the defence. Even if there should be any doubt as to the initial burden of proof in a case where the claim was dismissed after investigation, it seems to me that the rule laid down in the aforesaid Privy Council case should be applied in the present case where the claim was dismissed without investigation and on the sole ground that it was put in too late. My attention was drawn to a recent decision of this Court in *Govindaswami Pillai, In re, A. I. R.* 1928 *Mad.* 1259 in which the effect of the aforesaid decision of the Privy Council was considered. In that case, it is clear that the claim based upon a registered sale deed was investigated and rejected as a fictitious transaction and thereupon the defeated claimant filed a suit for a declaration of his rights under O. 21, R. 63, Civil P. C. Thiruvenkatachariar, J., who decided that case is of opinion that the mere filing of the title deed in such a case does not shift the onus on the other side to show that it was not a real or bona fide transaction, but some evidence has to be adduced in support of the reality of such a sale. Inasmuch as the claim in that case was decided upon the merits and the sale was held to be fictitious it is distinguishable from the present case. It seems to me that the dictum of the Privy Council in the aforesaid case can well nigh be applied to the present case for the reasons already stated by me. That being so the observations of the learned Subordinate Judge as to the burden of proof in this case cannot be deemed to be correct.

Having in view the correct principle of law relating to the burden of proof it has to be seen whether on defendant 1's side there is any tangible proof of facts or circumstances which would show that the original sale under Ex. B was either a benami transaction or a fraudulent one brought about with intent to defraud the creditors of defendant 2. Defendant 1 himself has deposed as his first witness. He alleges that Guruvammal had no money of her own to purchase the properties. D. W. 2 similarly states that Guruvammal had no stridhanam properties. He is a man whose credibility is open to much doubt and I should think there is no reliable evidence worth naming to make out the ingredients of fraud or collusion. There is, no doubt, the fact that the sale by defendant 2 was in favour of his own wife. The sale deed Ex. B recites the particulars of consideration and the trend of the entire documentary evidence on the plaintiff's side clearly indicates as observed by the learned District Munsif that the sale was a real transaction and was acted upon in a series of subsequent documents executed in respect of those properties. They are documents ranging from 1915 to 1922. The pattas were duly transferred in favour of Guruvammal and payments of kist since then have been proved to be made by her: vide Exs. C, D and F. It was she who was paying the loan due to the Government in pursuance of the undertaking in the sale deed obtained by her and that is evidenced by the documents filed in the case. The suit by the present defendant 1 was six years after the execution of the sale deed Ex. B. There is in my opinion a clear basis for the finding arrived at by the learned District Munsif but the Subordinate Judge would even

(2) A. I. R. 1928 Pat. 434=112 I. C. 371=7 Pat. 777.

go to the length of ignoring the oral evidence on the defendants' side and decide the case on a consideration of the evidence adduced on the plaintiff's side alone, in the view that if the plaintiff should fail to discharge the onus of proof that lay on him, his suit should be dismissed even without reference to the evidence on the other side. But according to the dictum laid down by the Privy Council the burden of proof lay on defendant 1 and it is by way of rebutting that proof that the plaintiff should adduce evidence.

I have therefore no hesitation in confirming the finding of the learned District Munsif and setting aside the decree of the lower appellate Court. The decree of the District Munsif is restored. Defendant appellant 1 should pay the plaintiff's costs throughout. Leave to appeal is refused.

P.R.S./S.N. *Decree set aside.*

A. I. R. 1931 Madras 42

JACKSON, J.

Public Prosecutor—Appellant.

v.

(*Polasanapalle*) *Nagaraju* and *another*—Accused—Respondents.

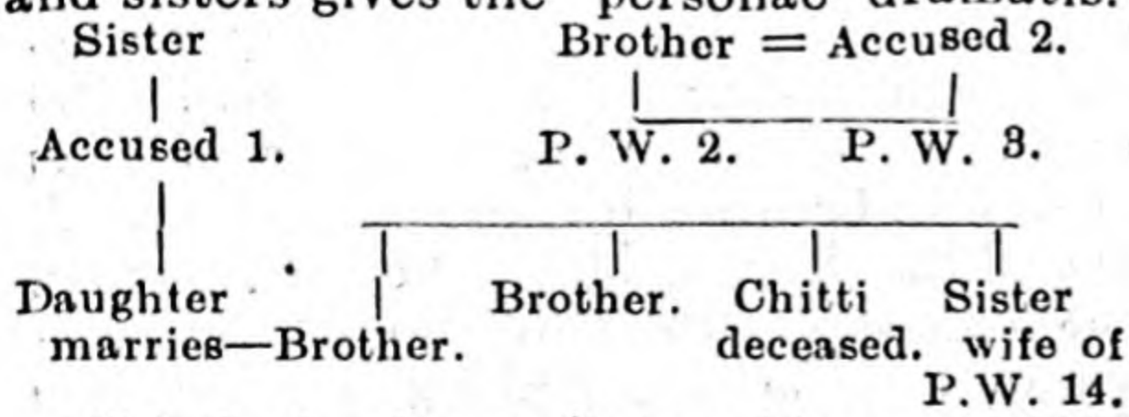
Criminal Appeal No. 615 of 1929, Decided on 13th December 1929, from acquittal order of Sess. Judge, East Godaveri Dn., in Criminal Case No. 17 of 1929.

Criminal Trial—Knowledge of law—Ignorance of accused cannot be presumed—Penal Code, S. 300.

An accused person must be given the benefit of the assumption that he knows the law and the Crown cannot impute his ignorance of law as a motive for a crime : *Rex* v. *Manson*, (1903) 67 *J. P. J. O.* 267, *Foll.* [P 42 C 2]

K. N. Ganapathi—for the Crown.

Judgment.— This tree of brothers and sisters gives the personae dramatis.



Chitti, the deceased was 14 years old. On 17th December 1928 his corpse was found in the yard of P. W. 5. The medical evidence shows that he was throttled.

He was seen on the evening of 16th December on the verandah of the house of accused 2 with the two accused, and the sons of accused 2, P. W's. 2 and 3.

On 18th December, these two boys were arrested for the crime; and on 29th December 1928 they "confessed;" that is to say, statements recorded from them under S. 164 were treated as confessions, but their effect is to put the guilt upon the present accused and an oilmonger, and to exonerate the boys. In the committing Court they stood by these statements, and in the Sessions Court they resiled. The present application to admit this appeal is practically a prayer that these depositions and statements may be reconsidered by a Bench of this Court to see if they warrant the conviction of the two accused.

It is quite within the bounds of possibility that these two boys were the actual murderers, and there must have been some suspicion against them when the police investigated, else they would not have been arrested. It is then quite possible that they thought of saving their skins by putting the blame upon their father and cousin. Putting their evidence at its highest, they are not very satisfactory witnesses, and it must be borne in mind that the one fact known about them beyond all doubt is that they have committed perjury, either at the trial or at the investigation. The problem then reduces itself to this simple question : Can two men be hanged on the suspect evidence of perjured witnesses ? To that question the answer must be, no; and in this case there is absolutely nothing besides that evidence. There is nothing unusual about Chitti being on his friends' veranda that night, and there is no motive for accused 1 and 2 to have committed the crime. The heirs of Chitti are his two sisters, and accused 1 who is the father of a brother's wife cannot have any claim, and cannot, I should think, have supposed that he had any claim. The Crown cannot impute ignorance of law as a motive. In the famous case of *Rex* v. *Monson* (1), the Crown imputed as a motive that Monson's wife held a transfer of the murdered lad's life insurance policy, and Monson did not know that a minor cannot assign, an imputation that was not accepted. An accused person must be given the benefit of the assumption that he knows the law.

The assessors are unanimously of opinion that the accused are guilty; but

(1) [1903] 67 J. P. J. O. 267.

their opinion probably derives from the popular instinct that after an atrocious murder someone should hang for the vindication of general morality. It is cases like this that illustrate the danger of the jury system. I do not think any Judge could come to an opinion contrary to that of the learned Judge who tried the case and therefore do not admit the appeal. The only exception I should take to his judgment is that in discussing the original confessions, he seems rather to disregard S. 114, Illus. (e), Evidence Act, and to assume irregularity in official acts. He says that the bare certificate in Exs. D and G does not prove that the statements were voluntarily made, which of course is strictly correct; but it may fairly be assumed that the Magistrate did his best to assure himself that the statements were voluntary, and if he had felt any suspicion he would have placed it upon record. Then he speaks of the best efforts of the Magistrate to remove police and other influences, as if police influence were necessarily bad. There is, so far as I know, nothing upon the record of this case which reflects upon the conduct of the police, and an assumption by the officers of one department that the officers of another department are naturally depraved is quite unwarranted and even offensive.

The appeal is dismissed.

P.R.S./J.M. *Appeal dismissed.*

A. I. R 1931 Madras 43

MADHAVAN NAIR, J.

(*Bobbili*) *Poladari Gadu* and *others*—Defendants—Appellants.

v.

Rajah of Vizianagaram and *another*—Plaintiffs—Respondents.

Second Appeals Nos. 13, 14 and 15 of 1928, Decided on 7th March 1930, from decree of Dist. Judge, Vizagapatam, in Appeal Suits Nos. 35, 39 and 40 of 1926.

Madras Estates Lands Act (1908)—Zamindar resuming lands granted in lieu of services of public nature—Grants not made subsequent to permanent settlement nor included in zamindari assets at settlement time—Grantees executing relinquishment deeds in favour of zamindar — Zamindar alone without consent of villagers held not entitled to resume—Nor did the relinquishment deeds entitle him to resume, the same being unenforceable in law.

A zamindar resumed certain lands which were granted to the ryots in lieu of certain services which they were to render to the villagers in general and not to the zamindars personally. The grants were not made subsequent to the permanent settlement, nor were the lands included in the assets of the zamindari at the time of the settlement. At the time of the resumption the ryots had also executed relinquishment deeds in favour of the zamindar.

Held : that the zamindar had no right to resume the lands and that the relinquishment deeds executed in favour of the zamindar alone were not valid and enforceable in law, and so they would make no difference with regardto the right of resumption by the zamindar who had originally no right to resume : *S. A. Nos.* 1405 and 1406 *of* 1924, *Rel. on* ; *A. I. R.* 1922 *Mad.* 119, *Dist.* [P 45 C 1]

Y. Suryanarayana—for Appellants.

S. Venkatesa Aiyangar — for Respondents.

Judgment.—This second appeal arises out of one of several suits (L. S. 223 of 1924) instituted by the Rajah of Vizianagaram for the recovery of arrears of rent with interest due by the defendants on certain "kattukaluva service" inam lands resumed by the proprietor for faslis 1331, 1332 and 1333. The defendants had executed relinquishment deeds and kadapas at the time of resumption with respect to these lands in favour of the zamindar. Their main contentions are twofold : (1) that the kadapas and relinquishment deeds are not valid and binding as they are vitiated by misrepresentation, coercion, etc.; (2) that the services to be rendered by the ryots with respect to these lands are of a public nature and the lands are therefore not resumable by the zamindar and therefore resumption is invalid. On the first point both the Courts held that the relinquishment deeds and kadapas are not vitiated by misrepresentation, coercion, fraud, etc. But the learned District Judge in discussing this question expressed the opinion that he has no doubt

"that the knowledge of the elaborate recitals of the relinquishment deeds cannot be imputed to the executants, especially when it is remembered that the relinquishment deeds were written from a draft that was prepared from similar documents : see para. 5 of the appellate judgment."

On the second point the lower appellate Court differing from the first Court held that the right of resumption of the lands lay with the zamindar.

Both the findings of the appellate Court are controverted before me by the appellant's learned counsel. The finding on the first point is a finding of fact and it has to be accepted in second appeal. As re-

gards the conclusion arrived at by the learned Judge, that the right of resumption is in the zamindar, I am not satisfied that his view is right. His reasoning on the point does not appear to be consistent and satisfactory. There is no evidence to show that the suit lands were granted subsequent to the permanent settlement. It is not proved that the assessment of the lands was included in the assets of the zamindari at the time of the permanent settlement for fixing the peishcush. The District Judge's opinion seems to be —and in this I think he is right—that the services are of a "public nature" and not personal to the zamindar. It is admitted that the ryots did not refuse to render the services at any time. The services consist in repairing the village water channels and as such are rendered to the village community. It may be that the kothwal, an estate official, goes with the ryots when they repair the channels. But, as pointed out by the learned Judge himself, normally the zamindar is not under any obligation to maintain the minor village channels. The learned District Judge gives some weight to the admission in the relinquishment deeds that the zamindar had to spend moneys on the repair of the village channels as the inam-holders were unable to do the repairs themselves. But there is no evidence in support of the truth of this admission. As the first Court points out :

"Not even one witness says this. Nor is a single document produced to prove it."

It is clear that the services rendered are to the ryots of the village and to the village generally and not at all personal to the zamindar. The learned District Judge states that

"the very nature of the grant thus leads to the inference that it was for "village service" "partaking of public services" as opposed to personal service but in lieu of wages."

Assuming that the grant is in lieu of wages as inferred by the learned District Judge it does not necessarily follow, having regard to the character of the services, that the zamindar by himself has the right to resume the land terminating the service. In *Rajah of Vizianagaram* v. *G. Jangadu* (1), in a suit instituted by the Rajah of Vizianagaram, the same plaintiff, as in the present case, with respect to "kattukaluva service inam lands" (similar lands as here) it was held by Srinivasa Ayyangar, J., that the lands were not resumable by the zamindar The following observations appearing in that judgment are relevant for the present case:

"Though the lower appellate Court has found that it was a grant in lieu of wages on the footing that it was a grant at any rate partly for public service to be performed for the villagers, it follows that the plaintiff has no right by himself to resume the land terminating the service. Again in this case the ground on which the argument was put forward was that ever since the permanent settlement the plaintiff has had cast on him and also has undertaken the duty in respect of the irrigation of the village, but whatever may be the rights and obligations of the landlord as between himself and the Government under the terms of the permanent settlement, it does not follow that the landlord is entitled to put an end at his pleasure and without concurrence on the part of the villagers to certain services which have been provided for by the grant. It is not suggested that the villagers in whose favour or for whose benefit the services are to be performed have agreed to the resumption of the grant."

Having regard to the character of the services rendered by the ryots and the fact that there is no evidence to show that the grants were subsequent to the permanent settlement, and that the lands were included in the assets of the zamindari at the time of the settlement, I must hold, differing from the learned District Judge, in view of the decision of this Court already referred to, that the suit lands are not resumable by the zamindar.

The question then arises: "Is the resumption by the zamindar valid?" Ordinarily in such circumstances as mentioned above it will not be; but it is pointed out that even if the "kattukaluva service inam lands" cannot be resumed by the zamindar according to the above view, and also according to the decision of this Court referred to still, in the present case the lands are resumable because of the voluntary relinquishment deeds executed by the ryots in favour of the zamindar. In support of this view reliance is placed on the following observation of Sadasiva Iyer, J., in *Zamindar of Tarla* v. *Kanda Barikivadu* (2):

"If both the grantor and grantee agree that a service should cease from a certain date, and that the lands should thereby cease to be held for performance of such service, no formal steps (whatever they may mean) are necessary to convert it into ordinary zeroyati. Under the Estates Land Act the presumption is that all land is zeroyati land, and once the land ceases to be service inam land it resumes the charac-

(1) A. I. R. 1927 Mad. 1001=106 I.C. 671.

(2) A. I. R. 1922 Mad. 119=63 I. C. 8=44 Mad. 697.

ter of ordinary zeroyati land without any formal ceremonies being gone through."

I do not think that this observation can be applied to the present case. The nature of the services shows that at any rate the zamindar by himself has no right to terminate the services. (Of course the ryots have not refused to perform the services in the present case.) If resumption cannot be made by one party exclusively without concurrence of the others also, relinquishment in favour of one party alone cannot be valid. It appears to me to be extremely doubtful whether a voluntary relinquishment in favour of a person who has no right at all to resume the land is enforceable, as a contract is void of consideration. No authority has been cited to me specifically bearing on the point. But I think on principle such an arrangement cannot be held to be enforceable in law. If I am right in this view the execution of relinquishment deeds in this case would not make any difference with regard to the right of resumption by the zamindar, who had originally no right to resume. The necessary conclusion is that the relinquishment deeds and kadapas are not binding on the appellant as the lands are not resumable by the zamindar and so the plaintiff is not entitled to any relief. This second appeal should therefore be allowed and the plaintiff's suit is dismissed with costs here and in the Court below (His Lordship then considered Second Appeals Nos. 14 and 15 of 1928, and held that they also should be allowed.)

P.R.S./S.N. *Appeals allowed.*

A. I. R. 1931 Madras 45

WALLACE AND BARDSWELL, JJ.

Sri Raja Sobhanadri Appa Rao Bahadur Garu, Nuzvid—Defendant—Appellant.

v.

Raja Muganti Venkata Rama Rao and *others*—Plaintiffs—Respondents.

Appeal No. 31 of 1925 Decided on 20th August 1930, from decree of Addl. Sub-Judge, Bezwada, in Original Suit No. 36 of 1923.

(a) Minor—Suit for possession—Allegation that sale deed executed by guardian was void—Sale deed found not to be void—Suit must be regarded as one for setting aside sale deed though such relief is not sought.

Where a minor brings a suit for possession alleging sale deed executed by his guardian on his behalf as void, but the sale deed was found not to be void, the suit has to be regarded as one for setting aside the sale deed, even though no such relief has been sought for, as that possession cannot be obtained unless that document is set aside: *A. I. R.* 1929 *Mad.* 313, *Foll.* [P 46 C 2]

(b) Registration Act (1908), S. 28—To establish fraud on registration law, there must be collusion between both parties to practise fraud on registering officer.

To establish fraud on the registration law there must be a collusion between parties to practise a fraud upon the registering officer, and that, as a test of whether parties had an intention to practise such a fraud, it has primarily to be considered whether there was a property that could be conveyed by the party executant or as to which a genuine belief existed that he could convey it. Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee though it may not follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention. The facts that the property is small or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud: *A. I. R.* 1914 *P. C.* 67; *A. I. R.* 1921 *P. C.* 8; 43 *Mad.* 405; 43 *Mad.* 436; 58 *I. C.* 849; 11 *All.* 136; *A. I. R.* 1923 *Mad.* 447; *A. I. R.* 1924 *Mad.* 281; *A. I. R.* 1929 *Mad.* 432; *A. I. R.* 1927 *Mad.* 863; *A. I. R.* 1925 *Bom.* 514; *A. I. R.* 1925 *Pat.* 787 and *A.I.R.* 1924 *All.* 897, *Rel. on.* [P 48 C 1, 2]

(c) Registration Act (1908), S. 28—Scope.

Not intending the document to relate to certain property is not the same thing as not intending to transfer that property or title thereto by means of the document. Otherwise all documents of benami transfer, which law regards as valid, would be void by force of S. 28. [P 49 C 1]

S. Srinivasa Iyengar and *P. Satyanarayana Rao*—for Appellant.

Advocate-General. M. Subaraya Iyer, M. Venkatasubbiah, V. Govindarajachari and *Y. Govindrajulu*—for Respondents.

Bardswell, J.—The suit under appeal is one for recovery of possession by the plaintiff from defendant 1 of the suit property which consists of one-fourth share in the Mokhasa village of Somavaram in the Kistna District. According to the plaint, the plaintiff's father, professing to act as his guardian during his minority, purported to alienate, on 14th October 1910, under a registered sale deed, the suit property to the late father of defendants 1 and 2 for a cash consideration of Rs. 27,302 which was quite inadequate, while the sale itself did not purport to be for any justifiable necessity. The suit property was in the possession of the father of defendants 1 and 2 till his death in or about May 1911, and

has been in the sole possession of defendant 1 since about September 1918 when there was a partition between him and his brother, defendant 2. The plaint further sets out that there was a fraud on the registration law in that there was included in the sale deed a vacant land belonging, not to the plaintiff, but to his father, which item was not intended to be sold, was never possessed or enjoyed by defendants 1 and 2 or their father, and is still in the possession and enjoyment of the plaintiff's father. Its inclusion in the sale deed was, according to the plaint, solely for the purpose of getting the sale deed registered at an office in the Godavery District, instead of in the Kistna District. The idea in getting the document thus registered was to keep the matter from the knowledge of the plaintiff's grandfather and actual guardian, the late Maharaja of Venkatagiri. The learned Subordinate Judge has found that the consideration under the suit sale deed Ex. 1 was adequate, and cannot say that plaintiff's natural father, who has been joined in the suit as defendant 4, was not his natural guardian at the time of the execution of that document. He has however further found that the sale in any case would not be binding on the plaintiff because it was not executed for his benefit, and that it was in fact void as there was a fraud upon the registration law in respect of it. He has therefore given a decree to the plaintiff for recovery of possession, together with mesne profits for three years before suit at the rate of Rs. 1,000 per annum. In this appeal, which is by defendant 1, the finding as to there having been a fraud on the registration law is attacked, and there are further contentions that the sale, as being one by a guardian, though not one of necessity, should be upheld as being beneficial to the minor's estate, and that the amount of mesne profits that have been allowed is excessive.

The most important point in the case is that of whether there has been a fraud on the registration law. The importance of the point is involved in the fact that upon its decision depends the decision of the further question of whether or no the suit has been brought in time. If the sale is held to be void owing to fraudulent registration then, of course, there will be no need to set it aside, and it is not disputed that the suit will have been brought well within the period of limitation. It is on these lines that the lower Court has found the suit to be in time. But if the sale deed is not found to be void then the suit has to be regarded as one for setting aside the sale deed, even though no such relief has been sought for, as that possession cannot be obtained unless that document is set aside. That this is the position has been held by this Court in *Ramaswami* v. *Govindammal* (1). Now, under Art. 44, Sch. 1, Lim. Act, the time allowed to a ward who has attained majority for setting aside a transfer of property effected by his guardian is three years from when he attains his majority. The plaint in this case, which was presented on 6th December 1921, states the age of the plaintiff as about 27, and on that showing was brought far more than three years after his attainment of majority. In his evidence, indeed, as P. W. 1, he has represented, on 14th July 1924, that he was aged only twenty-seven even then, but he admitted that he could not give his age definitely, while from what he says it would appear that he was making an under-estimate of it. Even so, if what he said in his evidence could be accepted, he must have been over twenty-three when the plaint was presented, and, as he was not a ward of Court, that would make the presentation over five years after the time when he became a major.

The lower Court has based its decision that there was a fraud on the registration law on its finding that the site at Vundoor, which was added in the sale deed so as to make it registrable at Samalkota in the Godavary District whereas the registration office for the suit property is Tiruvur of the Kistna District, was a fictitious item which belonged neither to the plaintiff nor to his father. This finding however is not in accordance with plaintiff's own pleading which, as set out in the plaint, is not that this Vundoor site was fictitious but that it belonged to and was being enjoyed by plaintiff's father and that the fraud consisted in including this item in the sale deed when there was no intention of conveying it. We may also remark incidentally that we are not satisfied on the evidence that

(1) A. I. R. 1929 Mad. 813=118 I. C. 481.

the Vundoor site is a fictitious item. Had the case for the plaintiff been that this item was fictitious and had that case been made good, then, no doubt, the learned Subordinate Judge would have been correct in his view that there had been a fraud in accordance with the Privy Council decision *Harendra Lal Roy* v. *Haridasi Debi* (2). As things stand the learned Advocate-General contends, on behalf of plaintiff, that it is open to him to show and that being granted, that he can establish that, irrespective of any question of a fictitious entry, there has been a fraud on the registration law. Taking it that he can argue on these lines we have to see whether he has made good his case in this connexion.

The law on the subject may first be considered. In *Harendra Lal Roy* v. *Haridasi Debi* (2), the Privy Council has stated that a fictitious entry

"intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists is a fraud on the registration law and no registration obtained by means thereof is valid."

Following this case there is the later Privy Council decision in *Mathura Prasad* v. *Chandra Narayan Choudhury* (3), in which the principle of the earlier decision was extended to the case of a mortgage bond in which property that actually existed was included without the mortgagor having any interest in it or the parties to the instrument having ever any intention that it should form part of the security. There has been a number of cases in this Court in which the principle underlying these decisions has been considered. In *Sankaran Nambiar* v. *Narayanan Tirumunpu* (4), it was held that there was no fraud of the registration law where item 2 was added in a mortgage deed, not so much to give an additional security as to enable the mortgagor to get the document registered near where he was living. It was found that whatever the original intention of the parties, they had deliberately included item 2 in the mortgage and that its inclusion was not with the object of effecting a fraud on the registration law. Another case of this Court of the same year is *Narasimha Rao* v. *Papanna* (5), in which it was held that when a cent of land was included, purely for the purpose of getting the deed registered by a particular Sub-Registrar, without any intention of passing title to the vendee, there was a fraud on the registration law. This decision, it may be noted, was passed, not with reference to the size of the property in question but only on a consideration of what was the intention of the parties with reference to it. In *Ramanathan Chettiar* v. *Muthukumara Pillai* (6), it was held that where the parties to a mortgage deed intended a particular property however small in value as compared with the rest, to be part of the security, although the motive for its inclusion might be mainly that the document should be registered by a particular Sub-Registrar, that motive could not be said in any way to be a fraud or violation of the Registration Act. This decision follows that of the Privy Council in *Hari Ram* v. *Sheodayai Mal* (7), according to which the words "some portion of the property" in S. 28, Registration Act, are not to be read as meaning some substantial portion of the property.

In *Rama Rao* v. *Vedayya* (8), it was held that the inclusion of an item in a mortgage deed merely in order that the registration might be by a particular Sub-Registrar was a fraud on the registration law, but in this case it appears that the item of property in question did not belong to the mortgagor. In *Venkata Lakshmikantharaju Garu* v. *Venkata Jagannatha Raju Garu* (9), the decision was that the fact that an item of property within the jurisdiction of a registration district where a document of mortgage was registered did not belong to the mortgagor would not invalidate the registration of the mortgage as a fraud on the registration law, unless it were shown that the mortgagee and mortgagor colluded to insert the item in the mortgage deed with the knowledge that the mortgagor had no title to it. The decision in *Marina Ammayi* v. *Sundayya*, *A. I. R.* 1929 *Mad.* 432, is to a similar effect, while in *Chokkalingam Chettiar*

(2) A. I. R. 1914 P. C. 67=23 I. C. 637=41 I. A. 110=41 Cal. 972 (P.C.).
(3) A. I. R. 1921 P. C. 8=63 I. C. 770=48 I. A. 127=48 Cal. 509 (P.C.).
(4) [1920] 43 Mad. 405=55 I. C. 86.
(5) [1920] 43 Mad. 436=56 I. C. 519.
(6) [1920] 58 I. C. 849.
(7) [1888] 11 All. 136=16 I. A. 12=5 Sar. 281 (P.C.).
(8) A. I. R. 1923 Mad. 447=73 I. C. 188=46 Mad. 435.
(9) A. I. R. 1924 Mad. 281=77 I. C. 464.

v. *Athappa Chettiar* (10), it has been held that where a person bona fide buys property for the purpose of facilitating registration of a transaction and also bona fide includes it in a sale or mortgage, he cannot be held to commit a fraud on registration which would render the whole transaction invalid. Rulings of the Bombay, Patna and Allahabad High Courts have also been cited before us in this connexion. In *Viswanatha Bhat* v. *Mallappa* (11), it was held that there could be no inquiry as to an alleged intention of the parties that an item of property which was included in a document so as to give jurisdiction to a particular Sub-Registrar was to be reconveyed. In *Mt. Jasoda Kuer* v. *Janak Missir* (12), it is remarked that S. 28, Registration Act, requires no more than the existence of a property within the jurisdiction of a particular Sub-Registrar in order to entitle him to register a document in respect thereof, which remark must be read with the context which shows that the conveyor appeared bona fide to believe that he had a title to convey in this property and that it did not seem that there could be any idea of defrauding anyone in having the registration effected in a particular office. The decision in *Durga Prasad Sahu* v. *Tameshar Prasad* (13) inclined to the view that even if it was a fact, which it was not found to be, that an item which existed and belonged to the vendor was inserted in a document merely for the sake of registration, that would not constitute a fraud on the law of registration.

The general effect of all these decisions is that to establish fraud on the registration law there must be a collusion between parties to practice a fraud upon the registering officer, and that as a test of whether the parties had an intention to practise such a fraud, it has primarily to be considered whether there was a property that could be conveyed by the party executant or as to which a genuine belief existed that he could convey it. Another point to be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee, though it is not perfectly clear, that it will follow as a matter of course that a fraud on the registration law has to be deduced from the absence of such intention. The facts that the property is small, or that the primary intention was that registration should be in a particular office, will not in themselves constitute acts of fraud.

The learned Advocate-General admits that the burden is on him to show that there has been a fraud on the law of registration. In the light of what is stated above we do not find that he has discharged the burden. The Vundoor site is one that actually exists ; the title to it was in plaintiff's father who seems to have been its actual owner ; it is not clear that there was no intention of passing possession of the item ; and it is not shown that the parties had any reason that would make them practise a fraud on the registering officer. It follows, then that Ex. 1 is a document which the plaintiff had to get set aside and that, as he did not bring this suit till more than three years after his attainment of majority, the suit fails as being out of time.

In view of our finding on the point of limitation the appeal is allowed and the suit is dismissed with costs to the appellant against the plaintiff both in this Court and in the Court below. The finding stated above in paras. 15 and 16, will be embodied in the decree.

Wallace, J.—I agree. I only wish to add a few words on the legal point. S. 28, Registration Act, is no doubt mandatory and the question for decision under that section is:

"Is any portion of the property to which the document relates situate within the registration sub-district ?"

When property to which the document relates is non-existent S. 28 has not been complied with: *Harendra Lal* v. *Haridasi Debi* (2). And where the document does not relate to certain property because the parties to it did not intend it so to relate, S. 28 has not been complied with : *Biswanath Prasad* v. *Chandra Narayan Choudhuri* (3). In both cases there must be a collusion between both parties to the document to deceive the registration authorities, in fraud or violation of S. 28 of the Act : see *Venkata Lakshmikantharaju Garu* v. *Venkata-*

(10) A. I. R. 1927 Mad. 863=105 I. C. 424=50 Mad. 800.
(11) A. I. R. 1925 Bom. 514=92 I. C. 628=49 Bom. 821.
(12) A. I. R. 1925 Pat. 787=4 Pat. 394.
(13) A. I. R. 1924 All. 897=82 I. C. 243=46 All 754.

Jagannatha Raju Garu (9). It is important to note that not intending the document to relate to certain property is not the same thing as not intending to transfer that property or title thereto by means of the document. Otherwise all documents of benami transfer would be void by force of S. 28. However desirable in theory such a conclusion may be it is not at present the law which has always recognized the validity of benami documents. S. 28 will not invalidate a benami document, because the parties to such a document do intend that it shall relate, so far as it has validity, to the property mentioned in it, and therefore are not colluding to deceive the registration authorities.

When therefore the contention is raised that the inclusion in a registrable document of a particular piece of property was merely for the purpose of giving jurisdiction to the Registrar, the true test whether S. 28 has not been complied with will be: in cases where the parties intend the document to be a deed of real transfer, did they collude in intending that that piece of property should not pass: see *Narasimha Rao* v. *Papunna* (5) and *Rama Rao* v. *Vedayya* (8); and in cases where the parties intend the document to be nominal or benami, did they collude in intending it not to apply, so far as it has validity to that piece of property. The test for both cases is: did the parties, in including that property, intend to deceive the registration authorities, and so escape the mischief of S. 28: see *Sankaran Nambiar* v. *Narayanan Tirumunpu* (4); *Chokkalingam Chettiar* v. *Athappa Chettiar* (10) and *Ramanathan Chettiar* v. *Muthukumara Chettiar* (6).

P.R.S./S.N. *Appeal allowed.*

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JACKSON, J.

P. R. Srinivasa Iyer — Defendant—Petitioner.

v.

K. S. Krishnaswamy Iyer and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 297 of 1929, Decided on 4th April 1930, from order of Dist. Judge, Trichinopoly, D/- 16th November 1928.

Court-fees Act (1870), S. 7 (4) (b)—Applicability—Plaintiff stating that family was already divided in status and he was suing for partition by metes and bounds—Suit does not fall under S. 7 (4) (b).

When a coparcenary has been disrupted it cannot be described as a joint family though the property of the family has not been divided by metes and bounds. Therefore where a person states in his plaint that the family has been divided in status, and he sues for a partition by metes and bounds, the plaint will not fall under S. 7 (4) (b): 8 *I.C.* 512 (*F.B.*), *Rel. on.* [P 49 C 2]

T. M. Krishnaswami Iyer for *S. S. Ramachandra Iyer*—for Petitioner.

K. G. Srinivasa Iyer—for Respondents.

Judgment. — This application raises the question whether a suit should be valued notionally or ad valorem the decision of which will also involve the further question of jurisdiction. The learned District Judge has held that the suit can be valued notionally setting aside the order of the learned District Munsif that the valuation should be according to the market value. The respondent frankly admits that the judgment of the learned Judge can only be supported if it is found that this suit falls under S. 7 (4) (b), Court-fees Act. The plaintiff states in his plaint that the family has been divided in status since 1921 and now he sues for a partition by metes and bounds. Is it a suit to enforce the right to share in any property on the ground that it is joint family property? This is by no means an easy question to decide, but I think it is answered authoritatively by *Rangiah Chetty* v. *Subramania Chetty* (1). Krishnaswami Ayyar, J., observes at p. 26 (of 21 *M. L. J.*):

> "There is a joint family at the date of the suit. The plaintiff's right to have the property divided is on the ground that the property belongs to the joint family on that date,"

and at the bottom of p. 24 (of 21 *M.L.J.*):

> "it must be admitted that a suit by a tenant-in-common in joint possession for the partition of the common property not belonging to a joint family cannot fall under this clause."

When a coparcenary has been disrupted, it cannot, I think, be described as a joint family though the property of the family has not been divided by metes and bounds. Therefore in the light of this interpretation the plaint would not fall under S. 7 (4) (b); and reading S. 4 along with S. 8, Suits Valuation Act, it must be held that the valuation in this case cannot be notional. No argument has been advanced in this Court as regards the cancellation of the sale deed which the plaintiff prefers to treat as void, a matter on which I need express

(1) [1911] 8 I. C. 512 (F.B.).

no opinion. In so far as the ruling of the learned District Judge is not set aside, the District Judge's order as regards other matters will stand. In the result therefore the plaint will have to be returned for presentation to the proper Court.

P.R.S./P.N. *Order accordingly.*

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WALLACE AND BARDSWELL, JJ.

District Labour Officer, Amalapuram —Appellant.

v.

Veeraghanta Venkatasubrahmanya Sastri—Respondent.

Appeal No. 1 of 1929, Decided on 15th September 1930, from decree of Sub-Judge, Amalapuram, D/- 15th March 1928.

(a) Land Acquisition Act (1 of 1894), S. 9—"Not earlier than 15 days after the date of the publication of notice'—Meaning explained.

Where notice about the inquiry is served upon the claimant on 19th August 1925 directing him to appear on 3rd September 1925, there is no clear 15 days' notice as required by S 9 (2) and the notice is not valid in law: *A. I. R.* 1930 *Cal.* 471, *Foll.* [P 50 C 2]

(b) Land Acquisition Act—Interpretation —Benefit of doubt as to, must be given to party.

If there is any real dubiety in interpretation in matters of procedure in the Land Acquisition Act, the benefit of the doubt ought to be given to the party. [P 50 C 2]

Government Pleader—for Appellant.

Appalacharya and *Jhiddu Lakshmayya*—for Respondent.

Judgment.—This is an appeal against the decision of the lower Court in the matter of the compulsory acquisition of the claimant's land. 32 cents belonging to him were acquired. The land is situated in old Survey No. 215, now re-Survey No. 142 in Kattunga village. The acquiring officer gave an award at the rate of Rs. 10 per cent which the lower Court has increased to Rs. 15. There was also a tamarind tree acquired for which the acquiring officer gave an award of Rs. 80 which has been increased by the lower Court to Rs. 120. Government appeals against the decision of the lower Court and the claimant has filed a memorandum of cross-objections.

The learned Government Pleader, on behalf of the Government, has argued a point of law as well as argued the case on the merits. The point of law is this. The notice about the inquiry was served upon the claimant on 19th August 1925 and it directed him to appear on 3rd September 1925. S. 9 (3), Land Acquisition Act, directs the Collector to serve notice on the claimant to the same effect as the notice in sub-Cl. 2. The notice in sub-Cl. 2 is to notify the claimant to appear before the acquiring officer

"at a time and place mentioned therein, such time not being earlier than 15 days after the date of publication of the notice."

When that is applied to sub-S. 3 it would mean that the notice to be served upon the claimant should direct him to appear at a time not earlier than 15 days after the service of notice. The question is whether "not earlier than 15 days" means that the claimant is to have 15 days clear notice before he need appear i. e., before the date of the enquiry or whether the date of inquiry may be on the 15th day. The language used seems to us unhappy and there is something to be said for an interpretation either way. The only reported case exactly on the point to which our attention has been called is in *Taraprasad Chalipa* v. *Secy. of State* (1) (at p.840 *of* 57 *Cal.*) where a Bench of the Calcutta High Court has decided for the present claimant's view. No particular reasons are given, but in the circumstances and having regard to the fact that if there is any real dubiety in interpretation in matters of procedure like that, the benefit of the doubt ought to be given to the party, we follow the interpretation of the phrase given by the learned Judges in Calcutta. We might add that in order to avert further difficulties of the same kind in future, it would be wise if acquiring officers gave more than 15 days clear notice in the notices issued under S. 9.

It is therefore open for us to go into the merits of the case, the claimant not being precluded from putting forward his case although he did not object under S. 9 since the notice, given to him was defective. (Their Lordships then dealt with the merits and allowed the appeal partly.)

P.R.S./P.N. *Order accordingly.*

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(1) A. I. R. 1930 Cal. 471=127 I. C. 666=57 al. 837.

A. I. R. 1931 Madras 51

MADHAVAN NAIR, J.

(*Komanduru*) *Sampath Ayyangar* and *another*—Defendants—Appellants.

v.

Sri Govinda Krishna Yachandralavari Bahadur, Rajah of Venkatagiri—Plaintiff—Respondent.

Second Appeals Nos. 182 and 183 of 1929, Decided on 22nd August 1930, from decree of Sub-Judge, Chittoor, in Appeal Suits Nos. 50 and 51 of 1927.

(a) Madras Revenue Recovery Act (2 of 1864), S. 35 — Registered and not real owner is defaulter.

Where one person is the real owner of a share in land and another is the registered proprietor of the whole the latter and not the former is the "defaulter" within the meaning of S. 35: 33 *Mad.* 41, *Foll*; 39 *Mad.* 795, *Ref.* [P 52 C 1]

(b) Contract Act (1872), S. 70 - Question whether what has been done is done for another is question of fact.

The question whether what has been done by "a person" has been done for "another" person within the meaning of S. 70 is a question of fact in each case: (*Case law referred*). [P 52 C 2]

(c) Contract Act (1872), S. 70—Person benefited must have opportunity to accept or reject benefits.

Under S. 70 it must be shown that the person benefited has had the opportunity of accepting or rejecting the benefit: 33 *Mad.* 15 and 16 *M. L.T.* 375, *Foll.* 38 *Mad.* 235, *not Foll.* (*Case law referred*). [P 54 C 1]

(d) Landlord and Tenant—Agraharamdars are jointly and severally liable for jodi dues.

Agraharams are ordinarily held on a single and indivisible tenure and agraharamdars are jointly and severally liable to the zamindar for the jodi due on the entire agraharam in the absence of any contract to which the zamindar is a party apportioning the jodi on the various Subdivisions of the agraharam made by the agraharamdars inter se: 56 *I. C.* 552, *Foll*: 115 *I. C.* 351 and *A. I. R.* 1927 *Mad.* 931, *Dist.* [P 54 C 2]

V. Ramadoss and *K. Subba Row*—for Appellants.

M. Venkatasubbiah—for Respondent.

Judgment.—These second appeals relate to the question whether the Rajah of Venkatagiri is entitled to claim the full amount of jodi for faslis 1332 and 1333 due from the appellants (defendants 1 and 3 in both the suits) who are the agraharamdars of the villages of Sakti Ganeshwarapuram and Kunnam Kulattur. The liability to pay the jodi was not disputed by the agraharamdars; but they contended that they are entitled to deduct from the amount claimed the amount of peishcush due on these villages which they had paid to the Government for the faslis in question. The deduction was claimed under S. 35, Act 2 of 1864, and S. 70, Contract Act. On the first ground, which was the only ground pressed in the lower appellate Court, the Subordinate Judge found against the agraharamdars' contention. Both the grounds are urged before me in second appeal.

The facts are briefly these: The two villages of Sakti Ganeshwarapuram and Kunnam Kulattur formed part of the Kalahasti Zamindari and were purchased by the plaintiff at a Court sale. After the purchase he did not get the villages separately registered in his name by the Collector under Madras Act 1 of 1876, and so the Zamindar of Kalahasti remained as the registered holder of these two villages. When the Rajah of Kalahasti failed to pay the peishcush on the zamindari for the suit faslis these villages were attached by the Government. The agraharamdars then paid the proportionate peishcush due on these villages and got them released from the attachment. They now contend that the peish cush due from these villages was rightly due from the plaintiff after his purchase at the Court sale and since that peishcush was paid by them the amount so paid should be deducted from the jodi now claimed by him.

The first question is whether the claim of the appellants is justified under S. 35, Revenue Recovery Act 2 of 1864. S. 35, Act 2 of 1864, so far as it is relevant to the present argument, is as follows:

"It shall be lawful for any person claiming an interest in land which has been, or is about to be attached, to obtain its release by paying the arrears, interest and costs incurred; and all such sums, if paid by a tenant, may be deducted from any rent then or afterwards due by him to the defaulter."

This section entitles a tenant, if he has obtained a release of his land from the attachment by paying the arrears of revenue due on it, to deduct the sum paid by him from the rent due by him to the defaulter. Assuming that the agraharamdars may be called tenants within the meaning of the section about which I am very doubtful, it is clear they have to show in this case that the plaintiff is the "defaulter" in order to claim the benefit of this section. The term "defaulter" is not defined in the Act. It has been held in *Subramania Chetty* v. *Mahalinga Sami Sivan* (1) that

(1) [1910] 33 Mad. 41=3 I. C. 624.

"where one person is the real owner of a share in land and another is the registered proprietor of the whole, the latter and not the former is the "defaulter" within the meaning of the Revenue Recovery Act."

According to this decision, though the plaintiff is the real owner of the two villages, inasmuch as their transfer has not been registered in his name, the transfer is invalid against the Government, and so the registered pattadar remains the landholder within the meaning of the Revenue Recovery Act, and the person liable to pay the revenue under S. 3 and becomes a defaulter within the meaning of the Act if he does not so pay. This case has been followed in *Jagapati Raju* v. *Sadrusannama Arad* (2). If this is the position, then it must follow necessarily that the defendants cannot recover the peishcush paid by them from the plaintiff as the Rajah of the Kalahasti is the defaulter and the plaintiff is not under any obligation to pay the proportionate revenue to Government. The Government rightly treated the Rajah of Kalahasti as the defaulter in spite of the purchase of the village in question by the plaintiff as the Rajah of Kalahasti still remained as the registered pattadar. It may be that the agraharamdars may have a remedy against the Rajah of Kalahasti to recover the amount of peishcush paid by them but the plaintiff is not a defaulter within the meaning of S. 35, Act 2 of 1864, and they cannot claim to deduct that amount from the rent due by them to him.

The next ground urged is that the appellants are entitled to recover the amount from the plaintiff under S. 70, Contract Act, and so this amount must be deducted from the jodi. S. 70, Contract Act, is as follows:

"Where a person lawfully does anything for another person or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered."

That the payment of the peishcush was lawfully made is not disputed; that the payment was not intended to be gratuitous is also not disputed. What we have to determine is: (1) whether the agraharamdars made the payment "for another person" (that is the plaintiff) and (2) whether he enjoyed the benefit of the payment within the meaning of S. 70, Contract Act. As regards the first, it is argued on his behalf that if the peishcush was not paid the villages would have been sold and the agraharamdars would have been deprived of the properties and since the payment was made to prevent that result it must be considered that the payment cannot be said to have been made for the plaintiff and so there is no obligation on his part to pay the amount to the defendants. On the other hand the appellants argue that as the peishcush on those villages was primarily liable to be paid by the plaintiff and as they paid it and thus saved the property for him, it must be considered that the payment was made by them on his behalf and for him. The question whether what has been done by a "person" has been done for "another person within the meaning of S. 70, Contract Act, is a question of fact in each case: see *Damodara Mudaliar* v. *Secretary of State* (3), *Jogambal'Boyee Ammani Ammal* v. *Naina Pillai Marakayar* (4), *Sri Sri Chandra Deo* v. *Srinivasacharlu* (5) and *Avudayappa Pillai* v. *Thandavaraya Pillai* (6). In *Jogambal·Boyee* v. *Naina Pillai* (4) Munro and Sankaran Nair, JJ. observed as follows:

"Where the person paying interest is making the payment he cannot be presumed, in the absence of evidence to show that he intended to act for the other party also, to have acted for such other party."

In *Sri Chandra* v. *Srinivasacharlu* (5) Miller, J., observed that in doing the thing where one's own interest is manifestly predominant, it may be difficult for him to show that what he did was done for another person. In the same case Sadasiva Iyer, J., observed:

"I do not think that these cases intended to lay down generally that where a person is interested in making a payment it cannot be held under any circumstances that he intended to act for the other party also."

Because the appellants are benefited by the payment of peishcush it does not necessarily follow that the argument that the payment was made for another person is unsustainable. In this connexion attention may be drawn to the case reported in *Saptharishi Reddiar* v. *Secretary of State* (7) where Ayling, J., pointed out that because the person who

(2) [1916] 39 Mad. 795=31 I. C. 255.

(3) [1895] 18 Mad. 88=4 M. L. J. 205.
(4) [1910] 33 Mad. 15=3 I. C. 110.
(5) [1914] 38 Mad. 235=20 I. C. 445.
(6) A. I. R. 1928 Mad. 320=111 I. C. 513.
(7) [1915] 28 I. C. 309.

does the act is also benefited by the act, the section does not become inapplicable. These observations would show that for determining the point no rules of general application can be laid down. The question is really one of fact and should be decided according to the particular circumstances of each case. In this case there is oral evidence on the part of the defendants that when they paid the peishcush they paid it for the Rajah of Venkatagiri. One of the money-order receipts in the case Ex. 1-b, shows that the sender of the money desired that the amount sent should be credited to the Venkatagiri Rajah : see Col. 1. If the appellants did not pay peishcush the zamindar would lose the jodi and other benefits arising from the ownership of the villages. The villages would be sold and he would cease to be their owner. Having regard to the fact that the amount of peishcush was payable by the plaintiff and it was paid as such by the defendants though it must have been in the interests of the defendants to pay it, it does not seem to me that that is a reason for saying that it was a payment made for the plaintiff. In this case though I am prepared to find that the peishcush was paid by the defendants for the plaintiff, it is not necessary to express a definite opinion on the question as I am satisfied, as I shall presently show, that the appellants have not succeeded in showing that the plaintiff enjoyed the benefit of their payment within the meaning of S. 70, Contract Act.

To prove that the plaintiff has enjoyed the benefit of the defendant's act the appellants rely on the decision in *Srichandra* v. *Srinivasacharlu* (5) and argue that if the plaintiff had the benefit of their act, which he undoubtedly had, it must necessarily follow that the section applies. It is true that the decision lends support to this argument. In that case the learned Judges relying on the plain meaning of the words in the section

"and such other person enjoys the benefit thereof,"

in support of their view, differed from the view of Munro and Sankaran Nair, JJ., in *Jogambal Boyee* v. *Naina Pillai* (4), in which they held, following the English law and referring to the notes in *Lampleigh* v. *Braithwaite* (8) in Smith's Leading Cases, as the source of the section that in order to make the section applicable

"it is necessary that the party sought to be made liable must not only have been benefited by the payment, but must also have had the opportunity of accepting or rejecting such benefit"

and that

"where no such option is left to him, and the circumstances do not show that he intended to take such benefit, he cannot be said to have 'enjoyed such benefit' within the meaning of the section : see the head-note."

If the decision in *Srichandra* v. *Srinivasacharlu* (5) which refused in interpreting the words of S. 70 to import into it the limitations laid down by the English law is still good law then the appellants are bound to succeed. There has been some controversy in this Court on this question ; but as pointed out by Abdur Rahim and Oldfield, JJ., in *Viswanatha Vijaya Kumara Bangaroo* v. *R. G. Orr* (9), the weight of the decisions undoubtedly preponderates in favour of the views expressed by Munro and Sankaran Nair, JJ. in *Jogambal Boyee* v. *Naina Pillai* (4) and Sankaran Nair and Spencer, JJ., in *Rajah of Pittapuram* v. *Secretary of State* (10). Subsequent to the decision in *Srichandra* v. *Srinivasacharlu* (5), the question with reference to that decision was considered by Munro and Sankaran Nair, JJ., in *Rajah of Pittapuram* v. *Secretary of State* (10). The view enunciated in *Jogambal Boyee* v. *Naina Pillai* (4), was affirmed and further explained in *Rajah of Pittapuram* v. *Secretary of State* (10). In that judgment Spencer, J., pointed out that, with regard to the choice of accepting or rejecting the benefit which should be given to the person sought to be made liable,

"certainly there is no law that the acceptance must precede the conferring of the benefit and there is nothing in the judgment in *Jagambal Boyee* v. *Naina Pillai* (4) to suggest it. In fact the use of the word "adopt" implies that the acceptance follows the deed,"

and in this view he held that as the plaintiff failed to establish in that case that

"the defendant adopted and enjoyed the benefit of the act which plaintiff did' "the suit was rightly dismissed."

This decision was followed by Sadasiva Iyer, J. who was himself a party to the decision in *Srichandra* v. *Srinivasacharlu* (5) and in *Narain Pai* v. *Appu* (11),

(8) [1916] 1 Sm. L.C. 160.

(9) [1918] 45 I.C. 783.
(10) [1914] 25 I.C. 783.
(11) [1915] 28 I.C. 456.

where he stated with reference to his own decision that

"the trend of recent decisions has gone the other way."

In *Saptharishi Reddiar* v. *Secretary of State* (7), Ayling and Tyabji, JJ., doubted the correctness of the decision in *Jogambal Boyee* v. *Naina Pillai* (4) on the point in question. By that time Sadasiva Iyer, J., had given up his view in *British India Steam Navigation Co.* v. *Secretary of State for India* (5) and followed *Rajah of Pittapuram* v. *Secretary of State* (10). This has not been noticed in *Saptharishi Reddiar* v. *Secretary of State* (7). Then came the decision of this Court in *Jagpati Raju* v. *Sadrusannamma Arad* (2), wherein it was pointed out by Srinivasa Iyengar, J., that Sadasiva Iyer, J., has followed *Harendra Lal Roy* v. *Hari Dasi Debi* (12), and the decision in *Viswanatha* v. *Orr* (9), already referred to, in which the general position was summed up by Abdur Rahim and Oldfield, JJ., as favouring the view expressed in *Jogambal Boyee* v. *Naina Pillai* (4) and the *Rajah of Pittapuram's* case (10). The latest decision of this Court on this point is in *Sundara Aiyar* v. *Anantapadmanabha Ayyar* (13) in which Odgers, J., followed the decision in *Rajah of Pittapuram's* case (10), and observed that it was laid down in that case that the party sought to be made liable must not only have benefited but must have had the opportunity of accepting or rejecting the benefit. In this connexion my attention was drawn to the decisions in *Smith* v. *Dinonath Mukerjee* (14) at p. 217, *Suchand Ghosal* v. *Balaram Mardana* (15), *Kedar Nath Mistri* v. *Narayanachandra* (16), *Bhicoobai* v. *Hariba Raghuji* (17), some of which have been considered in the Madras decisions.

But having regard to the definite view of our High Court on this point, I do not think it is necessary to discuss these cases. The appellants have no doubt shown that the plaintiff has been benefited by the act, but in order to succeed they must also show that he has had the opportunity of accepting or rejecting the benefit as explained in *Jogambal Boyee's* case (4) and *Raiah of Pittapuram's* case (10). In this case there is no evidence that any such option was given to him. There is nothing to show that the respondent adopted the benefit of the payment made by the appellants. No evidence has been offered on this point. Apparently the parties did not realize the significance of this aspect of the question. According to the trend of the decisions of this Court the appellants cannot therefore rely on S. 70, Contract Act, in support of their claim for deduction of the peishcush paid by them.

In Second Appeal No. 182 of 1929 there is a further question for decision. In this case the lower Court passed a joint and several decree against the appellants with respect to the payment of the amount of jodi decreed against them. It is argued that their liability to pay the jodi should have been apportioned. This argument cannot be accepted. In *Venkata Subramaniam* v. *Rajah of Venkatagiri* (18) it was held that

"agraharam are ordinarily held on a single and indivisible tenure, and agraharamdars are jointly and severally liable to the zamindar for the jodi due on the entire agraharam in the absence of any contract to which the zamindar is a party, apportioning the jodi on the various subdivisions of the agraharam made by the agraharamdars inter se. The present agraharamdars are all the descendants of the original agraharamdars."

It is not pleaded that there was any arrangement, between the agraharamdars and the zamindar, and consented to by him, which entitles them to say that the jodi amount should be apportioned. The cases relied on by the appellant, namely *Suryanarayana* v. *Sree Rajah Venkata Ramayya Appa Rao Bahadur* (19) and *Musafkanni Ravuther* v. *Doraisami* (20), in support of their contention that the liability of each of the appellants should be limited only to the jodi proportionately payable on the lands in his possession are inapplicable to the present case as the persons claiming apportionment in those cases were alienees of separate portions of the agraharam which is not the case here. The lower Court's decree on this point is therefore right and cannot be set aside. This question does not arise in the connected second appeal as in that case apportionment of the jodi was awarded in pursuance of the decision in Ex. 4 which

(12) A.I.R. 1914 P.C. 67=23 I.C. 637=41 I.A. 110=41 Cal. 972 (P.C.).
(13) A I.R 1923 Mad. 64=70 I.C. 405.
(14) [1886] 12 Cal. 213.
(15) [1911] 38 Cal. 1=6 I.C. 810.
(16) A.I.R. 1930 Cal. 344.
(17) [1918] 42 Bom. 556=42 I.C. 9.
(18) [1920] 56 I.C. 552.
(19) [1928] 115 I.C. 351.
(20) A.I.R. 1927 Mad. 931=105 I.C. 179.

binds the parties. In the result both the second appeals are dismissed with costs.

P.R.S./M.N. *Appeals dismissed.*

A. I. R. 1931 Madras 55

MADHAVAN NAIR, J.

Municipal Council, Trichinopoly—Defendant—Appellant.

v.

S. Venkatarama Aiyar — Plaintiff—Respondent.

Second Appeal No. 328 of 1927, Decided on 4th August 1930, from decree of Small Cause Court Judge, Trichinopoly, in Appeal Suit No. 35 of 1925.

(a) Precedents — Each judgment must be read as applicable to its particular facts and is no authority of propositions logically following from it.

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. A case is only an authority for what it actually decides, and it cannot be quoted for a proposition that may seem to follow logically from it: *Quinn* v. *Leathem*, (1901) *A. C.* 495, *Foll.*

[P 57 C 1]

(b) Madras Municipal Act (4 of 1884), S. 63 (1) A—School building is exempt even if proprietor derives profit by conducting school—Madras Municipal Act (5 of 1920), S. 83.

Under S. 83, Act 5 of 1920 as also under S. 63, Act 4 of 1884, a school is exempt from property tax on the ground that it is a building used for educational purposes even though the proprietor of it makes profit out of the school which he carries on in that building: *A. I. R.* 1914 *P. C.* 20, *Rel. on.* (*English law discussed*).

[P 58 C 1]

P. Venkataramana Rao — for Appellant.

K. G. Srinivasa Ayyar — for Respondent.

Judgment. — This second appeal raises the question whether the respondent is exempt from the liability to pay "property tax" with respect to a building known as "Arrack Godowns" a place within the Municipal limits of Trichinopoly under S. 63 (1) (a) of the old Municipal Act 4 of 1884 and under S. 83 (a) of the present Municipal Act 5 of 1920.

The facts are not disputed. The respondent is the proprietor, headmaster and manager of the Aryan Secondary School located in a building known as "Arrack Godowns" at a place called Teppakulam. The appellant is the Municipal Council of Trichinopoly represented by its Chairman. The respondent purchased the building from the Government (see Ex. C) for "school purposes only" for the price of Rs. 4,081-4-0. The Municipality assessed "Arrack Godowns" to property tax and realized from the respondent Rs. 297-4-2 for the years 1917 to 1921 by the issue of coercive process. The respondent claimed a refund of the amount from the Municipality on the ground that "Arrack Godowns" is exempt from taxation. The refund being refused, the respondent filed the suit out of which this second appeal arises to recover the amount with interest and also Rupees 1,000 being damages for trespass in execution of the illegal warrant issued to collect the tax in question. The District Munsif awarded the respondent a refund of all the taxes excepting the tax relating to the year 1917 which was disallowed as barred by limitation and also Rs. 500 as damages. This decree was confirmed by the Subordinate Judge. This second appeal has been filed by the Municipality against that decree.

The claim for the refund for the year 1917 does not now arise because the respondent did not file a cross-appeal in the lower Court against the Munsif's decree disallowing the claim. This second appeal relates only to (1) Rs. 208-10-9 property tax due for 8 half years collected under the provisions of the old Municipal Act 4 of 1884 and (2) Rs. 58-14-2. property tax for two half years collected under the provisions of the present Act 5 of 1920 and also to the damages awarded against the Municipality. I shall first deal with that part of the case which falls under S. 63 (1) (a), Act 4 of 1884. S. 63 (1) (a), (b) and (c) run as follows:

"If the Municipal Council notify, under S. 50 that a tax shall be levied on buildings or lands or both in the Municipality, the Chairman shall impose such tax on all buildings or lands, or both excepting (a) lighthouses, piers, wharves jetties, choultries, hospitals, dispensaries and other buildings or lands to the extent to which they are used for public, charitable or religious but not residential purposes, (b) burial and burning grounds and (c) buildings or lands belonging to the Municipal Council."

Under this section if the Municipality issues a notification under S. 50 of the Act it has the power to levy a tax on buildings or lands or both within the Municipality (referred to as property tax in the subsequent Act, that is, Act 5 of 1920) unless the buildings or lands fall

within the exceptions mentioned in Cls. (a) (b) and (c). The respondent claimed exemption from the tax on "Arrack Godowns" under Cl. (a) on the ground that the building is used for public, charitable purposes" as it was used for education which is a public and .also a charitable purpose. The argument of the respondent that the purpose is also charitable and on that ground also the building was exempt from liability to pay the tax was overruled by both the lower Courts. In this Court he has tried to support the decree also on the ground that the building should be considered as being used for charitable purposes also. In the view that I take of the case it will not be necessary to deal with this part of the argument.

The main question for consideration is whether the building, having regard to the facts of the case, can be said to be used for public purposes in the sense in which that expression is used in the Act. It is not denied by the appellant's learned advocate that the school, inasmuch as it is open to all the public and it imparts education, is used for a public purpose; but his argument is that unless the building is used exclusively for public purposes it does not come within the term "public purposes" as used in the section. In this case it is admitted that the respondent is entitled to appropriate for himself all the profits arising from the school after meeting the expenses of the management, salaries of teachers, etc. though he says in his evidence that there has been no profit all these years. It is argued that if the respondent makes profits for himself out of the institution, then though the purpose served by it is a public one, it cannot be said to be used for "public purposes." Various cases, English and Indian, were brought to my notice by both sides; but I do not propose to discuss them in detail as in my opinion the decision of the question should largely depend on the special facts of each case. The term "public purposes" has not been defined in the Act. As pointed out in *Hamabai* v. *Secretary of State* (1) at p. 1111 (*of* 13 *Bom. L. R.*), in English decisions, interpretations of the term "public purposes" are not uniform and it is difficult to extract any general principle from them applicable to all cases alike. Mr. Venkataramana Rao relies on *The Queen* v. *The Blackfriars' Bridge Company* (2) and *The Queen* v. *The Harrogate Commissioners* (3) to show that in England, in order to justify exemption from rateability under the Poor Relief Act, 43 and 44 Elizabeth, Ch. 2, Ss. 1 and 2, the claimant had to show that the building or land in question was used exclusively for a public purpose. I may observe—and this has been pointed out in the English decisions—that the exemption is not mentioned in the Act but it came to be recognized as a result of the decisions of Courts. These decisions, however useful they are in understanding the meaning of the term in a general sense, do not interpret the expression as used in any enactment. The strongest case relied on by the appellant is one reported in *Mayor, &c., of Essenden* v. *Blackwood* (4). In that case which related to exemption from rateability of a race course held by the respondent therein in trust for a racing club, it was held that the land could not be said to be "used for public purposes" within the meaning of S. 253, Victoria Local Government Act (1874), unless it was used exclusively for public purposes. The facts of that case showed that

> "there was on the part of the club, according to the true construction of their Act, a beneficial enjoyment of the land beyond that of the general public, and a pecuniary interest in the surplus rents and profits of the race course after providing for its maintenance and use: see the head note."

On the strength of this decision it is argued that inasmuch as the respondent in this case derives profits from the school, though the public is benefited by it as a place of education, the building cannot be said to be used for public purposes. This decision no doubt supports the appellant; but I am not quite sure whether the decision can be said to lay down a general test for the interpretation of the term "public purposes" applicable to all cases. The building in the case before us is used as a school for educational purposes, whereas the land in the case mentioned was used as a racecourse. It is difficult to say whether the learned Judges in *Mayor &c., of Essenden* v. *Blackwood* (4) would have applied the same considerations to the case if the land in it was devoted for quite a different purpose. In this connexion attention may be drawn to the often

(1) [1911] 12 I. C. 871.

(2) 112 E. R. 1428,
(3) 117 E. R. 741.
(4) [1877] 2 A. C. 574.

quoted observations of the Earl of Halsbury, Lord Chancellor, in *Quinn* v. *Leathem* (5), at p. 506:

> "There are", said his Lordship, "two observations" . . . . . which I wish to make and one is . . . . . that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

Obviously there is no logical connexion between the public purpose in the present case and the public purpose decided in *Mayor, &c., of Essenden* v. *Blackwood* (4) under the Local Government Act in Victoria. In my opinion the decision in *Mayor, &c., of Essenden* v. *Blackwood* (4), should not be applied in deciding this case.

The respondent relies on the decision in *Hamabai* v. *Secy of State* (1) in which it was held that resumption by the Government "to provide accommodation for Government officers" of land leased to a lessee fell within the meaning of the expression "public purpose" as used in the contract between the parties to that suit. This decision was upheld on appeal by the Privy Council in *Hamabai Foramjee* v. *Secy. of State* (6). As I have already said the Municipal Act does not define the expression and there are no decisions of this Court on the point. It does not seem to me that the legislature, when it intended to exempt from rateability buildings used for imparting education which is admitted to be a public purpose, intended to exclude only those institutions from which the headmaster derived no profits for himself. If that was the intention of the legislature that would have been explicitly so stated. Under the present Act 5 of 1920, as I shall presently show, when I deal with S. 83 of that Act, it is clear to my mind that the legislature exempts from rateability all educational institutions irrespective of the question whether the proprietor makes out of those institutions any private profit for himself or not. In the same way, I think all buildings used for educational purposes were intended to be exempted from payment of the Municipal tax under S. 63 (1) (a) also. I find from the evidence of Moulvi Syed Murthuza Sahib Bahadur, M. L. A., P. W. 5 in this case, that institutions similar to this in the same Municipality, namely the St. Joseph's College, the National College, Bishop Hebbar College and School, the Hindu Secondary School and the Islamia Secondary School, during the days it was in his management, were enjoying exemption and were not made to pay any property tax. I am referring to this evidence only to show how, in applying this section, the intention of the legislature was generally interpreted by the Municipality. I am unable to uphold the argument of the appellant on this point. In this view it is not necessary to discuss the question whether the school carried on in "Arrack Godowns" comes within the description of charitable institutions and can claim on that ground exemption from rateability. In my opinion the tax collected under Act 4 of 1884 from the respondent was rightly ordered to be refunded by the lower Courts.

Coming now to the propriety of the collection of the tax of Rs. 58-14-2 under Act 5 of 1920 we have to construe Cl. (a). S. 83, of that Act which says that the following buildings and lands shall be exempt from property tax.

> "Places set apart for public worship and either actually so used or used for no other purpose choulties, buildings used for educational purposes and libraries and playgrounds which are open to the public and from which no income is derived."

It will be observed that under this Act all the exemptions are grouped together in a separate section. It is argued by the learned advocate for the appellant, in Cl. (a), the descriptive clause "which are open to the public and from which no income is derived" applies to buildings used for educational purposes and libraries and playgrounds alike and since income is derived from "Arrack Godowns" the building does not fall within the exception and is clearly subject to property tax. I cannot agree with this construction of the clause. If this is the correct sense in which that part of the clause should be understood, then I can find no justification for the use of the word "and" between "purposes and libraries". If the legislature wanted to interpret that part of . Cl. (a), in the sense contended for

(5) [1901] A. C. 495=85 L. T. 289=50 W. R. 139=65 J P. 708=17 T. L. R. 749.
(6) A. I R. 1914 P. C. 20=27 I. C. 26=42 I. A. 44=39 Bom. 279.

by the appellant's learned advocate then the first "and" between "purposes and libraries" would have been dropped retaining only the "and" between 'libraries and playgrounds"; but that has not been done. In my opinion, the words in sub-S. (a), "which are open to the public and from which no income is derived" are referable according to the natural construction of the words only to 'libraries and playgrounds' and not to buildings used for educational purposes. It is therefore clear under S. 83 of the present Act that 'Arrack Godowns' is exempt from property tax on the ground that it is a building used for educational purposes even though the proprietor of it makes profit out of the school which he carries on in that building. I would therefore hold that this sum of Rs. 58-14-2 also was rightly ordered to be refunded by the lower Courts.

The next question relates to damages. In awarding damages the lower Courts have considered the conduct of the Municipality and the circumstances relating to the collection of the tax. The concurrent findings of the lower Courts as regards the liability to pay damages and the amount are based on the evidence in the case. I do not see sufficient reason to interfere with the findings of the lower Courts on these points. In the result the second appeal is dismissed with costs.

P.R.S./M.N. *Appeal dismissed.*

A. I. R. 1931 Madras 58

RAMESAM AND CORNISH, JJ.

V. Narasimha Iyengar—Appellant.

v.

Official Assignee of Madras and *others*—Respondents.

Original Side Appeal No. 14 of 1929, Decided on 17th January 1930, from judgment of Beasley, J., D/- 11th December 1928.

(a) Limitation Act, S. 10 — Directors of companies are not trustees for specific purpose.

Directors of companies are not trustees in whom the property of the companies has become vested in trust for any specific purpose within the meaning of S. 10 : 18 *Bom.* 119, *Foll.*; *A. I. R.* 1923 *Mad.* 578, *Expl.* and *A. I. R.* 1926 *Mad.* 109, *Dist.* [P 59 C 1]

(b) Companies Act, S. 235—Winding up order does not give right to liquidator to enforce time barred claim.

It is impossible to hold that a liquidator acquires a new right from the winding up order to enforce against the directors a claim which had already become time barred : *A. I. R.* 1927 *Lah.* 433, *Foll.* and *A. I. R.* 1925 *All.* 519, *not Foll.* [P 61 C 2]

V. Radhakrishniah—for Appellant.

T. M. Krishnaswami Iyer, K. Narasimha Iyer, S. E. Sankara Iyer, N. Sivaramakrishna Iyer, S. Parthasarathy and *V. K. Thiruvenkatachariar*—for Respondents.

Ramesam, J. — This is an appeal against an order of our brother Beasley, J., as he then was, dismissing an application of the Official Liquidator of the City Hygienic Milk Supply Co. Ltd., under S. 235, Companies Act, for an order compelling the directors of the company to pay certain amounts by way of compensation in respect of their acts of misfeasance, etc. Two points were raised before the learned Judge and both were decided against the applicant. The Official Liquidator appeals.

In appeal the two points that arise are : (1) whether directors of companies under the Companies Act are trustees for the purpose of S. 10, Lim. Act; and (2) if they are not trustees, from what date does limitation run.

Taking up the first point, it is now clear that, even in England in spite of occasional use of loose expressions to the contrary, it is now settled that directors of companies are not trustees. In *In re, Forest of Dean Coal Mining Co.* (1) Jessel, M. R., said at p. 451 :

" Directors have sometimes been called trustees, or commercial trustees, and sometimes they have been called managing partners. . . . . "

and at p. 453 :

" They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the company."

In *Flitcroft's* case (2), Bacon, V. C., no doubt said :

" That the relationship of trustees and cesti que trust subsists between the director of Joint Stock Companies and the shareholders, I do not entertain the slightest doubt."

But this statement is inconsistent with the remarks of Lord Justices in the Court of appeal and with later special judicial opinions. On appeal in the same case Jessel, M. R., said: " If directors who are quasi trustees for the company, etc." Brett, L. J., said : " They are trustees for the company not for the individual shareholders." But even this statement is too wide. Cotton, L, J.,

(1) [1879] 10 Ch. D. 450.
(2) [1882] 21 Ch. D. 519.

said : "They have misapplied funds as to which they stood in the position of trustees." In *In re, Faure Electric Accumulator Co.* (3), at pp. 150 and 151, Key, J., says :

"They certainly are not trustees in the sense of those words as used with reference to an instrument of trust, such as a marriage settlement or will. One obvious distinction is that the property of the company is not legally vested in them, etc."

In *In re Lands Allotment Co.* (4), Kay, L. J., says, at p. 639 :

"As directors they are not trustees at all. They are only trustees qua the particular property which is put into their hands or under their control, etc."

Lindley, L. J., says : "Although directors are not properly speaking trustees," etc. In *In re City Equitable Fire Insurance Co.* (5) Romer, J., observes: "To say that directors are trustees is a wholly misleading statement." It is unnecessary to refer to English decisions at greater length, for all that we are concerned with is whether they are trustees for the purpose of S. 10, Lim. Act.

In *Kathiawar Trading Co.* v. *Virachand Dipchand* (6) it was held by Sargent, C. J., and Bayley, J., that directors of companies are not trustees in whom the property of the companies has become vested in trust for any specific purpose. I entirely agree with this decision. It is contended that the purposes of the company are specific purposes within the meaning of the section. The purposes of the company are too wide and far from being specific, one would say they are very general purposes and even then it is doubtful whether it can be said that the property of the company is vested in the directors. Two decisions have been referred to by the learned advocate for the appellant as somewhat weakening the decision in *Kathiawar Trading Co.* v. *Virachand Dipchand* (6). These are *Kishtappa Chetty* v *Lakshmi Ammal* (7) and *Pachayappa Chetty* v. *Sivakami Ammal* (8). I have nothing to say as to the actual decisions in these cases, but I think that the statement of Schwabe, C. J., in the former of these cases namely, wherever there is control over money there is an express trust, a statement probably based upon the observations of Lord Esher, M. R. in *Soar* v. *Ashwell* (9), must be understood in the light of the other judgments of the Court of appeal in that case which show that "control" (in Lord Esher's judgment) must be regarded as synonymous with vesting. As to the decision in *Pachayappa Chetty* v. *Sivakami Ammal* (8) the facts are very plain and there is an express trust. I do not think that the remarks in these decisions affect the decision in *Kathiawar Trading Co.* v. *Virchand Dipchand* (6) with which I entirely agree. It follows therefore that directors can plead limitation.

Coming now to the second point: the question really turns upon whether entirely new rights with a new cause of action arises on the winding up of a company. That for certain purposes new rights may be conferred by the winding up of a company, there can be no doubt. One such well known case is the liability to pay calls as a contributory. Both English and Indian authorities are very clear on this matter; but it does not follow from this that the right of a liquidator under S. 235 is a case of a new right accruing by reason of the winding up. The corresponding section of the English Act of 1862 is S. 165 and it has been held by the House of Lords in *Cavendish Bentinck* v. *Fenn* (10) that that section creates no new rights but only provides a summary and efficient remedy. So also in the *City Equitable Fire Insurance Co.'s* case (5), Pollock, M R., said:

"That section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights; and I think that is abundantly shown by the *Coventry and Dixon's* case (11), etc."

In the last case James, L. J., observed:

"I am of opinion that that section does not create any new liability or any new right, but only provides a summary mode of enforcing rights which must otherwise have been enforced by the ordinary procedure of the Courts."

So far as contributories are concerned, we have got a specific section fixing the time when the amount is payable. S. 159 says that a contributory shall pay at the

(3) [1889] 40 Ch. D. 141=58 L. J. Ch. 48=59 L. T. 918=37 W. R. 116=1 Meg. 99.
(4) [1894] 1 Ch. D. 616=63 L. J. Ch. 291=7 R. 115=70 L. T. 286=42 W. R. 404=1 Manson 107.
(5) [1925] 1 Ch. 407.
(6) [1894] 18 Bom. 119.
(7) A. I. R. 1923 Mad. 578=72 I. C. 842.
(8) A. I. R. 1926 Mad. 109=91 I. C. 671.
(9) [1893] 2 Q. B. 390=4 R. 602=69 L. T. 585=42 W. R. 165.
(10) [1887] 12 A. C. 652=57 L. J. Ch. 552=57 L. T. 773=36 W. R. 441.
(11) [1880] 14 Ch. D. 660=42 L. T. 559=28 W. R. 775.

time when calls are made for enforcing liability. Naturally limitation runs from the time when calls are so made. We have no corresponding section in the case of liability for misfeasance under S. 235. On this matter two decisions of two Indian High Courts are in conflict, the decision in *In the matter of The Union Bank Allahabad* (12) and the decision in *Bhim Singh* v. *Basheshar Nath* (13), which follows an earlier decision of the Punjab High Court. Agreeing with the learned trial Judge, I think we should prefer to follow the decision of the Punjab High Court.

If the cause of action arises from the time when the misfeasance was committed, it is admitted that the application is barred whether Art. 36 or 120 applies. It is unnecessary to consider that question in this case.

Mr. V. K. Thiruvenkatachariar appearing for one of the directors argued that it is not all misfeasance for which directors may be liable under S. 235. This might be so; but it is unnecessary to consider this point in this appeal. The appeal fails and is dismissed with costs.

The learned Judge has given leave to the Official Liquidator to appeal and has authorized him to incur the expenses of the appeals from the assets of the company and we need not pass any further order as we agree with the discretion exercised by him. There will be one set of costs to the respondent.

Cornish, J.—S. 10, Lim. Act is founded upon the equitable doctrine explained by Bowen, L. J., in *Soar* v. *Ashwell* (9), that:

"time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust."

In my judgment it is settled by *Kathiawar Trading Co.* v. *Virchand Dipchand* (6), and the English authorities there cited that a director of a Joint Stock Co. is not, in the language of S. 10, "a person in whom property has become vested in trust for any specific purpose."

And a series of later English authorities confirms this view of the position of a director. In *Flitcroft's* case (2) at 534 Jessel, M. R., described directors as quasi trustees. In *Soar* v. *Ashwell* (9), Kay, L. J., observed:

"Generally speaking a person who is not an appointed trustee and whom it is sought to affect with a trust by reason of his conduct is not a trustee at all, although he may be liable as if he were, which is commonly expressed by saying that he is not an express but a constructive trustee."

And in *In re Lands Allotment Co.* (4), Lindley, L. J.. said:

"Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented, directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees, Kay, L. J., in *In re, Faure Electric Accumulator Co.* (3), p. 150,"

has pointed out an obvious distinction between the directors and express trustees, viz. that the property of the company is not legally vested in the directors. That the property and the company does not become "vested" in the directors by reason of such property being under their control, is also made clear by the authorities referred to in *Kathiawar Trading Co.* v. *Virchand Dipchand* (6). The dictum of Schwabe, C. J., in *Kishtappa Chetty* v. *Lakshmi Ammal* (7), that the word "vested" in S. 10, Lim. Act "does not mean anything more than properly having control of the property" is opposed to those authorities and appears to have been expressed without those authorities having been brought to his notice. Nor can it be said that the entrustment of the company's moneys to the directors for the general purpose of carrying on the business of the company is an entrustment for a specific purpose within the section. In *Khaw Sim Tek* v. *Chuah Haoi Guoh Neoh* (14) at p. 126 their Lordships of the Judicial Committee, discussing a Limitation Ordinance similar in terms to the language of S. 10 of the Indian Act stated :

"A specific purpose, within the meaning of S. 10 must be a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed."

It is clear upon these authorities that the directors in the matter before us cannot be regarded as express trustees, and, if they are not express trustees, S. 10, Lim. Act, does not operate to deprive them of their right to rely on any available provision or article in the Act as a bar to the liquidator's claim.

(12) A. I. R. 1925 All. 519=88 I. C. 785=47 All., 669.

(13) A. I. R. 1927 Lah. 433=100 I. C. 907=8 Lah. 167.

(14) [1922] 1 A C. 120.

The question then is, whether a bar is furnished either by Art. 36 or Art. 120 of the Act, these being the only articles which are suggested as having any application to the case. Admittedly, if the starting point of limitation is the alleged acts of misfeasance or breach of trust by the directors, the remedy would be barred whichever article governed it. But it has been contended by the learned counsel for the liquidator that the winding up order is the starting point of the liquidator's right of applying to the Court under S. 235 (1), Companies Act 7 of 1913. Reliance for this proposition is placed on *In the matter of the Union Bank, Allahabad, Ltd.*, where this view prevailed, and the reasons for it are given by Mukerjee, J., at p. 693 of the judgment as follows:

"The claim is by the liquidator, who had no existence at the dates on which the amounts claimed are alleged to have been misspent. If the liquidator is given permission by the law to claim these moneys, certainly it would be unfair and unjust to say that the claim became time barred before he came into existence."

But, with all respect, it may be pointed out that the right of application to the Court given by S. 235 is not confined to the liquidator ; it is given to a creditor and to contributories. And if creditors of a company or the shareholders, who are expected to be alive to their interests, choose to allow remedies which might be open to them in respect of losses attributable to misfeasance by the directors to become time barred, it seems to me that neither fairness nor justice requires that after the company has been ordered to be wound up, the liquidator shall have the right to enforce those remedies against the directors for the benefit of the creditors and contributories. It is however unprofitable to speculate upon the reasonableness of this particular aspect of S. 235, because it has been most authoritatively settled that the corresponding provision in S. 215 of the English Act, the Companies Consolidation Act, 1908, is a procedure section only and gives no new rights : see *In re City Equitable Fire Insurance Co.* (5), Sir Earnest Pollock, M. R says with reference to this section:

"I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights."

To the same effect is the judgment of Sargent, L.J., p. 527. This ruling is decisive of the question, and has been regarded as conclusive of it by a Bench of the Lahore Court in *Bhim Singh* v. *Bisheswar Singh* (13). In my opinion therefore it is impossible to hold that the liquidator acquired a new right from the winding up order to enforce against the directors a claim which had already become time barred whether under Art. 36 or Art 120, Lim Act. I think that the judgment of Beasley, J., should be upheld and that this appeal fails. I agree to the order of costs preferred by my learned brother.

P.R.S./M.N. - *Appeal dismissed.*

A. I. R. 1931 Madras 61

VENKATASUBBA RAO, J.

Gordon Woodroffe & Co.—Plaintiff.

v.

D. N. Radhakrishna—Defendants.

Civil Suit No. 464 of 1926, Decided on 26th August 1930.

(a) Contempt — Court — Auctioneer using sale proceeds and failing to deposit them is guilty of contempt.

Where an auctioneer appointed by the Court failed to deposit the sale-proceeds even after repeated adjournments granted to him and used the money for his own purposes, the auctioneer has committed a flagrant violation not only of the duty imposed upon him by the rules but has also disobeyed the successive orders made by the Court. In these circumstances he is guilty of contempt. [P 62 C 2]

(b) Madras High Court (Original Side Rules), O. 21, R. 5—Person in contempt—Court can attach property before term of imprisonment expires.

Under the Original Side Rules, O. 21, R. 5, the Court can attach the property of the person in contempt even before the term limited in the warrant of imprisonment expires. [P 64 C 2]

(c) Madras High Court—Powers in cases of contempt are same as those of English Courts.

Sequestration may issue after the man in contempt has been committed to jail, although the term of imprisonment has not expired. In such a case, sequestration could issue concurrently with attachment by way of double process. The High Court is invested with these powers of the English Courts : (*English Cases referred.*) [P 63 C 2]

(d) Interpretation of Statutes—High Court rules—Rules depriving High Court of jurisdiction must be strictly construed.

Rules of the High Court, which limit or extend common law rights must be expressed in clear unambiguous language, such as those which take away the jurisdiction of the High Court of justice. [P 64 C 2]

(e) Interpretation of Statutes—High Court rules—Existing rights or law is not repealed or modified unless contrary intention is clear.

No rule of the High Court operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the rule was passed, unless the intention is clearly expressed or necessarily implied. [P 64 C 2]

Advocate-General—for the Crown.
V. Radhakrishnayya—for Auctioneer.
Sell—for Plaintiff.

Judgment.—19*th August* 1930—The notice calls upon Mr. Ranganatham Naidu of Messrs. Dowden & Co., to show cause why he should not be committed for contempt. He appears and has been examined. He says that he is the sole proprietor of Messrs. Dowden & Co. It is immaterial for the present whether this statement is true or not. Messrs. Dowden & Co., used to be frequently appointed by the Court, auctioneers to sell properties. In this case, when the sale proclamation was settled the Master appointed them auctioneers to sell certain properties in execution of a mortgage decree. Mr. Ranganatham Naidu admits that the properties were sold by him in May 1930, and that he in due course received the sale proceeds. It was his obvious duty to have brought the money into Court. He failed to do so and the only excuse he is able to offer is that the Court was then closed. As the Master points out, this did not prevent him from bringing in the money. In any case it could have been brought on 14th July when the Court re-opened after the long recess. Again he made default and he swore to an affidavit on that day containing a report of the sale. Though it was sworn on the 14th, it was filed in Court only on the 18th. The case came up before the Master for the sale being confirmed and he discovered that the money had not been paid. After some adjournments Mr. Ranganatham Naidu finally declared before the Master on 28th July that he used the money for his own purposes, having utilized it in payment of his own creditors described in the Master's proceedings as Multanese creditors. Several orders were made by the Master requiring Mr. Ranganatham Naidu to bring in the money and owing to his continued default the case was posted before the Court. As it was represented to me that if time was granted the money would be forthcoming, I adjourned the case, I think, four times. I gave him every opportunity to fulfil his obligation and all he is able to say today is, that if another adjournment is granted money may be forthcoming. In his evidence he says that his liabilities far exceed his assets, and if that is true there is very little possibility of the money coming in. Whether the statement in regard to his financial position is true or not, I need not at present inquire. Mr. Ranganatham Naidu has committed a flagrant violation not only of the duty imposed upon him by the rules but has also disobeyed the successive orders made by the Master and by the Court. In these circumstances he is guilty of contempt and he shall stand committed to prison for a term of six months from this date, unless he shall at any time before the expiration of that term, comply in all respects with the order for payment and purge himself of the contempt, in which case, he may apply for his discharge from imprisonment : see for the form of the order *Oruganti Venkataratnam* v. *K.Desikachari* (1).

The notice issued to Mr. Ranganatham Naidu directs him to show cause not only why he should not be arrested but also why his properties should not be attached. As the learned Advocate-General has not been able to be present to day I adjourn this part of the motion to tomorrow.

It only remains to add that these proceedings were taken by the Court suo motu, as Mr. Sell who appears for the plaintiffs in the case, not being sure of his legal position, did not desire to take any part in them. As Mr. Ranganatham Naidu is in Court, I direct the bailiff to take him into custody.

20*th August* 1930—Place the party in contempt in Cl. B.

25*th August* 1930—I am asked to postpone delivering my judgment regarding attachment of properties, till tomorrow as the party in contempt has made arrangements to pay the money into Court before then. Let him be brought up to Court today.

26*th August* 1930—I adjourned this motion for considering the question whether the properties of the person in contempt could be attached. I directed notice to the Advocate General and have had the advantage of hearing his argument. Mr. Radhakrishnayya, the counsel for the party, contends that under the Original Side Rules, O. 21, R. 5, the Court cannot attach the property of the person in contempt until the term limited in the warrant of imprisonment (the period of six months in the present case) expires. It is the soundness of this contention that requires to be examined. The question is. What is the power possessed by

(1) [1919] 52 I.C. 448.

the High Court in regard to contempt independent of the Original Side Rules? Secondly, can such power be curtailed by the rules, in any event has it been so curtailed? As I shall show presently, the High Court has inherited the powers of the old Supreme Court, which in its turn, possessed the same power and authority as the Courts in England. What then was the extent of the jurisdiction and power of the English Courts? In *Perryman* v. *Dinham* (2), the defendant having been committed to the Fleet for not performing a decree, a sequestration was granted and the plaintiff was put into possession of the lands. The defendant objected that, he being in prison, the writ, amounting as it did to a double execution, was bad. This contention was overruled. In *Trigg* v. *Trigg* (3), the defendant being in contempt for not producing certain deeds, was taken on an attachment and turned over to the Fleet; nevertheless, a sequestration was ordered to issue against him. In *Dent* v. *Dent* (4), it was held that the Court had power to grant a sequestration, although no attachment had been issued. The question was more fully considered in *Miller* v. *Miller* (5). It was argued in that case that it was the universal rule in the Courts of Equity that before an order of sequestration was made, it should be preceded by the issuing of a writ of attachment. The learned Judge overruled this contention observing:

"I have looked into the cases and I do not find that this practice is so universal as stated."

The observations of Sir R. T. Kindersley in *In re The East of England Bank* (6), are cited in the judgment:

"If the practice is that in order to obtain a writ of sequestration, you must first get a writ of attachment, the effect is that there is no provision for sequestration in the case of persons who are not resident in England."

The attachment referred to in this case is, of course, the attachment of person. This case was followed in *Allen* v. *Allen* (7). Daniel states the law thus:

"It was also competent to the party claiming the benefit of the decree, where the disobedient person either could not be arrested upon the process, or, having been arrested, remained in prison without paying obedience to the Court, to issue a writ of sequestration, directing the commissioners therein named to sequester the personal property of the defendant and the rents and profits of his real estates, and to keep him from the enjoyment of them, till he had cleared his contempt: Daniel's Chancery Practice, Edn. 8. Vol. 1, p. 789."

The writ of sequestration referred to in the English books corresponds to what is known in this country as attachment of property. It is thus described in Edwards on Execution:

"The process of sequestration is a writ directed to certain persons, nominated by the person prosecuting the judgment or order, empowering them to enter upon the real estate of the disobedient person, and to receive, sequestrate, and take the rents and profits thereof, and also his personal estate, and keep the same under sequestration in their hands until he shall have performed the act required and cleared his contempt, 1888 Edn., p. 268."

The authorities I have cited show, that sequestration may issue after the man has been committed to jail, although the term of imprisonment has not expired. In such a case, sequestration could issue concurrently with attachment by way of double process.

This then was the extent of the power possessed by the English Courts. The High Court is invested, as I shall show, with the same authority and jurisdiction.

The Supreme Court at Madras was established by the Charter of 26th December 1800. By Cl. 5 of that Charter, a Court of record was constituted, to be called the Supreme Court of Judicature at Madras. By Cl. 8, that Court was invested with jurisdiction similar to the jurisdiction of the King's Bench in England. In the same way, it was also invested with the equitable jurisdiction of the kind possessed by the Court of Chancery. Cl. 31 of the Charter after enacting that the Supreme Court shall be a Court of Equity, proceeds to declare that it shall have the same power as the Court of Chancery in Great Britain, to administer justice and to compel inter alia obedience to the decrees and orders of the Court. The same clause very clearly provides that the Supreme Court shall exercise this power, as far as possible, in the same manner and to the same extent, as the High Chancellor of Great Britain. Thus the power of the Supreme Court to punish for contempt was extensive as that possessed by the Court in England. The High Court has inherited this

(2) [1641] 17 Car. 1=21 E.R. 535.
(3) [1759]Dic. 325=21 E.R. 294.
(4) [1867] 1 P. & D. 366=36 L.J. P. & M. 361 =15 L.T. 635=15 W.R. 591.
(5) [1870] 2 P. & D. 54=39 L.J. Mat. 38= 22 L.T. 418=18 W.R. 585.
(6) 10 Jur. (n.s.) 1003.
(7) [1885] 10 P. & D. 187=54 L.J.P. 77=33 W.R. 826.

power of the Supreme Court. S. 1, High Courts Act of 1861, says that it shall be lawful for His Majesty by Letters Patent to establish a High Court of Judicature at Madras. S. 8 provides that upon the establishment of such High Court, the Supreme Court and the Court of the Sudder Adawlut and Fouzdarry Adawlut shall be abolished. S. 9 deals with the jurisdiction and powers of the High Courts. It provides inter alia, that, save as by such Letters Patent may be otherwise directed and without prejudice to the legislative powers of the Governor-General of India in Council, the High Court to be established shall have and exercise all jurisdiction and every power and authority in any manner vested in any of the abolished Courts at the time of their abolition.

In pursuance of this Act, a Letters Patent was issued and while it recites in its preamble the provisions of S. 9 it does not restrict the power and jurisdiction of the High Court to punish for contempt. Nor has its power and authority, in so far as it is material to the present purpose, been curtailed or affected by any enactment of the Governor-General in Council. Finally, S. 106, Government of India Act, which repeals the High Courts Act, provides that the several High Courts shall have all such jurisdiction, powers and authority as are vested in them at the commencement of the Act. The result is, that the High Court has the same power in this respect as was possessed by the old Supreme Court.

The next question that arises relates to the effect of O. 21, R. 5 of the Original Side Rules. It is under Cl. 37, Letters Patent, and Ss. 122 and 129, Civil P. C, that the High Court is empowered to frame rules. It is in respect of proceedings in civil cases that power to make rules is conferred by these provisions. It has been suggested that the present motion to commit for contempt is a criminal matter and that the rules made by the High Court in so far as they deal with matters of criminal nature are ultra vires. It is unnecessary to discuss this position, nor the cases, such as, *O'Shea* v. *O'Shea* (8), that have been cited on the point. I shall assume without deciding, that O.21, R. 5 of the Original Side Rules is intra vires. Then, another question arises. The power that is conferred in regard to making rules is in respect of regulating procedure. If R. 5 has the effect of restricting the power of the High Court as suggested by the party's counsel, can it be treated merely as a rule of procedure? As I have come to the conclusion that, on its true construction the rule has no such effect, it is unnecessary to decide this point. R. 4 provides that the Court may commit the person in contempt to jail for such a limited time as it thinks fit. R. 5 then goes on to say that if at the end of the time limited in the warrant of imprisonment, the party persists in his disobedience, his property may be attached. The question is: What is the effect of this rule? It merely enacts that, on the expiry of a certain period, the Court may issue a certain process. This shows how the discretion of the Court may ordinarily be exercised. In my opinion, no greater effect should be given to this rule. It would be wrong to hold by mere inference, that the power which the Court undoubtedly possesses is taken away:

> "Statutes which limit or extend common law rights must be expressed in clear unambiguous language, such as those which take away the jurisdiction of the High Court of Justice" 27: Hals. p. 150."

> "No statute operates to repeal or modify the existing law, whether common or statutory, or to take away rights which existed before the statute was passed, unless the intention is clearly expressed or necessarily implied: p. 167."

Here we are not dealing with a statute, but with a rule made by the High Court, and these maxims apply with greater force. It is not only natural but proper to construe the rule in question, in the sense that it is merely regulative of the discretion which undoubtedly vests in this Court. I have therefore come to the conclusion that attachment can issue against the property belonging to the party, although he is still in jail. I was accordingly about to direct attachment but the party has cleared his contempt by paying the amount to the plaintiff's attorneys. They have reported satisfaction of the decree to the extent of Rs. 34,975, the entire sale proceeds (I having disallowed the party in contempt not only the auctioner's remuneration but also his charges for actual expenses incurred). The contempt having been cleared, there is no further need to attach his properties.

P.R.S./M.N. *Order accordingly.*

(8) [1890] 15 P. & D. 59=59 L. J. P. 47=62 L.T. 713=38 W.R. 374=17 Cox.C.C. 107.

A. I. R. 1931 Madras 65

CURGENVEN AND
BHASHYAM AYYANGAR, JJ.

Official Assignee of Madras—Appellant.

v.

Frank Johnson, Sons & Co. Ltd. and *another*—Respondents.

Original Side Appeal No. 41 of 1928, Decided on 28th July 1930, from judgment of Waller, J., D/- 6th February 1928, in Insolvency Application No. 431 of 1924.

(a) Contract — Construction — Stipulation cannot be implied because it is reasonable—Implication can be made if it is necessarily intended.

The principle is well settled that a stipulation not expressed in a written contract should not be implied merely because the Court thinks that it would be a reasonable thing to imply it. Such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made: *Lazarus* v. *Cairn Line of Steamships Ltd.* (1912) 106 *L.T.* 378, *Ref.* [P 66 C 1]

(b) Contract—Construction — Sole agency on commission for specified area and period —Principal not expressly bound to send goods—Principal cannot be impliedly bound.

A contract was one of sole agency; the agency was confined to a specified area; the agent was to sell for commission; the contract was for a fixed period determinable earlier by either party on notice and there was no express term obliging the principal to send any goods to the agent for sale in his area.

Held: that under these circumstances no implied contract binding the principal to supply the agent with goods could be discovered: *Rhodes* v. *Forwood*, (1876) 1 *A.C.* 256, *Foll.*; *Turner* v. *Goldsmith*, (1891) 1 *Q.B.* 544, *Dist.* [P 67 C 1]

(c) Contract—Construction — Whether stipulation should be implied depends on agreement and not nature of consideration.

Whether a stipulation should or should not be implied is a question relating to the construction of the agreement and does not depend on the nature of its consideration. [P 67 C 1]

S. Duraiswami Iyer and *V. Varadaraja Mudali*—for Appellant.

R. N. Aiyangar—for Respondents.

Bhashyam Ayyangar, J.—This is an appeal by the Official Assignee and as such the assignee of the estate and effects of one Kancherla Krishna Rao an insolvent, against an order of Waller, J., dismissing an application made by him in the said insolvency, for an order directing both or either of the two respondents, namely, Frank Johnson, Sons & Co., Ltd., and the United Refineries, Burma, Ltd., to pay him damages for breach of agreement. The United Refineries, Burma Ltd., respondent 2, was an incorporated company formed in 1920 by the Indo-Burma Oilfields Ltd. and the Yomah Oil Co., Ltd., who were both engaged in the production of crude oil in Burma, for erecting, maintaining and operating a refinery for crude petroleum oil and marketing the products of such refinery, and it had its registered office in Burma. Frank Johnson, Sons & Co., Ltd., respondent 1, who apparently did business both at Rangoon and Calcutta, had been appointed the sole selling agents in India of the petrol and other products which might be produced by respondent 2. The agreement which we have to consider was in writing and entered into on 12th December 1921 between the present insolvent and respondent 1, the latter acting as selling agents of respondent 2. It consisted of two memoranda, by the first of which Kancherla Krishna Rao undertook to purchase debenture stock in the Indo-Burma Oil Fields Ltd., for £20,000, and respondent 1, in consideration thereof, appointed him as the sole distributing agent for the sale of the products of respondent 2, in the presidency of Madras including its Native States, French possessions and the colony of Ceylon, for a period of ten years. Memorandum 2 laid down and defined the terms of this agency and fixed the rights and liabilities of the parties thereto in detail.

It is common ground that Kancherla Krishna Rao paid for the debentures undertaken to be purchased by him, but no products of respondent 2 were sent to him for sale. It was alleged on behalf of respondent 2 and not disputed by the appellant, that, for some reason, respondent 2 was unable to produce and did not produce any petrol or other products on any commercial scale. The question now emerges and it is the only one argued before us, whether Kancherla Krishna Rao was, and the appellant, who now represents him, consequently is, entitled to hold both or either of the respondents liable in damages for their omission or failure to supply him with the products for the sale of which he obtained the sole agency.

Now, the primary question of liability undoubtedly turns on the construction of the written agreement above referred to. And that agreement, notwithstanding its formal and detailed nature, does not con-

tain any clause imposing any obligation on either respondent to supply any products to Kancherla Krishna Rao, the agent for sale. If there was no undertaking or promise by the respondents to supply goods or products, it is obvious that no damages could be claimed by Kancherla Krishna Rao, or, the appellant, against respondent 1 or, much less, respondent 2, for any omission or failure to supply them. The learned advocate for the appellant has contended that, although the written agreement is silent on the point, a promise for the supply of products should be read into it by implication under the circumstances of this case. When he was pressed to particularize the promise which he wanted to have implied in the agreement. with reference to the quantity of the various products and the terms of their supply, he could only say that a reasonable quantity of the products produced by respondent 2 should have been supplied to Kancherla Krishna Rao.

Whether an implication should or should not be made in a particular case depends on and must be answered with reference to the special facts and circumstances thereof, but the principles which should guide us in the matter have been laid down in several leading cases. The judgment of the learned trial Judge refers to the most important of them. The principle is well settled that a stipulation not expressed in a written contract should not be implied merely because the Court thinks that it would be a reasonable thing to imply it. Such an implication can be made only if, on a consideration of the terms of the contract in a reasonable and business manner, the Court is satisfied that it should necessarily have been intended by the parties when the contract was made: see *Hamlyn* v. *Wood* (1) and *Lazarus* v. *Cairn Line of Steamships Ltd.* (2). Is it possible in the present case to say that, when the present insolvent and respondent 1 entered into the contract in question, the former necessarily bargained for, or the latter held out, any definite obligation that respondent 2 should refine and send out to the insolvent any products of the kind referred to in the agreement? It seems impossible to answer this question in the affirmative. It will be observed that the implications sought for will be inconsistent and collide with one of the important terms in the agreement, namely that either party was at liberty to cancel or terminate the agency by merely giving three months' notice in writing. The agreement must, no doubt, have proceeded on the expectation that respondent 2 would produce a large quantity of refined products and be in a position to supply Kancherla Krishna Rao with any required quantities thereof for commission sale; but the question is whether there was any and what bargain on these matters. It is not suggested that there was any negotiation or understanding as to the quantities of the products which respondent 2 should supply or the present insolvent should receive, or as to any other particulars regarding their consignment. This omission, no less than the absence of any stipulation in the formal agreement on such an important point, clearly cuts at the root of the implication urged on behalf of the appellant.

Going to the authorities, it may at once be mentioned that *Ogdens Ltd.* v. *Nelson* (3), cited by the learned advocate for the appellant, does not really help us. The facts of that case were essentially different and, although there is a reference to the principle of implication in the judgment of Collins, M. R., in the Court of appeal, the decision really turns on the construction of an express stipulation as explained and made clear by the judgments delivered by the House of Lords in the same case on further appeal: see *Ogdens Ltd.* v. *Nelson* (4). Damages were granted in that case only for the breach of an express stipulation.

The other material cases are *Turner* v. *Goldsmith* (5) and *Rhodes* v. *Forwood* (6). It was argued for the appellant that the facts of the present case more nearly resemble those in *Turner* v. *Goldsmith* (5), which the trial Judge has distinguished in his judgment, than *Rhodes* v. *Forwood* (6) which has been followed by him, but we are not prepared to accept this argument.

(1) [1891] 2 Q. B. 488=60 L. J. Q. B. 734=65 L. T. 286=40 W. R. 24.
(2) [1912] 106 L. T. 378=17 Com. Cas. 107=56 S. J. 345=28 T. L. R. 244.
(3) [1904] 2 K. B. 410.
(4) [1905] A. C. 109=74 L. J. K. B. 433=92 L. T. 478=53 W. R. 497=21 T. L. R. 359.
(5) [1891] 1 Q. B. 544=60 L. J. Q. B. 247=64 L. T. 301=39 W. R. 547.
(6) [1876] 1 A. C. 256=47 L. J. Ex. 396=34 L. T. 890=24 W. R. 1078.

It seems to us that the present case is entirely on all fours with *Rhodes* v. *Forwood* (6). Here, as there, the contract was one of sole agency ; the agency was confined to a specified area ; the agent was to sell for commission; the contract was for a fixed period determinable earlier by either party on notice; and there was no express term obliging the principal to send any goods to the agent for sale in his area. The House of Lords held under these circumstances that no implied contract binding the principal to supply the agent with goods could be discovered. In the other case, *Turner* v. *Goldsmith* (5), the facts are materially different. In the first place the relationship between the principal and the agent appears to have there approximated more to that of an employer and a servant than a manufacturer and a local commission agent for sale. Compare the observations of Phillimore, J., in *Northey* v. *Trevillion* (7). Secondly, although the contract in that case resembles that in *Rhodes* v. *Forwood* (6) and the present case in being for a fixed term of years, there is this essential difference that, whereas in the latter the parties provided for the termination of the agency by notice even within the prescribed period, there was no such provision in the former, and the contract was terminable by notice only as from the expiry of the period. Thirdly, the principal in *Turner* v. *Goldsmith* (5) employed the agent for sale not merely of the goods manufactured by him but of those which he could have procured, by purchase or otherwise, for sale. It appears to us therefore that the present case is dissimilar to *Turner* v. *Goldsmith* (5) and falls within the scope of the decision in *Rhodes* v. *Forwood* (6).

It was pressed on behalf of the appellant that the purchase of the debentures of the Indo-Burma Oil Fields Ltd., for £20,000 which is recited in the agreement in question as consideration for the appointment of the present insolvent as agent makes an essential difference, but we think it has no bearing as to whether or not a stipulation to supply goods should be implied. Whether a stipulation should or should not be implied is a question relating to the construction of the agreement and does not depend on the nature of its consideration.

(7) [1902] 18 T. L. R. 648=7 Com. Cas. 201.

It must be held in the result that the order appealed against is right. The appeal is dismissed with costs (one set).

P.R.S./M.N. *Appeal dismissed.*

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* A. I. R. 1931 Madras 67

ANANTAKRISHNA AYYAR AND CORNISH, JJ.

(*Satti*) *Ramanna*— Plaintiff —Appellant.

v.

(*Padala*) *Amireddi* and *others*—Defendants —Respondents.

Appeal No. 87 of 1929 and Civil Revn. Petn. No. 901 of 1929, Decided on 13th March 1930, from decree of Dist. Judge, East Godaveri, in Appeal Suit No. 55 of 1927.

*** Civil P. C. (5 of 1908), O. 7, Rr. 10 and 11—Return of plaint—On correct valuation of plaint suit beyond jurisdiction of Court—Court must return plaint for presentation to proper Court and should not ask plaintiff to amend valuation with a view to direct him to pay additional court-fee and then to return plaint.**

When the Court finds that on the correct valuation the plaint is not cognizable by it the proper thing to be done is to return the plaint so that it may be presented to the Court having jurisdiction. It will be for the Court having jurisdiction to entertain the plaint, to consider whether proper court fee has been paid and if not paid, to proceed in accordance with the powers conferred upon it by law for that purpose. If a Court finds that it has no jurisdiction, then to say that it has jurisdiction to ask the plaintiff to amendhis valuation with a view to direct him to pay additional court-fee and then return the plaint, would seem to suggest that a Court not having jurisdiction has got jurisdiction to do something which is prima facie the duty and function of the proper Court : *A. I. R.* 1927 *Bom.* 257; 8 *Mad.* 62; 8 *Bom.* 313 (*F.B.*) and 7 *Mad.* 171, *Rel. on.* 7 *Bom.* 487, *not Foll.*

[P 69 C 1]

M. Appa Rao—for Appellant.

C. Rama Rao—for Respondents.

Judgment.—This appeal and the revision petition have been filed by the plaintiff in O. S. No. 433 of 1926 on the file of the District Munsif of Rajahmundry. The plaint was for a declaration that the release deed dated 23rd March 1924, executed by the plaintiff and some other defendants in favour of defendant 1 was not valid in law but fraudulent and void and that it could not bind the plaintiff, for dissolution of partnership, and for other consequential reliefs. The valuation put in the plaint was a sum of Rs. 100 (vide para. 13) and court-fee

stamp of the value of Rs. 11-4-0 was affixed to the plaint. On objection taken by the defendant, the Court under S. 12 of the Court-fees Act, enquired into the question of the proper valuation of the plaint and came to the conclusion that the valuation of Rs. 100 mentioned by the plaintiff was not the correct valuation. The trial Court came to the conclusion that the valuation should be Rs. 56,919/2/3 in addition to another sum of Rs. 2318/6/0. It accordingly passed the following order:

"Before the suit is returned for presentation to proper Court, the plaintiff will have to pay the court-fee on Rs. 56,919/2/3 mentioned above plus Rs. 2,318/6/0 the amount of consideration paid for the release deed";

and gave time to the plaintiff to comply with the said order. The plaintiff not having complied with the said order, the Court by an order of a later date rejected the plaint, and directed the plaintiff to pay the defendants' costs on the basis of the valuation in the plaint. The plaintiff preferred an appeal to the District Court of Rajahmundry. The learned District Judge agreed substantially with the decision of the District Munsif on the question of the proper valuation of the plaint. The learned District Judge however thought that instead of the plaintiff having to value the plaint and pay court-fee on the sum of Rs. 56,919/2/3 as mentioned in the trial Court's order, it was enough for the plaintiff to value his plaint as 5/6ths of the said amount, being the shares of the plaintiff and the other defendants who executed the release deed in question in the partnership. He accordingly modified the trial Court's order in that respect, and directed that the case should go back to the District Munsif in order that the District Munsif might call upon the plaintiff to pay court-fee calculated on that sum within a reasonable time. Against that order the plaintiff has preferred the present C. M. A. and in the alternative he has also filed a C. R. P. On his behalf the learned advocate argued that having regard to the allegations in the plaint as a whole, the plaint should be taken to be simply one for the taking of accounts, and not to set aside or cancel a document within the meaning of S. 7, Court-fees Act as recently amended. The learned advocate took us through the substantial portions of the plaint, submitted that that must be taken to be the real nature of the plaint. We are unable to agree with him in that contention. The first prayer asked for in the plaint makes it clear that the plaintiff wants "a declaration that the release deed is not valid in law, that it is fraudulent and void and that it is not binding on the plaintiff." With this prayer before us, it is impossible to dispute the finding of the lower Courts, and we accordingly accept the finding of the lower appellate Court that the correct valuation of the plaint is the amount mentioned by the lower appellate Court.

The second question raised by the learned advocate was this: Even assuming the valuation fixed by the lower appellate Court to be correct, he argued that the proper order to be passed in this case is not to direct the plaintiff to amend his plaint and to pay court-fee on the valuation arrived at by the lower appellate Court under S. 12, and then to return the plaint for presentation to the proper Court. The learned advocate argued that on a proper construction of O. 7, Rr. 10 and 11, Civil P. C., the preliminary point which the Courts have to consider is to see whether having regard to the proper valuation, either mentioned in the plaint or arrived at by it, the Court has got jurisdiction to entertain the plaint. If it finds that it has no jurisdiction, then the proper provision of law to be proceeded under, is O. 7, R. 10, which states that the plaint shall be returned to be presented to the Court in which the suit should have been instituted, having regard to its proper valuation. It was however argued on behalf of the respondent that that was not the view apparently taken by a learned Judge of this Court in the case reported in *Kandaswami Goundan* v. *Subbai Goundan* (1). We are not clear that the exact point that we are called upon to decide at present in this case was the point that had to be decided by the learned Judge in that case. We find however that the view of the Bombay High Court in *Ganesh Tavanappa* v. *Tatya Bharnappa* (2), and that of this Court in *Kandu* v. *Konda* (3), supports the contention of the learned advocate

(1) A. I. R. 1924 Mad. 646=77 I. C. 781.
(2) A. I. R. 1927 Bom. 257=101 I. C. 343=51 Bom. 236.
(3) [1885] 8 Mad. 62.

for the appellant. When a Court finds that on the correct valuation, the plaint is not congnizable by it, it seems to us that the proper thing to be done is to return the plaint so that it may be presented to the Court having jurisdiction. It will be time enough for the Court having jurisdiction to entertain the plaint to consider whether proper court-fee has been paid, and if not paid, to proceed in accordance with the powers conferred upon it by law for that purpose. If a Court finds that it has no jurisdiction, then to say that it has jurisdiction to ask the plaintiff to amend his valuation with a view to direct him to pay additional court-fee and then return the plaint, would seem to suggest that a Court not having jurisdiction has got jurisdiction to do something which is prima facie the duty and function of the proper Court. This question seems to have been decided in effect in the case reported in *Kandu* v. *Konda* (3). That was somewhat similar to the present one. There the learned Sir Charles Turner, C. J., and Muthuswami Iyer, J., had a case where the District Munsif, on finding that the value of the relief claimed in the plaint was understated by the plaintiff arrived at his own conclusion regarding proper valuation under S. 12, Court-fees Act. Then on finding that on the proper valuation, the plaint was not cognizable in his Court, he directed that the plaint should be returned to the plaintiff for presentation in a superior Court. On appeal, the learned Subordinate Judge was of opinion that in the circumstances the District Munsif should have dismissed the suit. The matter came up before the High Court. This was what their Lordships said at p. 63:

"A commissioner was appointed to make a valuation of the property in the possession of the anandravans; he reported that the value was Rs. 6,400. The Munsif accepted the commissioner's valuation, and holding that the value of the subject matter was in excess of the pecuniary limits of his jurisdiction, returned the plaint for presentation in a superior Court."

Then after observing that the Subordinate Judge held that the Munsif should have dismissed the suit, their Lordships say that the decision in *Jagjivan Javhardas Seth* v. *Magdum Ali* (4), on which the Subordinate Judge relied, has been overruled by a Bench of three Judges of the same Court in *Prabhakar Bhat* v. *Visvantha Pandit* (5), in accordance with the decision of this Court, in *Jivraju* v. *Purushotham* (6). They held that the Munsif when he found that on a proper valuation he had no jurisdiction to entertain the suit was right in having directed the return of the plaint, and that the Subordinate Judge was wrong in holding that the Munsif ought to have dismissed the suit. This is also what the learned Judges of the Bombay High Court say in the case reported in *Ganesh Thavanappa* v. *Tatya Bharnappa* (2). We therefore think that the proper order that should be passed in this case, as we accept the finding of the learned District Judge as regards the proper valuation of the plaint in question, is this. The orders of the lower Courts will be modified; the records will be sent to the District Munsif's Court, so that the District Munsif may return the plaint on the finding already referred to that on a proper valuation of the reliefs claimed in the plaint, the same is beyond his jurisdiction ; and it would be open to the plaintiff to do what he likes with the plaint so returned to him.

As the main dispute in the case was as regards the proper valuation, and as the appellant has failed in that point we direct that he should pay the respondents' costs of the appeal in this Court. We do not interfere with the order as to costs passed by the lower Courts. We pass no order as to costs in the revision petition.

P.R.S./P.N. *Order accordingly.*

(4) [1883] 7 Bom. 487.
(5) [1884] 8 Bom. 313 (F.B.).
(6) [1884] 7 Mad. 171.

A. I. R. 1931 Madras 69

CORNISH, J.

Bethasami Naicken and *another* — Plaintiffs—Petitioners.

v.

Nagammal and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 685 of 1929, Decided on 28th March 1930, from order of Dist. Munsif, Periakulam, D/- 25th February 1929.

(a) Court-fees Act (1870), S. 7 (4) (b) and (c)—Suit held to fall under S. 7 (4) (c) proviso as amended (Madras) in 1922 and not S. 7 (4) (b).

Where the plaint sets out a claim by the plaintiffs in the alternative characters of members of a joint family or of tenants-in-common for a declaration that the defendants had no

right in certain immovable property, and for a permanent injunction, and contains the further prayer for a partition of a 2/3 share in items of immovable property in the event of the Court holding that plaintiffs were tenants-in-common with a co-tenant since deceased, the case falls within proviso to S. 7 (4) (c) as amended by Madras Court-fees Act (1922) and does not fall under S. 7 (4) (b). [P 70 C 1]

(b) Civil P. C. (5 of 1908), O. 7, R. 10—Court discovering valuation to be beyond its jurisdiction should at once return plaint.

The Court should return the plaint at once when it discovers that the valuation is beyond its jurisdiction and should not refuse to return it until plaintiff had paid the proper court-fee: 8 *Mad.* 62 ; 41 *Mad.* 701 ; *A. I. R.* 1927 *Bom.* 257 and *A. I. R.* 1931 *Mad.* 67, *Foll.*; *A. I. R.* 924 *Mad.* 646, *not Foll.* [P 70 C 2]

U. S. Ramaswami Iyer—for Petitioners.

B. Sitarama Rao—for Respondents.

Judgment. — The question which arises in this Civil Revision petition is whether a sufficient court-fee on a plaint has been paid. The plaint sets out a claim by the plaintiffs in the alternative characters of members of a joint family or of tenants-in-common for a declaration that the defendants had no right in certain immovable property, and for a permanent injunction. The plaint contained the further prayer for a partition of a 2/3 share in items of immovable property in the event of the Court holding that plaintiffs were tenants-in-common with a co-tenant since decleased. The plaintiffs contended that S. 7, Cl. 4 (b), Court-fees Act, governed the valuation of the property for the purposes of court-fee. The District Munsif rejected that contention, and I think he was right. By S. 7 (4) (c), Court-fees Act, as amended by the Madras Court-fees Act, 1922, it is provided that in suits coming under sub-Cl. (c) (which refers to suits to obtain a declaratory decree or order where consequential relief is prayed), where the relief sought is with reference to any immovable property, the valuation shall not be less than half the value of the immovable property calculated in the manner provided for by paragraph (v), S. 7. This means that the value is to be calculated on the market value of the property. The plaint undoubtedly contained a prayer for a declaratory decree and consequential relief in respect of a claim to immovable peoperty, and the proviso to S. 7, Cl. 4 (c), Court-fees Act therefore applied.

A second point arises out of the order of the District Munsif refusing to return the plaint until the plaintiffs had paid the proper court-fee upon the valuation of the property made by the commissioner appointed for that purpose. The District Munsif justified his order by the ruling of Krishnan, J., in *Kandasami Goundan* v. *Subbai Goundan* (1), where the learned Judge said that the Munsif was not justified in returning a plaint which was not properly stamped. It is to be observed, however, that the learned Judge's attention does not appear to have been drawn to *Kandu* v. *Konda* (2), where it as held that the Munsif having discovered after enquiry that the valuation of the lands in suit was beyond his jurisdiction adopted the correct procedure in returning the plaint. Neither was Krishnan, J's. attention apparently drawn to the remarks of Sadasiva Ayyar, J., in *Kannuswami Pillai* v. *Jaghthambal* (3) which says of O. 7, R. 10, Civil P. C.:

"I think it is clear that the legislature intended that as soon as the Court arrives at the conclusion at any stage of the case that the suit should have been instituted in some other Court, the plaint should be at once returned to be presented to the proper Court."

This principle has been accepted by Jackson, J. in a case reported in *Ranganatha Iyengar* v. *Sundararaja Iyengar* (4), and in a case *Ramanna* v. *Amireddi* (5) recently heard before Aanantakrishna Ayyar and myself. It is also supported by the observations of Fawcett, J. in *Ganesh Tavanappa* v. *Tatya Bharnappa* (6) at p. 241 (of 51 *Bom.*). On the balance of authority therefore I think the procedure which was followed by the District Munsif in this case was wrong, and that he should have returned the plaint at once when he discovered that the valuation was beyond his jurisdiction.

The learned counsel for the respondents has, however, argued that the Munsif had no right to return the plaint until it was properly stamped. And he has propounded an argument on S. 28, Court-fees Act, which says that no document which ought to bear a stamp shall be of any validity unless and until it is properly stamped. But I think that this does not mean anything more than that a plaint until properly stamped is not

(1) A. I. R. 1924 Mad. 646=77 I. C. 781.
(2) [1885] 8 Mad. 62.
(3) [1918] 41 Mad. 701=46 I. C. 265.
(4) A. I. R. 1930 Mad. 699=126 I. C. 111.
(5) A. I. R. 1931 Mad. 67.
(6) A. I. R. 1927 Bom. 257=101 I. C. 34 =51 Bom. 236.

effectual as a plaint for the purposes of the suit. It is not the less a plaint because it is not properly stamped. The petition is accordingly dismissed in part and allowed in part. In the circumstances, each party will bear his own costs.

P.R.S./P.N. *Revision dismissed.*

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*A. I. R. 1931 Madras 71

ANANTAKRISHNA AYYAR AND SUNDARAM CHETTY, JJ.

M. Raghavalu Naidu—Plaintiff.

v.

Thandaroya Pillai and *another*—Defendants.

Civil Ref. No. 8 of 1929, Decided on 15th August 1930, made by Dist. Munsif, Vellore, in Small Cause Suit No. 66 of 1929.

***(a) Civil P. C. (5 of 1908), O. 46, R. 1—Subordinate Court cannot compare soundness of views on question of law taken by High Court to which it is subordinate with the views of other High Courts—Court doing that in order of reference—Reference was returned for making proper order of reference if necessary—Practice—Precedents.**

It is not open to a subordinate Court to compare soundness of the views taken by the High Court to which it is subordinate on a question of law with the views of the other High Courts and doubt or decline to follow the same on the ground that the former do not seem to be as sound as the latter. [P 72 C 1]

Where the Subordinate Court in an order of reference compared the soundness of the views on a question of law contained in a decision reported in an unauthorized series of the High Court to which he was subordinate with those of the other High Courts the reference was returned with the remark that the Court may make a proper reference if deemed necessary; *A. I. R.* 1915 *P. C.* 15 and 30 *Bom.* 226, *Rel. on.*; *A. I. R.* 1926 *Mad.* 1011; 28 *All.* 262; *A. I. R.* 1926 *Rang.* 175 and *A. I. R.* 1923 *Mad.* 562, *Ref.* [P 72 C 2]

(b) Practice — Precedents — Decision of High Court applicable to facts proved—Subordinate Courts must follow them.

Subordinate Courts are bound to follow decisions of the High Court to which they are subordinate if the decisions, according to their view, are applicable to the facts proved before them: *A. I. R.* 1915 *P. C.* 15, *Foll.*

If there are two decisions of a High Court, one of a single Judge and another of a Bench composed of two Judges, then, unless the subordinate Court found some grounds for distinguishing the one decision from the other, it would be bound to follow the decision given by the Bench.

[P 71 C 2; P 72 C 1]

A. C. Sampath Iyengar and *T. R. Srinivasa Ayyar*—for Plaintiff.

Ch. Raghava Rao and *N. K. Vijiaraghavachari*—for Defendant 1.

Judgment.—In a case pending before the learned District Munsif of Vellore a question of law arose for decision. On that question of law, it would appear from the letter of reference of the learned District Munsif that the decisions of the High Courts of Allahabad and Rangoon in two cases reported in the *A. I. R.* series were contrary to the decision of the Madras High Court in the case reported in *Subbier* v. *Moideen Pichai* (1). The learned District Munsif has made the present reference to the High Court to have the question of law decided for guidance in the case before him. When this reference came on for hearing, our attention was drawn to certain passages occurring in the letter of reference of the learned District Munsif, and as we consider that before proceeding further we should say what we consider to be proper with reference to those passages, we proceed at once to set out in extenso the said passages from the letter of reference. In para. 9, this is what he states :

"On behalf of defendant 1 *Pethu Naidu* v. *Chuna Lakshmana Pillai*, *A. I. R.* 1926. *Mad.* 1011, *Maharaja of Benares* v. *Patraj Kunwar* (2) and *Ma Saw Yin* v. *Hockto* (3), were relied upon. The last two cases undoubtedly support the view taken by the first defendant."

With reference to the case reported in *A. I. R.* 1926 *Mad.* 1011, he remarked as follows :

"It appears to me with the greatest deference that this decision is not reconcilable with the decision in *Subbier* v. *Moideen Pichai* (1).

Further in para. 10, the learned District Munsif stated as follows :

"With the greatest deference I also beg to submit that the view assumed in the case *Subbier* v. *Moideen Pichai* (1) that the provisions in the Civil Procedure Code relating to investigation of claims and objections to attachment contained in O. 21 apply to an objection made by a garnishee of the nature raised in the present case, does not seem to be so sound as the view taken in the Allahabad and Rangoon cases."

Finally, in para. 12, the following passage occurs :

"I have thought it necessary to make the reference on account of difference of opinion pointed out above and on account of the irreconcilability of the case *Subbier* v. *Moideen Pichai* (1) and the case *A. I. R.* 1926 *Mad.* 1011. If *Subbier* v. *Moideen Pichai* (1) had been reported in the authorized series, I should have followed it without making the reference."

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(1) A. I. R. 1923 Mad. 562=72 I. C. 558.
(2) [1906] 28 All. 262=(1905) A. W. N. 277.
(3) A. I. R. 1926 Rang. 175=97 I. C. 247 = 4 Rang. 100.

Now we think it proper in limine to make the observation that it is not at all in good taste or proper for a subordinate Court to question the soundness or otherwise of the decision of the High Court to which it is subordinate. Subordinate Courts are bound to follow decisions of the High Court to which they are subordinate if the decisions, according to their view, are applicable to the facts proved before them. There could not possibly be any doubt upon this point. The Privy Council observed in the case reported in *Puttu Lal* v. *Parbati Kunwar* (4) at p. 366 (of 37 *All.*) as follows :

"The Court of the Subordinate Judge of Mainpuri is a Court which is subordinate to the High Court at Allahabad, and the Subordinate Judge of Mainpuri is bound to follow the decision of the Bench to which he is subordinate unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council or unless the law has been altered by a subsequent Act of the legislature."

To the same effect is the decision of the Bombay High Court in the case reported in *Bhanaji* v. *De Brito* (5) :

"A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his presidency unless the authority of the decision can be questioned by virtue of anything said or decided in the Privy Council."

In this particular case, we think that the remark in para. 10 of the letter of reference, in our opinion, ought not to have been made. It is not open to a subordinate Court to compare the soundness of the views taken by the High Court to which it is subordinate on a question of law with the views of other High Courts and doubt, or decline to follow the same on the ground that the former do not seem to be so sound as the latter.

If there are two decisions of a High Court, one of a single learned Judge and another of a Bench composed of two learned Judges, then, unless the subordinate Court found some grounds for distinguishing the one decision from the other, it would be bound to follow the decision given by the Bench. In para. 12 of the reference the learned District Munsif says that he should have followed the decision in *Subbier* v. *Moideen Pichai* (1), without making the reference, if the same had been reported in the authorized series.

If the matter had ended there, and the only point before the learned District Munsif was whether the decision in the Madras Law Journal should be allowed by him to be either cited or received in evidence or treated as an authority, the case would be governed by S. 3, Law Reports Act (13 of 1875). That section enacts:

"No Court shall be bound to hear cited or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts other than a report published under the authority of any Local Government."

Under that section, no doubt it would be open to a Court before .whom a decision from an unauthorized report is cited to make up its mind as to whether it shall hear that case cited, or shall receive or treat that decision as an authority binding on it. No doubt in exercising its discretion on any particular occasion, the Court would no doubt also give due weight to the practice prevailing in the Courts with reference to any particular report a decision from which is sought to be cited. But to say that no Court shall be bound to hear cited or receive or treat a decision as an authority is, in our opinion, something quite different from the Subordinate Court being entitled to compare the soundness or otherwise of the views, on a question of law contained in a decision reported in an unauthorized series of the High Court to which he is subordinate with those of other High Courts. We have therefore no doubt that the learned District Munsif would have been well advised if he had saved himself the trouble of comparing the soundness of the view of the two learned Judges of this Court in the case reported in *Subbier* v *Moideen Pichai* (1) with the views of other High Courts in the way he has done.

Under O. 46, R. 1, in a case where there is no appeal and when the lower Court entertains a reasonable doubt upon any question of law, it is open to it to make a reference to the 'High Court. In the circumstances we have mentioned, we return the reference to the learned District Munsif. It would be open to him to decide the matter himself if he thinks fit to do so, or to make a proper reference if deemed necessary.

P.R.S./P.N. *Order accordingly.*

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(4) A. I. R. 1915 P. C. 15=29 I. C. 617 = 42 I. A. 155=37 I. C. 359 (P. C.).

(5) [1906] 30 Bom. 226=7 Bom. L. R. 995.

* A. I. R. 1931 Madras 73

WALLACE AND BARDSWELL, JJ.

Kunhi Kutti Ali and *another*—Defendants—Appellants.

v.

Mohammad Haji and *others*—Plaintiffs—Respondents.

Appeal No. 128 of 1925, Decided on 8th September 1930, from decree of Sub-Judge, South Kanara, in Original Suit No. 55 of 1922.

(a) Malabar Law — Tarward — Suit by junior member of marumakhathayam tarwad to set aside lease granted by karnavan for 12 years—Alienation attacked as fraudulent and to detriment of tarwad—It can only be set aside in exceptional circumstances of gross betrayal of interests of tarwad as whole.

Where a junior member of marumakkathayam tarwad brings a suit that kuzhikanom lease granted for a period of 12 years by karnavan is not valid and binding on the plaintiff, his tarwad, or the suit properties and for delivery of the suit properties to the plaintiff on behalf of the tarwad, on the ground that the alienation is fraudulent and to the detriment of the tarwad, such suit to set aside an alienation can only be brought in exceptional circumstances of gross betrayal of the interests of the tarwad as a whole : *A. I. R.* 1926 *Mad.* 150 ; 43 *Mad.* 393 ; 14 *Mad.* 267; 47 *I. C.* 945 and 108 *I. C.* 738, *Rel. on.* ; 14 *Mad.* 26 ; 14 *Mad.* 101 and 37 *Mad.* 420, *Dist.* ; 51 *I. C.* 740 ; 53 *I. C.* 771 ; 3 *Mad.* 169 and *A. I. R.* 1927 *Mad.* 422, *Ref.* [P 75 C 2 ; P 76 C 1]

*** (b) Civil P. C. (1908), O. 26, R. 10 (3)—Second commission should not be issued unless first commissioner's report is unsatisfactory, in which case earlier commission should be wiped out altogether — Judge balancing one commissioner's report against that of other acts contrary to O. 26, R. 10 (3).**

A second commission should not be issued to deal with one and the same subject unless it is thought that the report of the first commissioner is not satisfactory in which case the earlier commission should be wiped out altogether and attention should be paid only to what is reported by the second commissioner. Instead of that if the Judge balances the report of one commissioner against that of the other and expresses a preference for the view of the first commissioner, he acts with great impropriety and contrary to what is contemplated by O. 26, R. 10 (3) : *A. I. R.* 1929 *Mad.* 661, *Rel. on.* [P 76 C 2]

T. Rangachari and *P. Govinda Menon*—for Appellants.

K. P. Sarvothama Rao and *B. Pocker*—for Respondents.

Judgment.—The suit under appeal has been brought as a representative suit by a junior member of a marumakkathayam tarwad for a declaration that the pattadharam granted on 18th July 1922 by defendant 1 who is the present karnavan, is not valid and binding on the plaintiff, his tarwad or the suit properties and for delivery of the suit properties to the plaintiff on behalf of the tarwad. The tarwad consists of two branches, the descendants of two women Alliathe and Birambi, who were sisters. The defendants are all of the branch of Birambi, while the plaintiff belongs to that of Alliathe and claims to be the senior anandravan, though this claim is challenged. The plaintiff asserts that the suit pattadharam has been granted by defendant 1 to two members of his own branch with a view to defrauding the plaintiff of the benefit of the great improvements which he has effected to the suit lands, while it prejudices the tarwad, on whose behalf the suit is brought, in that the amount of rental fixed under it is far too low. The Court below bas found that the suit pattadharam was not executed by defendant 1 in the bona fide exercise of his powers of management as karnavan of the tarwad, but for the purpose of enriching members of his own tavazhi at the sacrifice of the interests of the entire tarwad ; and it has therefore granted a decree to the plaintiff as prayed for. Against this decision defendants 2 and 3 are appealing.

It has been urged for the appellants and for defendant 1 as respondent 2 that the suit is not maintainable on two grounds. The former of these grounds is that leave has not been properly obtained by the plaintiff to sue in a representative capacity. This however is a point that we cannot allow to be taken. The plaintiff definitely states in para. 14 of his plaint that he has obtained the leave of the Court to sue on behalf of the tarwad and this recital has not been challenged in any written statement, nor was any issue taken as to it. We have to presume in these circumstances that there was no irregularity in the proceedings in the trial Court and that the plaintiff was properly permitted to bring the suit as a representative one.

The other ground is more important. It is that the grant of the pattadharam by defendant 1 was an ordinary act of management by the karnavan, in the exercise of his legitimate powers ; and that consequently no suit can be brought by a junior member of the tarwad to have it set aside but that if the view of the learned Subordinate Judge in this parti-

cular instance as to the nature of the act of the karnavan that is in question, is correct, then the proper remedy was to bring a suit for the karnavan's removal. There is no dispute as to the correctness of the view expressed in the lower Court's judgment that, on the face of it, the suit pattadharam, which grants a kuzhikanom lease for a period of twelve years, is an ordinary act of management within the karnavan's competence. Stress is laid on *Abdulla Koya* v. *Eacharan Nair* (1), in which a Bench of this Court has remarked, in the matter of a suit as to a melcharth granted, as it was contended, improperly, by a karnavan :

"No doubt if a karnavan habitually grants improvident leases and thereby renders himself unable to fulfil his obligations towards the other members of the tarwad, this would be a ground for removing him from the karnavasthanam, but we do not think that a particular lease can be declared to be invalid as against the lessee merely because it is not proved to be beneficial to the tarwad. To fetter a karnavan's discretion in this way would be to render his whole management of the tarwad liable to criticizm and reversal at any moment."

Again, in *Kishakkumbrath Moidin* v. *Koyambrath Murkothakandi* (2), it has been held by a Bench of this Court that "where a kanom is executed by a karnavan of a Malabar tarwad for the purpose of paying off a debt binding on the tarwad, the Court is not required to investigate with meticulous care whether the transaction was a prudent one or whether there was necessity for entering into such a transaction for the purpose of raising the necessary amount."

On the other hand a number of decisions have been quoted to us to show that in the case at any rate of kanoms that have been improperly granted, the Court will interfere, and that at the instance of junior members of a tarwad. One of these is *Unni* v. *Kunchi Amma* (3) which dealt with a suit brought to recover property that had been improperly alienated by a karnavan under a kanom. The point however for decision in that case was one of limitation while the kanom had been executed by a previous karnavan who had been removed from office, and the suit was brought by two persons who claimed to have been appointed managers by a decree of Court. In *Anantan* v. *Sankaran* (4) it was held that junior members of a tarwad could maintain a suit against their karnavan, senior anandravan and others for a declaration that a kanom was invalid and for recovery of properties. In that case however the kanom was granted not by the karnavan but by the senior anandaravan to whom the karnavan had delegated the management under a karar, and emphasis was laid on the fact that the time for filing the suit had almost expired and that the karnavan, who was joined as a defendant had failed to sue. It is got to be observed that in *A.I. R.* 1926 *Mad.* 150 it has been remarked that this decision in so far as it suggests the broad proposition that in all circumstances the junior members will be entitled to sue when the karnavan has failed to do so, seems to be opposed to all the prior and subsequent decisions, but that on the actual facts the case came within the accepted principle that the anandravan may be permitted to sue when the karnavan has disabled himself from bringing such a suit, that is when the circumstances are exceptional.

Vatavatta Nair v. *Kanath Puthen Vittil Kuppasan Menon* (5) deals with a suit brought by a senior anandravan for having set aside a kanom granted by the karnavan in office who was defendant 2. The suit was allowed on the principle that a kanom granted, as had been in that suit, by way of renewal of an earlier kanom the term of which had not expired, was not binding on the tarwad except on proof of necessity or benefit to the tarwad which proof was lacking. *Cheria Kunhi Pocker* v. *Chowkaran Malikaimal Valia Bappolty* (6), is a case in which a junior member of a tarwad successfully sued to recover properties for which a kanom had been given, but it was a case in which the kanom had been granted by a previous karnavan. The plaintiff in that case had obtained permission to sue on behalf of all the members. In *Kenath Achu* v. *Kalliani Amma* (7) the senior anandravan brought a suit to set aside a kanom that had been renewed prematurely by the karnavan in office who was a defendant, and lost the suit not because he had no right to maintain it but because it was held that in the circumstances the renewal was proper.

(1) [1918] 47 I. C. 945.
(2) [1928] 108 I. C. 738.
(3) [1891] 14 Mad. 26.
(4) [1891] 14 Mad. 101.
(5) [1919] 51 I. C. 740.
(6) [1919] 53 I. C. 771.
(7) A. I. R. 1923 Mad. 700=75 I. C. 476.

It would thus appear that a junior member of a tarwad may bring a suit to set aside even a kanom that has been executed by a karnavan who is still in office; but that he can only do so in exceptional circumstances is shown by the decisions in *Ottaparakkal Thazhath Soopi* v. *Charichal Pallikkal Mariyamma* (8). There it was held that, except in very special circumstances, where the karnavan is proved to be guilty of gross misconduct and collusion it is not competent to the junior members of the tarwad to sue for redemption of a kanom granted by their karnavan. *Bikkutti* v. *Kalendan* (9) deals with a case of a deed of gift and holds that junior members of a tarwad could bring a suit for the cancellation of such a deed, but this was in exceptional circumstances in that the karnavan, who was defendant 1, could not maintain the deed in that it had been granted by himself.

Kunhamad Hajee v. *Kuttiath Hajee* (10) indicates what is an appropriate remedy in the event of grossly improper lease being granted by the karnavan in office, what it finds being that the grant of a very improvident lease, following on a course of conduct pursued for some years, in which the interests of the tarwad were persistently disregarded, is sufficient ground for removing the karnavan from the management of the tarwad property. That this is an appropriate remedy is also indicated in *Abdulla Koya* v. *Eacharan Nair* (1) to which reference has been made in para. 3 above. No case has been shown to us in which a suit has been brought successfully by a junior member of a tarwad against his karnavan, praying for such relief as has been granted to the plaintiff in respect of such an ordinary act of management as the granting of a twelve year kuzhikanom lease. Our attention has been called to *Chappan* v. *Ranu* (11) in which it has been remarked that the property of a tarwad is vested in its members who, when the karnavan makes an alienation that is not binding on them, can sue to recover possession and may do so on their title without even asking for the alienation to be set aside, it being for the alienee to prove that the alienation was binding on them. That however was a case in which the alienation by the karnavan was by way of a mortgage. The case for the plaintiff, respondent 1, in this connexion receives most assistance from some remarks of Jackson, J. in *Manavadan* v. *Sredevi* (12). In his judgment in that case the learned Judge has stated that the rights of the junior members of a tarwad are confined to suing for maintenance, to suing for cancellation of any transaction entered into by the karnavan to the detriment of the family and to suing for his removal.

The junior members sued in that case for the removal of the karnavati on allegations of fraud and misappropriation of family funds and it was held that they could not, as a matter of right when suing for such relief, ask for the karnavati to render general accounts. As a matter of fact the karnavati, a woman, ceased in the course of the suit to occupy her position as such because by the rule of family succession she moved to a higher sphere. In such circumstances it was found that the plaintiffs had no cause of action. They were entitled to sue for a decree removing defendant 1 from management and to contend that, if she gave no account by way of rebutter of their proved allegations, such a decree should be granted and defendant 1 should be removed. As however the removal was already an accomplished fact such a contention would be idle. The judgment then goes on to remark that the plaintiffs might have brought their suit in a different way, that each proved defalcation might be set aside and defendant 1 held liable. These remarks however as to the kind of suits which junior members of a tarwad are entitled to bring, are by the way and have no bearing on the point which the case actually decided and, in any case they have to be considered along with what has been laid down in the other decisions to which reference has been made already. These make it clear that when the alienation which is attacked as fraudulent, improper or to the detriment of the tarwad does not amount to more than a lease, a suit to set it aside can only be brought in exceptional circumstances. It

(8) [1920] 43 Mad. 393=55 I. C. 760.
(9) [1891] 14 Mad. 267=1 M. L. J. 227.
(10) [1881] 3 Mad. 169.
(11) [1914] 37 Mad. 420=15 I. C. 587.
(12) A. I. R. 1927 Mad. 422=100 I. C. 607=50 Mad. 431.

is unnecessary in this particulor case to say more than this, apart from reiterating that no precedent has been shown to us for such a relief as has been granted in this suit, in a suit framed as this has been, as we are satisfied that in this case no circumstances have been shown to exist which would justify its being regarded as one in which the plaintiff is entitled to exceptional treatment.

The plaintiff asserts that the suit pattadharam is to the prejudice of the members of the tarwad generally and the main consideration from this point of view is whether the rent fixed under Ex. 21 is a reasonable one or is one, as the Court below has found it to be, that is quite inadequate. The plaintiff asserts that a good many of the suit items have been assigned for the maintenance of his branch by a former karnavan and that the assignment has been continued by subsequent karnavans, but the learned Subordinate Judge does not give any clear finding as to there having been such a grant for maintenance nor is the point one of great importance. Even too if some of these suit lands have been granted to plaintiff's branch for maintenance, their being leased out under the suit document will matter little as long as a proper rental has been obtained for them which can be used for the purpose of such maintenance. We may however, remark that the evidence as to there having been such a grant is not entirely convincing. Plaintiff himself as P. W. 2 shows that the grant was not for the whole branch to which he belongs but only to his particular sub-tavazhi, and he admits that there was no such grant to the other two sub-tavazhis of his branch and that the grant which he sets up was made orally only and was not reduced to writing. Further there is the matter of a house. The house does not stand on one of the items which is said to have been allotted for maintenance but on what was a waste plot. On this plot there is a house called Kadinhumoola which the plaintiff says is a tarwad house occupied by himself and the four daughters of his deceased sister. He declares that there was formerly a small house and that he has had this house built, while on the defence side there is evidence that this house was not built by him and that he does not himself live in it. This however is again a matter of no very great importance as it is clear even from the evidence of plaintiff himself that there are other places of residence available for his branch and he has not stated that no provision can be made, or is being made by the karnavan for his residence in the event of his leaving this house. According to D. W. 3 there are three other houses available for his branch.

We come then to the question of rental in which connexion the learned Subordinate Judge has taken largely into consideration the reports of two commissioners, both of whom harve reported on the probable yield of the suit lands.

We have in the .first place to remark that the lower Court should not have issued two separate commissions to deal with one and the same subject, and to treat the reports of both the commissioners as evidence in the case. The exact circumstances in which he came to issue the second commission do not appear from the record that has been placed before us, but the second commission should not have been issued, unless it was thought that the report of the first commissioner was not satisfactory in which case the earlier commission should have been wiped out altogther and attention should have been paid only to what was reported by the second commissioner. Instead of this the learned Subordinate Judge has balanced the report of one commissioner against that of the other and has expressed a preference for the views of the first commissioner. In taking this course he has acted with great impropriety and contrary to what is contemplated by O. 26, R. 10 (3), Civil P. C. Though the practice which he has adopted may be one that is prevalent in Malabar it is one that should no longer be continued as has been pointed out in clear terms by this Court in *Ambi* v. *Kunhi Kavamma* (13).

Apart too from this consideration, the report of neither commissioner deserves any attention as neither of them has come to any independent conclusion of his own, but each of them has only made a collection of statements of what he had learned on enquiry from others. The first commissioner made his enquiries as to the rent from some tenants who happened to be present and as to the yield from some neighbours. The second commissioner got most of his information from de-

(13) A. I. R. 1929 Mad. 661=118 I. C. 296.

fendant 3, though he also questioned the tenants, but without reducing their answers to writing. In these circumstances their reports are not of the slightest value.

The remaining evidence is by no means sufficient to make out a case for the plaintiff. There is only one witness on his side apart from himself. This man is the Shanbogue who gives no assistance as to what the yield or proper rent should be, but makes some general observations as to the nature of the lands and as to the effect of the opening of a new bar some 15 years or so ago. The lands lie near the sea as well as to a river which surrounds them on three sides, and the bar has been opened as a new outlet for the river into the sea. The Shanbogue says that within the last 20 years three crops have been raised on certain of the fields, without specifying which these fields are, and that before the opening of the bar only one crop was being raised on these fields as they used to be flooded with water during the rainy season, but at the same time he is rather lukewarm as to the benefit that has been derived from the bar, as he says that after the opening of the new bar there is not so much damage to the first crops as before, and that there is no special damage to the second and third crops by reason of its opening, thereby implying that there still may be some damage, caused to all these crops. On the other hand, D. W. 5 who is a Taluk Board member and against whose credibility nothing has been advanced, says that the new bar has caused the suit property to deteriorate. It cannot be assumed as has been done by the learned Subordinate Judge that the opening of the bar must have been beneficial because it was a work undertaken by Government. On this oral evidence, then, it is impossible to say that the suit lands have become specially valuable during the last 15 years or so, or that they have become considerably more valuable than they were 85 years ago, even if we had, as we have not, information as to their yield or rental at that earlier period.

In one of his calculations the learned Subordinate Judge has been guilty of an inaccuracy. He has said that according to defendant 3 (D. W. 7) the tenants paid a rent of not less than 1,000 paras of paddy before the date of the suit document Ex. 11. But defendant 3 has said nothing of the kind. What he said was that prior to Ex. 11 the total varam was below 1,000 paras of paddy and the total patom was below Rs. 700 without stating the actual figures in either case. The learned Subordinate Judge is therefore wrong in adding to 1,000 paras the 500 paras by which the paddy that must have been admittedly raised since Ex. 11 and saying that the rent at the time of the second commissioner's inspection was at least 1,500 paras.

The rent actually reserved under Ex. 11 is 1500 paras of paddy and Rs. 800 cash. In considering whether the rental in grain is proper the lower Court has gone into another calculation in para. 41 of its judgment, but here again we cannot follow it. As part of its basis of calculation it accepts what the Shanbogue says as to the one acre being equivalent to 5 pothipads without saying anything as to why it prefers this evidence to that of D. W. 1, who says that an acre is divided into two pothipods. As a further basis of its calculation it takes the yield of one item as found by the second commissioner, whose report we have found to be worthy of no consideration. This calculation then is not of the slightest use.

Nor can we accede to the suggestion of the learned counsel for the plaintiff respondent 1 that, as the defendants stated no objection to what the first commissioner found as to the yield from certain items, the excess as between what he found to be their yield and what has been found to be their yield by the second commissioner, should be added to the total yield as found by the second commissioner and the result taken as the proper yield from the suit lands. We cannot consider the figures of either commissioner in any way.

Some lease deeds have been filed for the defence to show that the rent fixed under Ex. 11 is not excessive. Some of these the lower Court has brushed aside and others it has not considered at all. We do not however propose to discuss these documents as they would only require consideration if the plaintiff had made out an exceptional case of the gross betrayal of the interests of the tarwad as a whole. This however he has quite failed to do.

A suggestion has been made that a third commission should be ordered to be

issued but it is one that does not appeal to us. This is really not a case in which a commission such as was ordered was necessary. What was required was evidence as to the yield of the lands from persons with local knowledge of the conditions. The plaintiff has made ample opportunity of letting in such evidence and has not availed himself of it. There is no reason for giving him any further chance of adducing any kind of evidence. The result then is that the appeal succeeds. The decree of the lower Court is reversed and the suit is dismissed with costs to defendants 1, 2 and 3 in this Court and in the Court of first instance.

P.R.S./P.N. *Appeal allowed.*

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RAMESAM AND JACKSON, JJ.

Srinivasa Ayyangar and *others*—Defendants—Appellants.

v.

S. Ramalinga Iyer and *others*—Plaintiffs—Respondents.

Civil Appeals Nos. 233 and 396 of 1927, Decided on 13th August 1929, from decree of Dist. Judge, Madura, in Original Suit No. 28 of 1925.

Madras Religious Endowments Act (1 of 1925), S. 69—Trustee—Trustee setting up title in himself without justification and not acting in good faith—Removal is justified.

Although setting up of title in himself by a trustee may not be a sufficient ground for the removal of the trustee in a case in which there is a mistaken impression as to right such case would be unique one requiring very special proof, but where the trustee has no justification for his conduct and did not act ingood faith, the Court is quite within the limits in removing him from trusteeship : *A. I. R.* 1921 *Mad.* 467 and *A. I. R.* 1928 *P. C.* 106, *Rel. on.* [P 80 C 2]

K. Rajah Iyer and *K. V. Srinivasa Iyer*—for Appellants.

T. R. Ramachandra Iyer and *K. S. Venkatarama Iyer*—for Respondents.

Ramesam, J.—These appeals arise out of a suit for a scheme and consequential reliefs under S. 69, Madras Act 1 of 1925 (The Religious Endowments Act) in respect of the endowments of a temple dedicated to Sri Varadaraja Perumal Swami in the village of Mullipallam, Nilakottai Taluk, Madura District. The plaintiffs' case is that the lands which were constituted as an endowment were originally granted as an inam by the ancient Carnatic rulers of the country to the diety. The defendants belong to the family of the archakas of the temple. They pleaded that the archakas were in occupation of the lands from time out of memory. They also say that they bona fide believe that the grant of the inam was to the service holder burdened with the obligation of the service of doing puja and putting light in the nights, and the allegation in the plaint that the inam was an inam to the deity was denied. Issue 5 in the case is whether the grant was to the temple itself or to the archaka burdened with service to the idol and Issue 4 is whether the plaint lands themselves constitute the inam or only the teerva thereof (the word "teerva" being used synonymous with assessment). The District Judge found that the grant was to the temple itself and not to the archaka and that the lands themselves constituted the inam. He gave a decree removing defendant 1 from the position of the trustee and he left it to the Religious Endowments Board to frame a scheme and appoint a fresh trustee. Meanwhile he directed that the receiver appointed by the Court should continue in possession. Both the parties appeal. The defendants are agreed that defendant 1 is the only person who was doing the work of the de facto trustee, that is, that he only was managing the temple and that the other defendants had nothing to do with the management of the temple.

The first question that arises in the case is the subject of Issue 5. The earliest document we have is Ex 7 being an extract from the jamabandi chitta of the village of Mullipallam for fasli 1210. It refers to "Devadayam Sudha inam, and lower down refers to "Perumal" temple sudha inam". The next document we have is Ex. A (same as Ex. 7-A) an extract from the inam jamabandi account for fasli 1212 (that is the year 1802-1803). The document begins by referring to Devadayam inam. Then the heading of Col. 3 is given as Perumalkoil inam. As pointed out by me in *Tripura Sundaramma* v. *Secretary of State* (1) the word "devadayam" itself may not be conclusive but the use of the word "Perumalkovil inam" tends to show that the inam was regarded as inam belonging to the temple. Devaraja Battar the ancestor of the defendants living at the time, was shown as cultivator. He was

(1) A. I. R. 1928 Mad. 282=106 I. C. 891.

not mentioned even as the archaka of the temple. For fasli 1215 we have got Ex. 7-B which refers to Perumal inam cultivated by Devaraja Ayyangar. The next document we have got is Ex. B-1 the inam statement and Ex. B the inam register. In Col. 2 of the inam register the inam was described as "devadayam." I have already observed this may not be conclusive but in the inam statement in Cols. 4 and 5 also the word "devadayam" is mentioned under the headings "relationship between the original grantee of sannad and the person in enjoyment at present" and particulars of family." Though the use of word "devadayam" in Col. 2 of the register may not signify very much it seems to me that the use of word in Cols. 4 and 5 of the inam statement is unusual and goes to some extent against the contentions of the appellants (by which term I will throughout refer to the appellants in A. S. No. 233). In Col. 1 of the inam statement the entry is :

"Entered in fasli 1212 Devaraja Ayyangar, Varadarajaperumal maniam, enjoyment at present by Lakshmana Ayyangar archaka performing puja to the said Swami,"

the heading being "name of Inamdar entered in dowl and the name of the person enjoying at present." The reference is obviously to Ex. A, and while Devaraja Ayyangar's name is there, we have also the words "Varadarajaperumal maniam." The mention of enjoyment by Lakshmana Ayyangar does not add very much. In Col. 2 the age given is apparently the age of Lakshmana Ayyangar. Under Col. 3, "residence", we have "Varadaraja Perumalkovil in Mullipallam village." Under the heading "particulars of enjoyment," the entry is: "enjoyed by Varadarajaswamiperumal." Then we have got this note under the statement :

"The said land has been in the enjoyment of Varadarajaperumal Swami for a long time. It was granted by the Rajahs of Carnatic for the puja and naivedyam for the said Swami. From that time my ancestors and myself have been enjoying hereditarily. There is no document."

Then follows the seal of Varadarajaperumal Swami and then the signature of Lakshmana Ayyangar, inamdar. The appellants contend that the heading of the document is ambiguous. Assuming that this is so the whole document shows that Lakshmana Ayyangar regarded the land as land belonging to the deity. In the inam register under Col. 14 the person entered in the register prepared according to Regulation 31 of 1802, both in faslis 1212 and 1217 is shown as Perumal. In Col. 15 also the name entered in the survey or in the subsequent accounts in fasli 125S, is shown as Varadaraja Perumal. In Cols. 16 and 17 the entry is "Mullipalam Varadaraja Perumal, worshipper Lakshmana Ayyangar." Col. 21 shows that the Deputy Collector recommended the inam to be confirmed free of quit-rent. The title deed was not exhibited in the suit but it seems to have been filed in connexion with the application for the appointment of a receiver and it purports to be issued to the manager for the time being of the temple. In our opinion Ex. B does not at all help the appellants. On the other hand both Exs. B and B-1 show that the then archaka regarded the inam as belonging to the temple. Ex. 5 is the Sivajama patta granted for fasli 1276 for water cess issued to Lakshmana Ayyangar as pattadar. There is nothing in this to help the defendants. In 1871 Lakshmana Ayyangar executed an othi deed of thunduvaram for a sum of Rs. 17-8-0, for three years: Ex. 3. Having regard to the term and the amount taken, it may be regarded practically as a lease.

In the document the land was described as Mullipallam Perumal temple manyam. It does not show any desire on the part of Lakshmana Ayyangar to assert his own title. Ex. 3-A is a usufructuary mortgage of thunduvaram dated 13th July 1883. Lakshmana Ayyangar was succeeded by his daughter's son Muthuvenkatachalam Ayyangar the father of defendant 1 ; and the tenant executed the document in favour of Muthuvenkatachalam Ayyangar. Here also the land was described as the manibhum of Varadaraja Perumal temple. Rs. 66 was the amount taken under the document and it was to run for five years. The same remarks apply to Ex. 3-A as to Ex. 3. The next document is Ex. 3-B. This is for Rs. 100 consisting of Rs. 17-8-0 taken under Ex. 3, Rs. 40 taken under another document dated 15th June 1877 and Rs. 42-8-0 received in cash. Under the terms of this document one-half of the produce was to be taken by Muthuvenkatachalam Ayyangar as melvaram and the other half by the tenant as plough-

varam and thunduvaram. The term fixed is five years. The land is described as Varadaraja Perumal maniam. Then we have got a series of documents beginning with Ex. 3-C dated 2nd July 1885 up to 2nd March 1911, Ex. 3-J, all executed by Muthuvenkatachalam Ayyangar. In these documents the description of the land as Varadaraja Perumal manyam was dropped and changed into :

"which belongs to me having accrued from my maternal grandfather which was enjoyed before this by my maternal grandfather Lakshmana Ayyangar with patta entered ancestrally in his name and which is now being enjoyed by me with patta entered in my name."

Except two items Rs. 45 borrowed for reclamation under Ex. 3-H and another item of Rs. 250 borrowed for expenses of a litigation, all the other items of these mortgages relate to private family expenses of defendant 1's father. The documents themselves show it and the District Judge also finds it. Though interest was being paid off by mortgage of thunduvaram the principal under these documents was practically never discharged. The debt went on mounting up until by Ex. 3-J it amounted to Rs. 450. Then Muthuvenkatachallam Ayyangar died. Ex. 3-K is the first document executed by defendant for Rs. 500 consisting of Rs. 450 due under Ex.3-J and a fresh loan of Rs.50 for family expenses. This was renewed by Ex. J which was executed for Rs. 500 due under Ex. 3-K and an additional sum of Rs. 500 borrowed for the expenses of the family and for marriage expenses. The next document is Ex. M under which the amount due was Rs. 700, and under it another item (other than the one mortgaged under Ex. J) was mortgaged. Then we have got Ex. J-1 which was intended to be a continuation of Ex. J for Rs. 450. Ex. H is a renewal of Ex. M in 1924 for Rs. 700. Thus it is clear that defendant 1 and his father were enjoying the land as if it was their private property and they were mortgaging it for their own private purposes. This of course is improper conduct on the part of defendant 1 and justifies his removal from the trusteeship unless it can be said that the conduct was bona fide. It may be said that defendant 1 was misled by the conduct of his father Muthuvenkatachalam Ayyangar and he did not particularly study the inam statement and the inam register or take legal advice in the matter. The matter then came on before the Religious Endowments Board. Defendant 1 filed a statement before them, which is now filed as Ex. O. Prior to that he had given another statemsnt before the Revenue Inspector, Ex. C-1. In Ex. C-1 he described the suit lands as "the manibham lands of the said temple." In Ex. C he said in para. 2:

"the temple of Varadarajaperumal is a village temple of Mullipallam with a grant of 7 acres and 86 cents"

and in para. 3:

"The balance if any of the proceeds of the endowed property is intended for the maintenance and remuneration of the archaka in whom all the services of the temple are vested."

In para. 12 he said :

"According to the ancient custom of this country the hereditary archaka of the village temple has the right to appropriate to himself and maintain himself and all his family out of all the surplus of the temple pooja etc., according to the mamool thittam."

Thus the attitude of the defendants in Ex. C and Ex. C-1 was to admit that the land belongs to the temple and that he was entitled to the surplus proceeds only as remuneration of a temple servant. Having made those statements in Ex. C and Ex. C 1, he changes his attitude in the written statement in the suit and pressed his contentions therein not only in the Court below but also before us in the High Court. We think there is no justification for this conduct of defendant 1 and we do not see any reason to differ from the conclusion of the District Judge that he ought to be removed. In *Srinivasacharyulu* v. *Pratyanga Rao* (2), the conclusion was against the archakas but no opinion was expressed on the question whether the defendants acted in good faith and the matter was left for further investigation. This decision does not help the appellants. In *Hussain Bibi* v. *Sayad Nur Hussain Shah* (3) it was said that the setting up by a trustee of title in himself may not be a sufficient ground for the removal of the trustee in a case in which there was a mistaken impression as to right. It is also observed that such a case would be a unique case requiring very special proof. We have found that defendant 1 was not under any mistaken impression in 1925 but chose to raise those contentions in the suit. This decision does not therefore help the appellants. We therefore confirm the order of the District Judge

(2) A. I. R. 1921 Mad. 467=64 I. C. 816.
(3) A. I. R. 1928 P. C. 106=109 I.C. 52 (P.C.).

removing defendant 1 from trusteeship. This of course does not prevent him from continuing as an archaka.

The only question that remains is whether we should frame a scheme in the terms of S. 69, Religious Endowments Act. I think we should do so. The following scheme will be framed:

(1) The temple will be managed by three trustees consisting of a member of the defendant's family and two other villagers. The first trustees will be defendant 4, plaintiff 4 and Ramaswami Chettiar. One of the trustees will vacate office at the end of three years by lots and the remaining trustees will co-opt another trustee. At the end of another three years another of the original two trustees will vacate by lots and another person will be co-opted. Afterwards at the end of every three years, the remaining original trustee will vacate office and a fresh trustee will be co-opted as before. In the case of a vacancy by death the other two trustees will co-opt. If the co-opting trustees do not agree, the Endowment Board will nominate the trustee. 2. One-third of the net income of the temple inam lands will be set apart as remuneration for the services of the archakas. This clause will be operative from the time the defendants are deprived of possession. They will give credit for any payments received in the meanwhile and get any expenses incurred by them. 3. The trustees will keep proper accounts and manage the affairs of the temple under the directions of the Religious Endowments Board.

In A.S. No. 233 of 1927, the appellants will bear the respondents' costs. No order as to costs in A. S. No. 396 of 1927.

Jackson, J.—I agree. I may observe that the heading to the statement Ex.B-1 appears to me to be correctly translated and clearly indicates Varadarajaperumal to be the inamdar.

P.R.S./V.B. *Order accordingly.*

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* A. I. R. 1931 Madras 81

ANANTAKRISHNA AYYAR, J.

(*Moovvarra Kakkamvelli*) *Lakshmi Amma*—Appellant.

v.

Thazhathitathil Krishna Kurup—Respondent.

Appeal No. 172 of 1928, Decided on 24th October 1930.

1931 M/11 & 12

(a) Civil P. C., (1908), S. 144—"Restitution," meaning explained.

The word "restitution" which occurs in S. 144 implies that a party who applies under S. 144 should prove that he was in possession of something, the restitution or restoration of which he seeks. [P 82 C 2]

***(b) Civil P. C. (1908), S. 144—"Or otherwise" significance of term explained.**

The words "or otherwise" which immediately follow the word "restitution" are inserted in S. 144, to provide for cases where it is not possible to make restitution in the sense of restoring the very property that was lost to the petitioner, and when the Court proceeds to do the next best thing that it could do in the petitioner's behalf in the circumstances. What "other" relief should be granted by the Court would depend upon the circumstances of each case. [P 83 C 1]

***(c) Civil P. C. (1908), Ss. 144 and 47—Suit for redemption of four items of mortgaged property—Decree for redemption of three on deposit into Court of balance of mortgage money by mortgagor—Mortgagor after such deposit filing appeal for redemption of fourth item—Appeal decreed—Application under S. 144 for mesne profit—Mortgagor not being in possession of that item at date of trial Court's decree, S. 144 did not apply—Under S. 47, application under S. 144 was allowed to be converted into plaint.**

In a suit for redemption of the four items of the property mortgaged, a decree for redemption of only the three items on deposit into Court of the balance of the mortgage money by mortgagor had been granted, on which the mortgagor after so depositing the money into Court had filed an appeal for redemption of the fourth item, which also was decreed. Then the mortgagor put in an application under S. 144 for the mesne profits of the fourth item.

Held: that as the mortgagor was not in possession of this property at the date of the trial Court's decree, S. 144 would not apply to such a case. If the attention of the lower appellate Court in the first appeal had been drawn to the fact that the mortgagor had deposited the required amount into Court in proper time and that she should accordingly be decreed mesne profits in respect of the item which was decreed to her by the lower appellate Court it would have, if it thought fit to do so, decreed her mesne profits also. In such case her application under S. 144 should be allowed to be converted into a plaint, by virtue of the Court's power under S. 47: *A. I. R.* 1924 *Cal.* 769 and *A. I. R.* 1927 *Mad.* 898, *Ref.* [P 83 C 1, 2]

V. P. Karunakaran Nambiar—for Appellant.

P. Govinda Menon—for Respondent.

Judgment.—The appellant before me was plaintiff 3, in O. S. No. 205 of 1921 on the file of the District Munsif's Court of Badagara. The suit was for redemption of four items of properties on the footing of a mortgage. The plaintiffs got a decree in the trial Court for redemption but only in respect of three of

the four items mentioned by them in their plaint. The decree directed that on payment by the plaintiffs into Court of a particular amount found to be due on the mortgage, the defendants should put the plaintiffs in possession of the three items. The plaintiffs paid the money into Court in accordance with the directions contained in the decree and obtained possession of the item decreed to them by the trial Court. Plaintiff 3 however preferred an appeal to the lower appellate Court against that part of the trial Court's decree which disallowed her the other item claimed in the plaint. The result of the appeal was that the appellate Court modified the decree of the trial Court by decreeing the other item also in favour of plaintiff 3. Plaintiff 3, the decree-holder having obtained possession of this extra item which she succeeded in getting a decree for in appeal, filed an application to recover mesne profits due in respect of this item from the date on which she deposited the money into Court to the date on which she obtained possession of that item. Her application was resisted by defendant 12, who was the only person interested in respect of this item. The trial Court however held that plaintiff 3, was entitled to recover mesne profits as on the footing of restitution and accordingly directed defendant 12 to pay mesne profits to plaintiff 3 for the period in question. Defendant 12 preferred an appeal. The learned Subordinate Judge of Tellicherry came to the conclusion that S. 144, Civil P. C., could not be applied to such a case as the present, and he accordingly reversed the trial Court's order and disallowed the decree-holder's claim for the mesne profits in question. plaintiff 3, the decree-holder, has accordingly preferred the present Civil Miscellaneous Second Appeal.

On her behalf it was contended by her learned advocate that the case would substantially come under S. 144, Civil P. C. He argued that the trial Court's decree was varied by the appellate Court's decree and if the trial Court had passed the decree which was ultimately passed by the appellate Court, plaintiff 3 would have been in a position to obtain possession of this item and enjoy the mesne profits or income arising therefrom and that it was owing to the decree, erroneous, in this respect, passed by the trial Court that she has been deprived of possession of the mesne profits arising from this item. He also laid emphasis on the words "or otherwise" occurring in S. 144, Civil P. C. He drew my attention to certain Privy Council cases *Jainulabdin Khan* v. *Muhammad Asghar Ali Khan* (1) and *Jai Berhuma* v. *Kadarnat Marwari* (2), where the scope of S. 144, or of S. 583 in the prior Code, has been discussed by the Privy Council. On behalf of the respondent it was argued that S. 144 would apply only to cases where in execution of a decree passed by one Court a benefit is received by the decree-holder and thereafter that decree is reversed or set aside subsequently by a competent Court, and that in such cases the Court should place the parties in the position which they would have occupied but for such a decree which was varied or set aside. In the present case, plaintiff 3 was not in possession of this item at the date of the plaint or at the date of the trial Court's decree. Her suit was to get possession of the same, among other items. That being so, it is rather difficult to apply that portion of S. 144 which speaks of "placing the parties in the position which they should have occupied but for such a decree", to the case of plaintiff 3. No doubt the words "who have been deprived by way of execution of any property or benefits" do not occur, in S. 144. But the word "restitution" which occurs in that section would seem to imply that a party who applies under S. 144 should prove that he was in possession of something, the restitution or restoration of which he seeks. As the plaintiff was not in possession of this property at the date of the trial Court's decree, I find it difficult to apply S. 144 in her favour. As for the words "or otherwise" appearing in S. 144 on which reliance was placed for the appellant, it seems to me that the appellant could not get any real assistance from those words either, in the circumstances of this case. The words "or otherwise" are found in the Code of 1882 also. I have not been referred to any decision of any Court where these words have been the subject

(1) [1888] 10 All. 166 = 15 I. A. 12 = 5 Sar. 129 (P.C.).
(2) A. I. R. 1922 P. C. 269=69 I. C. 278 = 49 I. A. 351=2 Pat. 10 (P.C.).

of comment. Having regard to the word "restitution" which precedes immediately these words " or otherwise", it would appear that the words "or otherwise" were inserted to provide for cases where it is not possible to make restitution in the sense of restoring the very property that was lost to the petitioner and when the Court proceeds to do the next best thing that it could do in the petitioner's behalf in the circumstances. What "other" relief should be granted by the Court would depend upon the circumstances of each case. A familiar instance is where in execution of a decree, subsequently reversed, the property of the petitioner was sold in Court auction, and purchased not by a party to the suit but by a third person. In such a case it has been held that the ultimate successful party would not be entitled to restitution in the sense of getting back the very property that was sold in execution of the erroneous decree. In such cases it has been held that the aggrieved party would be entitled to the proceeds of the sale, as the equivalent into which the original property has been converted. It is probably to cover such cases that the words "or otherwise" have been inserted in the section. In any event, on the facts before me, it is clear that the appellant was not in possession of this property, and that consequently the words of the section I have quoted could not apply to such a case.

Then it was argued by the learned advocate for the appellant that this would be then a case where she has no remedy at all. That however is not the point for my present consideration ; I have now only to consider and decide the only point before me, whether she is entitled to restitution under S. 144. It was pressed upon me that the justice of the case requires that S. 144 should be very liberally construed. I am anxious to help her to the extent to which I could legitimately go, having regard to the wordings of S. 144, Civil P. C. It appears to me that in such cases, the appellant's counsel ought to have drawn attention to the fact when her appeal in the main suit was heard and decided by the lower appellant Court. If the attention of the lower appellate Court in the first appeal had been drawn to the fact that she had deposited the required amount into Court in proper time, and that she should accordingly be decreed mesne profits in respect of the item which was decreed to her by the lower appellate Court, then it is probable that the justice of the case would be considered by the lower appellate Court, and it would have, if it thought fit to do so, decreed her mesne profits also. The learned advocate for the respondent drew my attention to two cases, one reported in *Baikuntha Nath* v. *Prosanna Moyi Debi* (3), and the other in *Bhimana Gowd* v. *Sidda Lingana Gowd* (4) ; they generally support the contention urged on behalf of the respondent, but it is unnecessary to discuss those cases in detail as I think that the appellant's case does not come within the language of the section. I therefore have no alternative but to dismiss this civil miscellaneous second appeal with costs.

The appellant's learned advocate however requested me to allow the application made by her to be converted into a plaint and asked me to exercise the rights given to the Court by S. 47, Civil P. C. I think that the present is a case where I should grant her request. The petition filed by her will accordingly be treated as a plaint, subject to her complying with the requisitions that may be made by the first Court with reference to its form, and also court-fee payable thereon. Of course, I say nothing as regards the maintainability of the suit or the defence the other side may have with respect to the same Those are matters that would have to be gone into after the plaint is registered and when it is tried in the usual course.

P.R.S./B.V. *Appeal dismissed.*

(3) A. I. R. 1924 Cal. 769=81 I. C. 571 = 51 Cal. 324.

(4) A.I.R. 1927 Mad. 898=104 I. C. 768.

A. I. R. 1931 Madras 83

REILLY AND ANANTAKRISHNA AYYAR, JJ.

A. T. Pannirselvam—Petitioner.

v.

A. Veeriah Vandayar and *another*—Respondents.

Civil Revn. Petn. No. 1326 of 1930, Decided on 29th October 1930, from order of Sub-Judge, Tanjore, in O. P. No. 40 of 1930.

(a) Interpretation of Statutes—Retrospective effect—Statute not dealing with procedure does not have retrospective effect, unless clearly so intended by legislature.

Per Reilly J.—A statute other than one dealing with procedure shall not be construed so as

to have retrospective effect, unless the intention of the legislature that it should have such an effect, appears in its terms or by clear and necessary implication. But if such an intention appears in the statute which repeals a previous statute, there is no doubt that it can have a retrospective effect so as to apply even to pending litigation. [P 85 C 1 2]

(b) Interpretation of Statutes—Declaratory Act ordinarily has retrospective effect.

A declaratory Act, that is an Act which merely declares the law as it is and as it had been at the date of its commencement ordinarily has a retrospective effect : *Jones* v. *Bennett*, (1890) 63 *L. T.* 705, *Ref.*; *A. I. R.* 1929 *Mad.* 1 (*F. B.*) and *A. I. R.* 1930 *Mad.* 834 (*F. B.*), *Ref.* [P 85 C 2]

(c) Interpretation of Statutes—There may be a declaratory provision in non-declaratory Act.

A provision of an Act not in its general character declaratory, may be declaratory in effect, though not in form: *Attorney-General* v. *Hartford*, (1849) 3 *Ex.* 670, *Ref.* [P 86 C 1]

(d) Madras Local Boards Act (1930), S. 54 (2)—S. 54 (2) of new Act is amending and not a declaratory section.

Section 54 (2) as re-enacted amends S. 54 (2) of the old Act (1920) and is not merely a declaratory provision. [P 86 C 1]

(e) Madras Local Boards Act (1930), S.54 (2)—S. 54 (2) is grammatically in future tense and hence is not retrospective.

The whole of S. 54 (2) in its new form is grammatically in the future tense and nothing in that section is retrospective in its effect: *Smithies* v. *National Association of Operative Plasterers*, (1909) 1 *K. B.* 310, *Ref.* [P 87 C 1]

(f) Madras Local Boards Act (1930), Schedule R. 5 (3)—Old remedy at time of institution of suit has not been taken away.

Rule 5 (3) provides literally that any new remedy provided by the new Act shall be available in the pending proceedings. It does not say that the old remedy, available when the proceedings were instituted, has gone. If the legislature had so intended, it would have said so in plain, clear and simple language. Such meaning cannot be brought out by mere implication, which also cannot be found in the language used. [P 87 C 2]

(g) Madras Local Boards Act (1930), Schedule R. 5 (3)—It applies to suits, application etc. by or against Local Board and not to litigation between individuals.

All the subrules of R. 5 in the schedule refer to the Local Boards concerned and R. 5 (3) refers to applications, suits, or appeals, by or against a Local Board and not to applications or litigation between individuals such as election petitions in which one person attacks the election of another person. [P 88 C 1]

(h) Madras Local Boards Act (1930), S. 54 (2)—Intention of legislature is not to interfere with procedure of Court in matter already pending before it.

A new provision in regard to procedure might well have retrospective effect so as to apply to pending litigation, but the legislature should state so in clear and plain words. Without something far more clear, it cannot be inferred that the intention of the legislature in enacting S. 54 (2) was to interfere with the procedure of a Court in a matter already pending before it, remembering that the Act has nothing in its general scope to do with the procedure of Courts at all. [P 88 C 2]

(i) Madras Local Boards Act (1930), Schedule R. 6 (1) (a) and (c) — "Holding office" explained.

In R. 6 (1) (a) and R. 6 (1) (c) of the Schedule " holding office " means validly holding office. [P 89 C 2]

(j) Civil P. C. (1908), S. 115—When lower Court having jurisdiction decides point, High Court will not interfere with decision though wrong.

When the lower Court having jurisdiction to do so, decides a point, the High Court will not interfere with a decision whether it was decided rightly or wrongly. The High Court's power of revision does not ordinarily extend to examine the correctness or sustainability of a finding of fact arrived at by lower Court [P 90 C 1 P 91 C 1]

(k) Interpretation of Statutes—Retrospective operation should not be given to statute to affect existing rights, unless statute is violated.

Per *Anantakrishna Ayyar*, *J.*—A retrospective operation is not to be given to a statute so as to impair an existing right or obligation or otherwise than as regards matter of procedure, unless the fact cannot be avoided without doing violence to the language of the enactment. A statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. If it is capable of being interpreted in either way, it ought to be construed as prospective only: *A. I. R.* 1927 *P. C.* 242, *Ref.* [P 91 C 2]

(l) Interpretation of Statutes — Context should be looked to before holding a declaratory statute to be retrospective in operation.

The context of the statute and the terms of the clauses in question should be examined before even statutes which are declaratory in form are held to be retrospective: *Young* v. *Adams*, (1898) *A. C.* 469, *Foll.* [P 92 C 1]

(m) Interpretation of Statutes—When new remedy is given by statute where old remedy existed, it is cumulative and not in lieu of old remedy.

Remedies may be given by a statute, and if a new remedy is given in a case, where an old remedy existed, the ordinary presumption is that this new remedy is a cumulative one and not in lieu of the old remedy. [P 93 C 2]

Advocate-General, P. Venkataramana Rao and *R. Sundaralingam*—for Petitioner.

T. R. Venkatarama Sastriar, K. P. Ramakrishna Ayyar and *N. Rajagopala Ayyangar*—for Respondents.

Reilly, J.—The Petitioner in this revision petition was elected President of the District Board of Tanjore in January last. His opponent at that election, the respondent here, put in an election petition in the Court of the Subordinate

Judge of Tanjore early in February of this year. Unfortunately for various reasons the disposal of that petition was delayed until 4th September last. The petitioner here has urged before us that by 4th September the Subordinate Judge had lost jurisdiction to deal with the petition in consequence of a new Act, which had come into force Act 11 of 1930. There is no dispute that at the time when the election petition was presented to the Subordinate Judge he had jurisdiction to dispose of it ; nor is it suggested before us that he lost jurisdiction until the new Act came into force on 26th August 1930. The Subordinate Judge found that the election of Mr. Pannirselvam, the petitioner here, was void and ordered a re-election. That decision of the Subordinate Judge is contested before us for various reasons. But the reason which has occupied our attention and with which only I think it necessary to deal at any length is the allegation that at the time he disposed of the petition the Subordinate Judge had no jurisdiction to do so. For the election petitioner, Mr. Veeriah Vandayar, it is contended that, as admittedly the Subordinate Judge had jurisdiction to deal with the petition when it was presented to him, the new Act did not deprive him of jurisdiction.

The new Act amends in many particulars the Madras Local Boards Act of 1920, which was in force when this election took place and under the provisions of which Mr. Veeriah Vandayar instituted his election petition. Among other things it repeals S. 13 of the Act of 1920, under which no salaried officer of the Government was eligible to be elected president of a Local Board. And I understand that the only objection to the election of Mr. Pannirselvam which was pressed when the election petition came on for hearing before the Subordinate Judge was that he was ineligible for election as president because he was a salaried officer of the Government. Now it cannot be doubted that it is a fundamental rule of interpretation that a statute other than one dealing with procedure shall not be construed so as to have retrospective effect unless the intention of the legislature that it should have such an effect appears in its terms or by clear and necessary implication. That principle is reinforced, so far as this presidency is concerned, by the Madras General Clauses Act, under which, unless a contrary intention appears in an Act of the Madras legislature, though it may repeal a previous Act, that repeal does not affect any right, privilege, obligation or liability acquired, accrued, or incurred under the enactment so repealed nor affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, etc. ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed.

That is very much the effect of the interpretation Act in England. But, if a contrary intention appears in a subsequent Act, there is no doubt that it can have a retrospective effect so as to apply even to pending litigation, as is shown by *Quilter* v. *Malleson* (1). But, when we look at the new Act 11 of 1930, with which we are concerned, we find nothing explicit in it to the effect that it is retrospective in its action. The learned Advocate-General, who appears for the petitioner before us, has urged that that is of little importance because the Act itself is a declaratory Act. If it were really a declaratory Act, an Act which merely declared the law as it was at the date of its commencement and as it had been, then no doubt it might have, and ordinarily would have, a retrospective effect as pointed out by Lord Chief Justice Coleridge in *Jones* v. *Bennett* (2), though the mere description of an Act was a declaratory Act is not decisive on that point. But, when we examine this Act 11 of 1930, is it a declaratory Act ? That is not what it purports to be in its preamble, which runs :

" Whereas it is expedient further to amend and consolidate the Madras Local Boards Act 1920, and the Madras Village Panchayat Act, 1920."

So far as the new Act is a consolidating Act, it is so because it consolidates the Madras Local Boards Act 1920, and the Madras Village Panchayat Act 1920. Apart from that it purports to be an amending Act.

Nevertheless, failing his contention that the whole of the new Act is a declaratory Act, the learned Advocate-General has contended that certain provisions of it may be declaratory in nature and re-

(1) [1882] 9 Q.B.D. 672=52 L.J. Q.B. 44=31 W.R. 75=47 L.T. 560.
(2) [1890] 63 L.T. 705=6 Asp. M.C. 596.

trospective in effect. No doubt it is possible that a provision of an Act not in its general character declaratory may be declaratory in effect, though not in form, as was the case in *Attorney-General* v. *Hertford* (3). What the learned Advocate-General has suggested before us is that S. 54(2), Madras Local Boards Act, in the form in which it has been re-enacted in Act 11 of 1930 is a declaratory provision, which sets out and limits retrospectively the disqualifications of Government officers. S. 54(2), Madras Local Boards Act, before its recent amendment ran :

"No salaried officer of Government shall be qualified for election as a member of a Local Board, provided that this prohibition shall not apply to village headman."

Mr. Pannirselvam held the office of the Public Prosecutor and Government Pleader of Tanjore, and it was alleged against him by his opponent that he was therefore a salaried officer within the meaning of S. 54 (2) and S. 13 of the Act before its amendment. It has not been denied before us, and the exhibits in the case show, that doubts were felt by various parties and were at times referred to the Government whether a Public Prosecutor and Government pleader was a salaried officer of Government within the meaning of S. 54 (2) of the Act as unamended. The learned Advocate-General has urged that S. 54 (2) as re-enacted by Act 11 of 1930 was designed to clear up those doubts and to declare the law and in that sense must be regarded as a provision having retrospective effect. The new S. 54 (2) as re-enacted runs :

"No officer of Government other than a village headman should be qualified for election or for holding office as a member of a Local Board, provided that this prohibition shall not apply to the holder of any office which does not involve both of the following incidents, namely that the incumbent (a) is a whole time servant of the Government, and (b) is remunerated either by salary or fees."

It cannot be denied that that provision as re-enacted does clear up any doubts which might be felt and which had been felt as to whether a Public Prosecutor and Government Pleader could be elected as a member of a District Board. But it goes a good deal further than that, as has been pointed out by Mr. Venkatarama Sastri for the respondent here. It amends S. 54 (2), of the old Act, in two marked ways. The old section said that no salaried officer of Government shall be qualified for election as a member of a Local Board, The new section says that not only will no officer as interpreted by the proviso immediately following be qualified for election but no such officer will be qualified for holding office as a member of a Local Board. That is something far more than merely declaring the law. That is a plain amendment of the law. And when we go on to the proviso immediately following, under which certain persons who are officers of Government are not to be held officers of Government disqalified by this subsection we find instead of "salaried officers" of Government being mentioned whole-time servants of Government who are remunerated either by salary or fees are mentioned. That again makes a very distinct change in the law. Salaried officers of the Government were excluded from election by the old section even though not whole-time servants of the Government. Such officers are not now disqualified for election or for holding office as members of a Board, though they were disqualified for being elected before. When we examine the subsection in that way and find that it makes two marked changes in the law, even though it may have cleared up doubts, and have been intended to clear up doubts, in respect to the eligibility of persons holding such offices as Government Pleaders and Public Prosecutors, we cannot treat it properly in my opinion as a declaratory provision. But of course, had it been a declaratory provision, that would not necessarily have affected the jurisdiction of the Subordinate Judge. It would have declared the law by which he had to decide the question before him ; but it would not have taken away his jurisdiction. What is urged in that connexion is that the Subordinate Judge lost his jurisdiction in consequence of proviso 2, to S. 54 (2) of the Act as amendmed, which runs:

"Provided further that, if any question arises either before or after an election whether any person is or is not disqualified under this subsection, the question shall be referred to the Local Government, whose decision shall be final."

It is suggested that, when that provision came into force, the Subordinate Judge lost jurisdiction to decide the question which was properly before him in the election petition already instituted. Now to my mind the natural reading of

(3) [1849] 3 Ex. 670.

that second proviso is not to that effect. Its words are: "If any question arises." That in itself is no indication of the past. The next words on which the learned Advocate-General laid stress were "either before or after an election." Those words, I do not think, help him because they are still in the natural construction of the sentence referring to future matters." "If any question arises before an election" that does not mean "has arisen in the past." "If any qusetion arises after an election" neither does that refer to any question in the past. And it is of interest to notice that the whole of that sub-S. (2), S 54, in its new form is grammatically in the future tense, a matter which we cannot ignore when dealing with the contention that a particular provision, not explicitly retrospective, not described explicitly as declaratory, is yet to be construed as retrospective in its effect. The importance of that use of the future tense was pointed out in *Smithies* v. *National Association of Operative Plasterers* (4), in connexion with the question whether a new provision should be applied to a pending action. To my mind we cannot find that anything in S. 54 (2), as re-enacted by Act 11 of 1930 is retrospective in its effect.

But there is another provision on which the learned Advocate-General strongly relied. There is a schedule at the end of Act 11 of 1930 containing some rules, which are described as "transitional provisions," provided for certain matters until the amendments made by the new Act come into full force. One of those rules, R. 5 (3) runs: "Any remedy by way of application, suit or appeal which is provided by the said Act (that is the Madras Local Boards Act, 1920) as amended by this shall be available in respect of proceedings under the said Act * * * * * pending on the date of the commencement of this Act, as if the proceedings in respect of which the remedy is sought had been instituted after the commencement of this Act."

The learned Advocate-General has contended that the effect of that rule is that the remedy open to the objector in an election petition under the Act before the amendment is replaced by a new remedy under the Act and itself has disappeared. That is not what R. 5 (3) grammatically says. What it says is that any remedy by way of application, suit or appeal which is provided by the said Act as amended by this Act shall be available in pending proceedings. First, it is to be noticed that that rule disposes of the contention that the proceedings before the Subordinate Judge in the election petition were somehow guillotined by the new Act and came to a final end when the Act came into force. But it must be borne in mind that it provides literally that any new remedy provided by the new Act shall be available in the pending proceedings. It does not say that the old remedy, available when the proceedings were instituted has gone. We are asked to interpret it in that way. But surely that would be a most back-handed way of expressing such a result.

Indeed I can hardly imagine that, if the legislature really wished to bring all election petitions properly instituted under the Act before this amendment to an end, had they not been disposed of when the new Act came into force, that would have been stated in clear and simple language. It would be a strong course to cut short proceedings in such a petition, on which an aggrieved person had properly embarked, though no doubt it would have been within the competence of the legislature to do that. But, if such a very unusual thing was to be done surely we should expect it to be done in plain language, not by an implication in a rule such as this, an implication which cannot strictly be found in the language used. But I think that Mr. Venkatarama Sastri has really provided us with the right explanation of R. 5 (3) of these transitional provisions. He has pointed out that R. 5 has four subrules in it. The first provides that the property and rights used, enjoyed, possessed by, vested in etc., a Board in existence under the old Act shall, when Act 11 of 1930 comes into force, pass to the Board which takes its place. Sub-R. 2 provides that preceedings of the old Boards may be continued, so far as they are not inconsistent with the new Act, by the new Boards concerned. Sub-R. 3 then provides for remedies by way of application, suit or appeal provided by the old Act as amended by the new Act being available in pending proceedings. Then comes sub-R 4, which takes up each of the three previous sub-rules in turn and provides that, if any dispute arises as to the Local Board to which any property, right, interest or liability is to pass under sub-R. 1 or as

(4) [1909] 1 K. B. 310=78 L. J. K. B.259=25 T. L.R. 205=100 L. T. 172.

to the Local Board by which any proceeding is to be continued under sub-R. 2 or as to the Local Board to or against which any remedy is to be available under sub-R. 3, then that question shall be referred to the Local Government, whose decision shall be final. When we take the whole of R. 5 together, including the provision in sub-R. 4 for deciding disputes on that point, I think it is clear that all these sub-rules refer to the Local Boards concerned and that sub-R. 3 refers to applications, suits or appeals by or against a Local Board and not to applications or litigation between individuals such as election petitions, in which one person attacks the election of another person. If that is the correct view to take, then R. 5 (3) of the transitional provisions had no effect upon the jurisdiction of the Subordinate Judge.

But a modified contention was put forward by the learned Advocate-General in the course of his argument that, even if the Subordinate Judge's jurisdiction to deal with the election petition before him was not affected by the new Act, proviso 2, to S. 54 indicated a new procedure which he was bound to follow in deciding the question before him, the question whether Mr. Pannirselvam was disqualified for election. As I have pointed out, proviso 2 to S. 54 as re-enacted is that, if any question arises whether any person is or is not disqualified, the question shall be referred to the Local Government, whose decision shall be final ; it is not disputed that a new provision in regard to procedure might well have retrospective effect so as to apply to pending litigation, and what is suggested is that the Subordinate Judge in this case, once Act 11 of 1930 came into force, instead of trying to decide the question whether Mr. Pannirselvam was disqualified or not, should have referred it to the Local Government and, when he got the Local Government's ruling, should have disposed of the petition before him accordingly. It is interesting to notice that in the transitional provisions, to which I referred just now, certain questions as to which Board of the new Boards to come into being is to have any property or to continue proceedings or to have a remedy in suits and so on are to be referred to the Local Government, questions which without that provision might have to be decided by a Court and there is no doubt that after Act 11 of 1930 came into force a question about the disqualification of a person by reason of any office he held under the Government would have to be referred to the Government. But it is going a very considerable length to urge that that provision, proviso 2 to S. 54 (2) as re-enacted, was intended to apply to the procedure of Courts dealing with election petitions already properly before them. No doubt the legislature could have applied a new procedure to such inquiries. But to my mind, if that had been their intention, something much more clearly stated would have been found in regard to the matter. It is not necessary to interpret proviso 2, S. 54 (2) as re-enacted in that way ; and without something far more clear, I am not prepared to infer that the intention of the legislature was to interfere with the procedure of a Court in a matter already pending before it, remembering that this Act, 11 of 1930, has nothing in its general scope to do with the procedure of Courts at all.

However, that is not the end of the argument for the petitioner here. It is urged that there are other provisions, other rules in the transitional provisions which oust the jurisdiction of the Subordinate Judge. R. 6 of those transitional provisions provides that, notwithstanding anything contained in the Madras Local Boards Act of 1920 or the amending Act, the members of every District Board or Taluk Board holding office at the date of the commencement of the amending Act shall be deemed to have been elected under that Act and their term of office shall extend to a date to be fixed by the Local Government not more than a year after the coming into force of the amending Act for the purpose of new elections to the new Boards. And in R. 6 (1) (c) it is provided that the President and the Vice-President of the District Board or the Taluk Board holding office at the commencement of the amending Act shall hold office as President or Vice-President, as the case may be, up to the date so fixed by the Local Government. It has been urged by the learned Advocate-General that the effect of that is that a President holding office at the date when the new Act came into force, that is, on 26th August 1930, will be entitled to remain in office until the date fixed by the Government, which, I

believe, is 25th August 1931, however irregular may have been the method by which he has come to hold office, any election petition instituted against him under the old Act before the new Act came into force having no longer any effect. That is a surprising contention, and we should have to be very sure that the rules had that effect before we could accede to it. There are various reasons which under the old Act could be urged why an election was invalid, why a candidate for an election was disqualified.

According to the learned Advocate-General's contention in this part of the case however serious might be the disqualifications which might be urged against an elected president in an election petition pending at the date when the new Act came into force, that is, on 26th August 1930, all those disqualifications would evaporate for the period until the date fixed by ths Government, as it happens a year later, for the new elections. If he were discovered to be a deaf-mute or a leper, if he were discovered to have been adjudicated insolvent, if he had any other of the disqualificaticns which might have been made the basis of an election petition against him, none of them would have any effect for the period until the new elections were to be held, that is, for the ensuing year. In connexion with that argument it is interesting to observe that R. 6 (1) (a) of the transitional provisions makes the holding of office by members of Boards for the period until the date fixed by the Government for the new elections subject to the provisions of Ss. 54 (2), 56 and 59 of the Act. That is, the members holding office when the new Act came into force are to continue to hold office subject to those sections which provide for certain supervening disqualifications, many of them of the same nature as the disqualifications which would have made a man ineligible for election and might be the subject of an election petition; and the members are to hold office subject also to S. 57, which provides for those disqualifications being decided by the District Judge.

Similarly R. 6 (1) (c) provides that Presidents and Vice-Presidents of Boards are to continue to hold office until the date fixed by the Governments for elections subject to Ss. 15, 43 and 44, that is, subject to the provisions for their vacating office in certain events or for their removal by the Government in certain events or as the result of a vote of "no confidence." So it will be seen that members are not to hold office from the date on which the new Act comes into force until the date fixed by the Government for the new elections irrespective of any disqualification which may occur to them, nor are presidents and vice-presidents to hold office irrespective of the ordinary provisions for their vacating office in certain circumstances or for their removal. Then why are we to jump to the conclusion that all questions of disqualification which might be raised in election petitions are to lapse, that a member or a president is to hold office however he might have been disqualified for getting into the office originally?

The learned Subordinate Judge in dealing with this matter has come to the conclusion that in Rr. 6 (1) (a) and 6 (1) (c), "holding office" means validly holding office. That certainly gives a reasonable interpretation to those two rules. It has been urged by the learned Advocate-General that under the provisions in regard to election petitions when there is a petition pending against a member or a president, he is entitled to hold office until the petition is decided, and therefore Mr. Pannirselvam in this case was holding office at the date when Act 11 of 1930 came into force because for various reasons this petition against his election had not been disposed of. But neither the new Act nor the old Act explicitly provides that members or presidents against whom election petitions are pending shall hold office until the petitions are disposed of. On the contrary, if they are found to be disqualified in such petitions, the order which has to be made is that their elections are void. What the old Act provided by S. 57 (3) was that "pending such decision the member shall be deemed to be disqualified." What the Act as now amended provides is that

"pending such decision the member shall be entitled to act as if he were not disqualified."

That is a very different thing from providing that he holds office pending the decision; and in my opinion the learned Subordinate Judge was right in finding that at the date when Act 11 of 1930 came into force Mr. Pannirselvam was not holding office as President of the

District Board within the meaning of R. 6 (1) (c) of the transitional provisions of the new Act. That being so, we cannot find that he holds that office by virtue of those transitional provisions and is so immune, as has been contended, from the jurisdiction of the Subordinate Judge from the date when the new Act came into force. In my opinion all these contentions that the Subordinate Judge had no jurisdiction to dispose of the petition before him on 4th September 1930 fail.

It is also urged in the petition before us that apart from any question of jurisdiction the learned Subordinate Judge's decision that Mr. Pannirselvam was disqualified as a salaried officer under the Act before it was amended was wrong. Whether his decision on that point was right or wrong, it does not appear to me to be a question with which we need deal on this occasion. It is not a question properly coming before us in revision proceedings under S. 115, Civil P. C. Whether he decided rightly or wrongly, if he had jurisdiction to decide the matter, then we cannot find that there was anything illegal or materially irregular in his decision. And in my opinion this is not a case in which we need fall back upon any reserve power of revision or superintendence which we have under any other enactment, because the question whether Mr. Pannirselvam was qualified or not under the Madras Local Boards Act before it was recently amended is not a question of any general public importance. From the date upon which the new Act came into force, 26th August 1930, such a question in the particular form in which it was raised in this case cannot be raised any longer. Therefore it appears to me quite unnecessary that we should go into it now.

In my opinion this Revision Petition should be dismissed with costs of respondent 1 (advocate's fee Rs. 250).

Anantakrishna Ayyar, J.—I agree.

The petitioner before us was elected President of the District Board of Tanjore, and on an election petition duly presented, the learned Subordinate Judge has declared his election to be void on the ground that as Government Pleader and Public Prosecutor, Tanjore, he held a salaried office under Government and was not eligible for election as President of the District Board under S. 13, Madras Local Boards Act (14 of 1920); and he has therefore presented this revision petition to us against that order. On his behalf the learned Advocate-General raised before us three contentions and Mr. P. Venkataramana Rao who followed him raised a fourth contention. The learned Advocate-General argued that, having regard to the provisions of the new Act 11 of 1930, which became law while the proceedings were pending before the learned Subordinate Judge, the Court had lost its jurisdiction in respect of this matter and that guillotine had been applied by the legislature to the petition pending in the lower Court. It was argued that the petition and the proceedings before the lower Court "dropped automatically" in the words of the learned Advocate General. But at a later stage of the argument, the learned Advocate-General modified that position to some extent. As I understood him, he argued that though the petition might not have "dropped automatically" the proper procedure that the learned Subordinate Judge ought to have followed was to refer the particular point in dispute before him to the Local Government and to pass his final orders on the petition in accordance with the opinion of the Government thereon, and the learned Subordinate Judge not having done so, his order should be revised as one passed without jurisdiction, or at any rate, as one passed with material irregularity. Thirdly, the learned Advocate-General argued that under R. 6 of the transitional provisions, the petitioner before us was holding office on the date of the commencement of the new Act and therefore the other sub-rules of R. 6 apply, with the result that he is secure in the holding of his office till 25th August 1931. The fourth point that was argued by Mr. P. Venkataramana Rao who followed the Advocate-General on behalf of the petitioner was that the learned Subordinate Judge was not right in his finding that a Government Pleader and Public Prosecutor in the mufassal in a salaried officer under the Government and as such ineligible for election as President of the District Board.

To take the last point first: it is at the highest only a mixed question of fact and law whether a Government Pleader and Public Prosecutor in the muffassil is "a salaried officer under the Govern-

ment." I proceed on the assumption that it is a mixed question of fact and law. From the records before us it appears that on this question the Government held different views on different occasions. We find from Ex. A that as early as 1887 the Government held the view that he was a salaried officer under the Government within the meaning of similar provision under the District Municipalities Act. In Hammick's Municipal Manual published in 1905 I find a statement to the same effect: see p. 29. A reference to Ex. 3 would show that subsequently the Government were advised that the amount paid to a Government Pleader and Public Prosecutor could be said to constitute " only retaining fee," but could not be said to be " salary," and consequently that the Government Pleader is not " a salaried officer " under the Government. Whichever might be the correct view, the finding arrived at by the learned Subordinate Judge is on a mixed question of fact and law, I am not sitting here in appeal against the learned Subordinate Judge's finding upon that question. The High Court's power of revision does not ordinarily extend to examine the correctness or sustainability of a finding of a fact arrived at by the lower Court, and I do not think that the case before me in any way constitutes an exception to the general practice of this Court. That being so, and having regard to the circumstances that such cases are not likely to arise in future—the policy of the new Act being in this respect quite different — I do not think that this is a case in which the High Court should enter into the examination of the correctness or otherwise of the finding on such a question. No special grounds are shown for us to interfere with such a finding. In this view, I overrule the fourth contention raised by the learned advocate for the petitioner.

In order to understand and correctly decide the first three contentions raised by the learned Advocate-General, I think it is necessary to keep in view the general principles of legal interpretation of statutes, and also bear in mind the exact scope of, and limitations imposed on, the principle relating to construction of statutes, regarding their retrospective operation. Though the general position could not be disputed, yet as I think that most of the contentions raised by the learned Advocate-General could be properly appreciated and answered, if the rule of interpretation and its limitations be succinctly stated, I proceed to refer to the statement of the rule and its limitations as appears from decided cases and leading text books. In Maxwell on Interpretation of Statutes at p. 348 the rule is stated in these terms, rule regarding procedure apart:

"upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication; and the same rule involves another and subordinate rule to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable whenever the line is reached at which the words of the section cease to be plain."

Similarly in Statute of Law by Craies at pp. 324 and 326, there are similar statements of the rule. I do not propose to quote them in extenso, but one paragragh at p. 326 I should like to refer to here.

"Perhaps no rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation or otherwise than as regards matter of procedure unless the fact cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

In Halsbury's Laws of England, Vol. 27, p. 159, it is stated:

"A statute is prima facie prospective, and does not interfere with existing rights, unless it contains clear words to that effect, or unless, having regard to its object, it necessarily does so."

Further:

"a statute is not to be construed to have a greater retrospective operation than its language renders necessary."

Now, it is therefore necessary not only to see whether the wording of the new Act is clear on this point, but also to examine how far it is clear, and how far it necessitates retrospective application of the provisions of the new Act, because in cases of doubt, or where a line is reached where it is not at all clear whether the legislature intended to have par-

ticular provisions retrospective operation or not, the rule is clear that such new provisions should have prospective operation only. I do not really think that correctness of these statements is really disputed, but I thought it proper to refer to these authorities only because it is necessary to keep in mind the exact scope and the limitations of the doctrine as laid down by learned authors.

Now the learned Advocate-General argued that S. 54 as enacted by the new Act (11 of 1930) is a declaratory provision only, and therefore the presumption is that the new provisions were intended to have retrospective operation. In this connexion it is necessary that I should refer to an observation made by the Privy Council in the case *Young* v. *Adams* (5), because that observation, it seems to me, furnishes an answer to this contention of the learned Advocate-General. "It may be true" their Lordships remark:

"that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply to acts which had been completed or to interests which had vested before they became law."

They proceed further to lay down that the context of the statute and the terms of the clauses in question should be examined before even statutes which are declaratory in form are held to be retrospective. No doubt when it is clear from a declaratory statute that its object was to "explain" certain words or clauses in a prior enactment, it would be easy to infer the intention of the legislature to be that the new Act should be retrospective. This High Court had to deal with such a question recently, when, for example, a question arose whether the meaning to be attached to the word "attested" occurring in the Transfer of Property Act was as explained in a later Act. The later Act, Act 27 of 1926, was passed "to explain" certain provisions of the prior (main) Act. The Court had also to consider in another case what the effect of an amendment to S. 53, Prov. Ins. Act was when there was doubt regarding the meaning of a certain expression used in the main Act. In those circumstances this Court held in two recent Full Bench decisions that having regard to the scope and the avowed object of the declaratory Acts they should be taken in those cases to be prima facie retrospective: see *Veerappa Chettiar* v. *Subramania Ayyar* (6) and *Pichamma* v. *Official Receiver of Cuddapah* (7). Unless the intention be clear, either by express words used or by necessary intendment, I should not be justified in holding a new Act to be retrospective. The Privy Council in *Delhi Cloth and General Mills Co.* v. *Income-tax Commissioner, Delhi* (8) made the following observations as to when statutes should be construed as retrospective. At p. 290 this is what their Lordships say:

"While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment."

Now keeping in mind the exact scope of this principle, and also the limitations which have been laid down as attaching to the same, I proceed to examine the material sections to which our attention was drawn by the learned Advocate-General.

On the first question relating to S. 54, I am not able to agree with the learned Advocate-General that what has been done under the new Act is only to "explain" the position of a person holding a "salaried office under the Government," as laid down by the prior Act. The legislature evidently took occasion to modify its policy relating to the whole matter. Under S. 54 they have provided for a case where "a person is remunerated either by salaries or fees." They have also specially provided for other classes of officers of the Government, whole timed and not whole timed. They have also taken care to indicate that unless both these conditions are fulfilled in any particular case, viz., unless a person be both a whole timed officer and also remunerated by salaries or fees, he could not be held disqualified under the new Act. Again the effect of such a disqualification has been extended to persons who after becoming a member etc., became subsequently disqualified to hold the office. It is clear to my mind that the present is

(5) [1898] A. C. 469=67 L. J. P. C. 75=14 T. L. R. 373=78 L. T. 506.

(6) A. I. R. 1929 Mad. 1=116 I. C. 367=52 Mad. 123 (F.B.).
(7) A. I. R. 1930 Mad. 834 (F.B.).
(8) A. I. R. 1927 P. C. 242=106 I. C. 156=54 I. A. 421=9 Lah. 284 (P.C.).

not a case where the statute could be said to be merely declaratory. The present case is therefore not governed by S. 54 of the new Act, and the first contention must accordingly be overruled.

Again the learned Advocate-General argued that under R. 5, sub-R. 3 of the transitional provisions the present is a case where the legislature has expressly provided that applications made while the old Act was in force should not be proceeded with; but that if any dispute arises, such as the one with which the learned Subordinate Judge was concerned then the question has not to be referred to the Local Government whose decision shall be final. It seems to me that R. 5 does not apply to the present case. Under the new Act the Government have taken power to change the areas and jurisdiction of Local Boards. They could extend the jurisdiction and area of one Taluk Board by adding new areas to the same, and they could cut up an old Taluk Board or take away some portion from it, as they think proper. The Government could also change the names of such Boards, &c.: see Ss. 4 and 5 of the new Act. Questions will naturally arise in such cases as to which Local Board is to be the owner of property possessed by old Board, and as to which Board is to sue or be sued with reference to particular causes of action; questions would arise whether notices already issued preliminary to imposing taxes regarding persons or properties would be valid or not, and whether the new Boards would have to begin the whole process afresh. It seems to me that R. 5 of the transitional provisions only deals with cases similar to those I have suggested above. No doubt sub-R. 3, if it .stood alone and if it be wrested from its context, might lend some support to the contention. If the object was to enact a provision which would have the effect attributed to it by the petitioner, its present place between two subrules which refer to quite a different matter would be the most inappropriate place to locate such an important provision relating to the automatic dropping of an application filed in due course under the old law and pending before a Court when the new Act came into force. Sub-R. 4 refers to any dispute arising as to the Local Board by which any proceeding is to be continued under sub-R. (2), or to or against which any remedy is to be available under sub-R. (3). It is thus applicable to disputes to which the Local Board was a party, election petitions like the one in question are not covered by the said rule, the Board is not a party to such petitions. On the other hand, if we read all the four subrules together and in harmony with one another, the object of R. 3 is clear, and, in my opinion that is the correct view that we should take. Even if I am wrong in my view as regards the exact scope of R. 5, sub-R. 3 the word "available" occurring in the rule would seem to indicate that a new remedy is provided for by it which may be taken advantage of by a person interested in the circumstances, but it does not follow that that is the only remedy open to him. Remedies may be given by a statute, and if, a new remedy is given in a case where an old remedy existed, the ordinary presumption is that this new remedy is a cumulative one and not in lieu of the old remedy. It is a rule of construction that when a statute creates a new remedy in respect of a cause of action which existed under the common law, this new remedy is taken to be cumulative and not in substitution of the old remedy. If we take it that under sub-Cl. 3 a new remedy has been made available to a person in the position of the petitioner in the lower Court, that does not, in this view, disable him from pursuing the old remedy, which he has already adopted, by way of moving the Court by a petition and which petition is pending before a Court. I would however prefer to base my judgment on the first of the two grounds mentioned by me. It therefore seems to me that sub-Cl. 3, R. 5 of the transitional provisions is net capable of the construction put upon it by the learned Advocate-General on behalf of the petitioner.

The last point on which great stress was laid by the learned Advocate-General relates to the construction of R. 6 of the the transitional provisions. The words "holding office" occurring in Cl. (a), R. 6 were strongly relied on. It was argued that as the petitioner was "holding office" on the date when the new Act came into force, his term of office became secure, and that he was entitled to continue till 25th August 1931, the date fixed by the Local Government. As I

read the other subrules of R. 6, it seems to me that what is provided for by R. 6 is to extend the terms, and in some cases to shorten the terms, of the members etc., referred to therein. One cannot speak of a person's term of office unless he validly holds that office. No doubt in one sense a person elected as a member, or elected as president. holds office (though his election is questioned) until the rights are finally adjudicated upon an election petition duly presented under the Act. But both the old Act and the new Act make it clear that the result of the adjudication so far as his office is concerned is to declare his election void, and under the present Act it is expressly enacted that "pending such decision" the member shall be entitled to act as if he were not disqualified S. 50. In order to bring about so little dislocation as possible in the actual transacting of business by the Boards, the legislature has provided for the validation of those acts of such members and presidents which were 'done before adjudication by the Court on the validity of the elections concerned; but at the same time, the legislature has also made it clear that when the legality of the election or appointment is decided against by the Court, the election is declared void. A trespasser who might be in possession of such an office on the date of the new Act could not be said "to hold office" within the meaning of the rule. Again, R. 6 adds a proviso "subject to the provisions of Ss. 54 (2), 56, 57 and 59 of the Act."

The result of the construction of R. 6, and its subrules contended for by the learned Advocate-General would be that having regard to the other provisions of this R. 6 allegations serious in the eye of the legislature made against such candidates and pending adjudication in a Court are all condoned, so to speak, during this interim period, whereas if the same candidate be guilty of the same disqualification after the Act, proceedings could be taken against him in respect of the same. It is therefore difficult to accept the argument that what the legislature has provided for in sub-R. 6 is to condone such disqualifications and make such persons duly elected members or presidents, irrespective of all allegations made against them, though they are pending investigation before the Court. I do not think it necessary to dilate upon this part of the case, as I agree with my learned brother's observations thereon. I overrule this contention also.

I must state that if the legislature intended that the amended S. 54 is to have retrospective operation, or that an election petition duly filed and being inquired into by Court should automatically drop, or that the jurisdiction which a Court admittedly had when proceedings were initiated before it should be taken away from it or otherwise curtailed, or gullotine applied to such pending proceedings, one should have expected the legislature to say so in express terms or at least by necessary intendment. I am not able to find any such reasonable indication in the new Act; and having regard to the well settled principles applicable to such matters, I do not think that the above contentions urged on behalf of the petitioner before us should be accepted.

In my view, it could not be said that the learned Subordinate Judge has in this case either exercised a jurisdiction not vested in him by law or exceeded his jurisdiction in the matter. That being so, I agree that this revision petition should be dismissed with costs.

P.R.S./B.V. *Revision dismissed.*

A. I. R. 1931 Madras 94

RAMESAM, J.

Sundara Ganapathi Mudali—Plaintiff—Petitioner.

v.

Daivasikamani Mudali and *another*—Defendants—Respondents.

Civil Revn. Petn. No. 1647 of 1929, Decided on 24th February 1930, from order of Sub-Judge, Vellore, D/- 14th October 1929, in Original Suit No. 40 of 1929.

(a) Civil P. C. (1908), O. 7, R. 1—Court should see substance and not to form of plaint.

What a Court has to see is the substance of the plaint and not the more form. The presence or absence of a prayer in a particular form is immaterial when the relief has been substantially claimed in the body of the plaint.

[P 95 C 2]

(b) Court-fees Act (1870), S. 7 (4) (b)—Partition deed with alleged fraud in allotting properties—Suit for partition and to get over effect of partition deed—S. 7 (4) (b) or (c)

applied and hence plaintiff was given opportunity to value his relief in his own way.

Where there was a partition deed effected with an alleged fraud in alloting properties to parties in suit and where the plaintiff instituted a suit for partition and to get over the effect of partition deed, on a question in what way the court-fees should have been paid,

Held: that under the circumstances S. 7 (4) (b) or (c) applied to the case and as there was a partition deed effected, the parties did not remain joint but had separated. Hence on the footing that the plaint was one to which S. 7 (4) applied, the plaintiff had the right of valuing the relief sought in his own way and that he should pay court-fees on such valuation which should be made according to the provisions of S. 7 (5). [P 96 C 1, 2]

A. Viswanatha Ayyar and *A. Ramaswami Iyer*—for Petitioner.

V. M. Ramaswami Mudaliar — for Respondents.

Judgment.—This revision petition is filed against an order of the Subordinate Judge of Vellore on two issues in Original Suit No. 40 of 1929. This suit was filed by the present petitioner against his father and stepbrother for a partition of the family properties. Prior to the filing of the suit there had been a deed of partition but the plaintiff alleges in his plaint that he was threatened by his father and others with violence and otherwise to sign it without knowing its contents properly and without realizing its full effect and compelled to yield to the pressure brought to bear on him, that when the document was afterwards presented for registration he came to know of the nature and import of the document and realised the fraud committed on him and refused to agree to its registration. He also alleges that the share of the defendants was grossly undervalued, while the properties allotted to him were overvalued, many items of properties and considerable cash have been omitted and a large sum of money was wrongly got allotted for some maintenance and marriage expenses of the plaintiff's stepsisters, that unfair advantage was taken of the position in which defendant 1 stood towards the plaintiff and that the plaintiff had no independent advice in the matter. He then alleges in para. 11 that the deed was not acted upon or given effect to and the entire family properties continued joint between the parties and that plaintiff continues to remain in joint possession and enjoyment of the same. The written statement, para. 13, says,:

"All the allegations in paras. 10 to 14 of the plaint are entirely false, malicious and vexatious."

Among the issues framed are issues 7 and 8:

7. Is the suit without a prayer to set aside the partition deed maintainable?

8. Is the court-fee paid correct.

The Subordinate Judge has recorded findings on these two issues and hence this revision petition.

On issue 7 he found that the suit is not maintainable without a prayer to set aside the partition deed. As to this I am of opinion that a formal prayer is unnecessary. The plaintiff has made it clear in the plaint that he regards the partition deed as not binding on him. He alleges that it is voidable at his option, gives reasons why he has got the right to avoid it and seeks for relief on the basis that that partition deed is avoided. In substance the plaint is one which seeks to get over the effect of the partition deed and to obtain reliefs as if no such deed existed. Substantially the plaint is one suing for a declaration that the partition deed is not binding on him and for further reliefs following on such declaration. What we have to see is the substance of the plaint and not the mere form. The presence or absence of a prayer in a particular form is immaterial. The Subordinate Judge himself has not passed any further order asking the plaintiff to amend by the addition of any prayer.

On issue 8 he was of opinion that the plaintiff should pay court-fees under S. 7 (4) (b). He is of opinion that Art. 17 (b), Sch. 2, does not apply on the ground that the plaintiff valued the suit at Rs. 51,903-12-0 for purposes of jurisdiction and that the valuation of the suit for purposes of jurisdiction and for purposes of court-fees must be the same under the Suits Valuation Act and if the suit falls under S. 7 (4) he was of opinion that the court-fee should be paid as on Rs. 51,903-12-0. In the result he passed an order directing the plaintiff to pay the excess fee.

The learned advocate for the petitioner contends that the case is governed by the decision of Odgers, J., in *Suryanarayana* v. *Seshayya*, *A.I.R.* 1926 *Mad.* 122 and he also relies on *Gill* v. *Varadaraghavayya* (1). In the latter case the plaintiff alleges that he and the defendants were

(1) [1920] 43 Mad. 396=55 I. C. 517.

co-tenants but that he was in possession of the whole property on behalf of himself and the co-tenants. Their Lordships Sir John Wallis, C. J., and Sadasiva Ayyar, J., held that Art. 17 (b), Sch. 2, applied. In the former case the facts are that the family became divided in status and the plaintiff sued for division by metes and bounds. We have not got in that case the complication which exists in case of a partition deed allotting certain specific properties to one of the members and that member seeking to get over that partition deed. In my opinion that fact distinguishes the present case from the decision in *A. I. R.* 1926 *Mad.* 122. In the present case though in one part of the plaint it says that:

"the plaintiff and defendants form members of a joint undivided family and own considerable moveable and immovable properties,"

taking the whole plaint it is clear that the status of jointness was put an end to by the partition deed and though the specific allotment therein is complained of as unjust and improper the original status cannot be restored. Even para. 11 does not amount to an allegation of reunion and the restoration of the original joint family property. It only says that the entire joint family properties continued joint between the parties and the plaintiff continues to be in joint possession and enjoyment of the same. This amounts to no more than saying that the plaintiff is a tenant-in-common with the other parties. If it was meant by the allegation in para. 11 that the defendants willingly dropped the partition deed, I think we must take it as a mere idle allegation. The partition deed was compulsorily registered by the Registrar on 17th May against the plaintiff's opposition. The suit was filed on 6th July. To say that in this interval the defendants were agreeable that the partition deed should be ignored and not be given effect to is so ridiculous an allegation that it might be ingored. No doubt if that allegation is insisted upon and is to be taken seriously, the judgment of Odgers, J., might apply, but as I have already observed it is so futile an allegation on its face that a Court would be entitled to ignore it. I think that S. 7 (4) (c) if not (b) applies to this case and not Art. 17 (b), Sch 2.

The only question then is, what is the court-fee plaintiff should pay? The plaintiff framed his plaint on a basis so totally different from the conclusion now arrived at that it is unfair to him to make him stand by the statement, that the valuation of the suit for purposes of jurisdiction is Rs. 51,903-12-0. On the footing that the plaint is one to which S. 7 (4) applies he had the right of valuing the relief sought in his own way. This right is now only subject to the proviso to S. 4 introduced by the Court-fees Amendment Act of 1922. Under S. 7, para. 4 of that Act it is said that in suits coming under sub-Cl. (c) in cases where the relief sought is with reference to any immovable property such valuation shall not be less than half the value of the immovable property calculated in the manner provided for by para. 5 of this section. In the present case the plaintiff has got some immovable properties allotted to him but he complains that this is an unfair allotment. And he apparently thinks that he is entitled to some more properties. I think an opportunity ought to be given to him so that he may state the valuation of his share of the immovable properties in the manner stated by the proviso, that is, according to para. 5, S. 7 and the valuation of the properties allotted to him and half the difference between the two would be the minimum value on which he is to pay the court-fees.

So far as the other moveable properties iucluding outstandings, allotment for maintenance and other similar items are concerned the plaintiff would be entitled to value his share in the way he likes. I think the proper order would be to return the plaint to him for amendment on these lines and to state his own valuation both for purposes of jurisdiction and court-fees and to require him to pay such court-fees. After the papers are received by the lower Court it shall pass a formal order returning the plaint for amendment and fixing a time for amendment and payment of the additional court-fees.

I make no order as to costs.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 97
Full Bench

BEASLEY, C. J. AND ANANTAKRISHNA AYYAR AND CURGENVEN, JJ.

(*Raja Damara Kumara*) *Venkata Lingama Nayanim Bahadur Varu*—Plaintiff—Appellant.

v.

Penaganti Jagannadha Rayanimgar and *others*—Defendants—Respondents.

Appeal No. 99 of 1925, Decided on 23rd April 1930, from decree of Sub-Judge, Chittoor, D/- 16th September 1924, in Original Suit No. 18 of 1922.

Trust—Alienation of trust property as private property after previous declaration that it is trust property—Suit for declaration invalidating alienation brought by succeeding trustee—Defence by alienee that property is not trust property is tenable.

When a person assuming the position of a trustee in respect of property as to which there is no previous dedication, obtains from a Court a declaration that the property is trust property and acts as such trustee but subsequently alienates the property on the footing that it is his private property, the subsequent alienee from him is entitled to set up a defence, in a suit filed by the succeeding trustee for a declaration as to the invalidity of the alienation, that the property is not trust property. And as far as the alienees are concerned, the proceedings in the previous suit cannot be regarded as anything more at the highest than a piece of evidence, to be considered along with the other evidence in the case in deciding whether any trust existed.

[P 103 C 1, 2]

Advocate-General and *A. Ramachandra Ayyar*—for Appellant.

D. P. Sundararamayya for *P. Chenchiah, P. Venkatarama Rao* and *C. Basu*—for Respondents.

Order of Reference. — This appeal arises out of a suit by the present Rajah of Kalahasti (1) to declare that the mortgage-deed, dated 21st September 1912, and the Original Suit No. 7 of 1916 on the file of the Sub-Court, North Arcot, and all the subsequent proceedings in execution of the decree including the sale are all fraudulent, collusive and nominal transactions, (2) to declare that they are not binding on the plaint trust and (3) to direct the defendants to deliver possession of the trust village Yerpedu to the plaintiff with mesne profits and costs of the suit. The allegation that the mortgage and sale were fraudulent, collusive and nominal transactions was given up in the suit and the sole question argued was whether the village Yerpedu was a trust village or not. The lower Court found that the trust had not been made out and dismissed the suit. Against this decision the plaintiff appeals.

In order to understand the case, it is necessary to give a brief history of what has happened with regard to this village of Yerpedu. In 1801 there was a special commission which was to effect the settlement of zamindaries working along the lines which were afterwards laid down in Regn. 25 of 1802. The commission deputed one Mr. Stratton to make a report on the zamindaris of Venkatagiri, Kalahasti and Karvetnagar. The scheme was to exclude from the total peishcush such lands as lekhiraj or lands exempt from payment of Government revenue. Mr. Stratton submitted his report, and in Ex. FF which is called Stratton's Register the entry shows this village of Yerpedu as an alienated village. When however the settlement was actually made, it was decided that, as this Kalahasti zamindari had been already paying a fixed peishcush to the Nawab of Arcot, it would be enough if this peishcush were adopted and to that were added a commuted value of the military services the zamindar had to render. Consequently in the sannad granted there is no deduction for the lekhiraj lands as was made in the case of ordinary zamindaris. In 1907 the Government started an enquiry about such inams with the result that the Rajah of Venkatagiri, who held a sannad similar to that of the Kalahasti Rajah, filed a suit in which he asked for an injunction restraining the Government from holding any investigation into the nature of and title to the inams and lekhiraj lands in his zamindari and from dealing with the same under the inam rules or resuming them or assessing them to public revenue. He was successful in all the Courts here, and also when the matter was carried up to the Privy Council which gave its decision on 15th July 1921. This is reported in *Secy. of State* v. *Rajah of Venkatagiri* (1). The date of the judgment of the High Court is 29th March 1916. In 1896 the then Rajah of Kalahasti, Akkappa Nayanim Bahadur Varu, mortgaged this village of Yerpedu along with other properties to the Rajah of Venkatagiri under Ex. 7. The latter filed O. S. No. 2 of 1907 on this mortgage on 14th March 1907. By that time the Rajah of Kala-

(1) A.I.R. 1922 P.C. 168=73 I.C. 741=48 I.A. 415=44 Mad. 864 (P.C.).

hasti who had mortgaged the properties was dead and had been succeeded by his son Thimmanayanim Bahadur Varu : vide Ex. 8, an extract from the suit register. A decree was obtained on the mortgage, and, when the Rajah of Venkatagiri wanted to execute it, the Rajah of Kalahasti filed O. S. No 21 of 1910 on the file of the Temporary Sub-Court of North Arcot to have it declared that this was a trust village of which he was the trustee, that his father had no right to alienate the village and that it should be declared a trust property. The plaint in that suit is Ex. GG. It may be noted that neither in the written statement in the suit on the mortgage, nor even when the execution application Ex. 5 was put in, did the Rajah of Kalahasti allege that this was trust property which his father had no right to alienate. The Rajah of Venkatagiri did not contest O. S. 21 of 1910 and a decree was passed accordingly. Probably, the Rajah of Venkatagiri thought that he had sufficient security for his mortgage or was satisfied that it would be paid soon and so he did not raise any contention in respect of this property. We find that the decree was fully satisfied in 1914 and that not by the sale of the mortgaged property but by payment out of Court : vide the last order on Ex. 5, dated 6th March 1914. After obtaining this decree, Thimmanayanim Bahadur Varu mortgaged this village of Yerpedu on 21st September 1912 to the present defendant 1. The latter filed O. S. 7 of 1916 against the Rajah in the Sub-Court of North Arcot and obtained a decree. He brought the village to sale, purchased it himself and took delivery of it on 2nd December 1919. In that year the Rajah Thimmanayanim Bahadur Varu died and was succeeded by his son, the present plaintiff, and he instituted this suit on 15th March 1922 to have it declared that the mortgage to defendant 1 and the purchase by the latter in Court auction were invalid as the village was trust property. Defendant 1 is the brother-in-law of the late Rajah. Two other brothers of defendant 1 had been added as defendants 2 and 3 but were struck off as being unnecessary parties.

In 1907 the then Rajah of Kalahasti who had executed the mortgage deed of 1896 to the Rajah of Venkatagiri was between two cross fires. On the one hand, the Rajah of Venkatagiri was suing him on his mortgage and the Rajah of Kalahasti was countering this by pleading that the property was trust property ; on the other hand, the Government were trying to demand the village as inam property and if he were to meet that demand he would have to declare it to be an ayan village. It is obvious therefore that no particular importance can be attached to the various contradictory titles put forward by the Rajah of Kalahasti from 1907. He at first made a cautious statement, Ex. S, to the Revenue authorities. It seems likely that he then squared up his difficulties with the Rajah of Venkatagiri. Subsequently he specifically denied to the Government that this was an inam village : vide Ex. 18 and Ex. D. After the execution of the mortgage to defendant 1, it is conceded by both sides that, in subsequent suits to which defendant 1 was not a party any attitude taken up by the Rajah of Kalahasti is not of much use in determining the question whether this is trust property or not, so we need not go into these matters deeply.

The Subordinate Judge has fully discussed the evidence on the point whether Yerpedu was gifted for charity. Up to the year 1907 it is perfectly clear, as argued by the learned Government Pleader who appeared for the respondent, that the only documentary piece of evidence to show that this village Yerpedu was dedicated to the choultry is Ex. FF of Mr. Stratton's Report. There is one earlier document, Ex. WW-1 which is called Huthavali (income) account of Yerpedu for 1796. The learned Subordinate Judge has correctly summed up the position in saying :

> " From the contents of the account I learn that not alone the kattubadi on inams to the village but more than a third of the grain rents and half of money rents were being remitted to the Zamindar for his personal use."

All the documents up to the year 1907 negative the idea that this village was entirely dedicated to the trust. They show at the most that some paddy used to be sent from it, generally about a putti, by the Samasthanam which was devoted to the charity. But as remarked by the learned Subordinate Judge, who has carefully set out the evidence, it is only a part of the income of this village that was spent for the purposes of the charity and it is clear that certain other

villages were contributing more. The explanation attempted is that these villages were only indented on when there was not enough grain at Yerpedu. That is belied by the documentary evidence which shows that even while there was grain at Yerpedu it was not utilized for this purpose and indents were made on other villages for supplies. We may also note that in one year supplies were taken from Yerpedu for a purely Mahomedan celebration ; and in one year we find (from Ex. 31) that nothing at all was sent from Yerpedu to the choultry. Therefore it is highly unlikely that the entire income of the village would have been dedicated to the choultry which was intended for pilgrims going to Hindu temples. Then again we have a series of grants of land in Yerpedu village which are inconsistent with the village being dedicated to the charity: vide Ex. 35 dated 1844, Ex. 36 dated 1845. and Exs. 37 and 38. The lower Court gives the dates of these latter documents as 1852 and 1853, but there appears to be some doubt as to whether they should not be 1792 and 1793. Then we have a series of leases granted by the zamindar of this village in which it is classed with other ayan villages without any distinction and in none of them is the lessor described as a trustee. One of these leases is Ex. 41, dated 3rd March 1900. It is in favour of the Court of Wards which was then managing the estate. Accuracy in describing the property as trust property and the lessor as trustee might be expected here, but we find no such description.

Turning now to Ex. FF, Mr. Stratton's report, which, as stated above, is the only document before 1907 which supports the view that the village was trust property; this report was admittedly not acted upon because no sannad was ultimately granted on that basis, as it proved unnecessary to go into the question whether any lands were lekhiraj and inam. It is open to doubt, in the light of the observations of their Lordships of the Privy Council in *Venkateswara Iyan* v. *Shekhari Varma* (2), at p. 391, whether this report is evidence at all in the circumstances. In that case certain paimash accounts for 1798-99 and 1805-06 were relied on by the plaintiffs. Their Lordships remark:

"On looking at these accounts two observations at once occur. The first is that, putting them at the highest, they are only evidence of possession, having been rendered to Government for the purpose of informing them from whom they were to demand the revenue. The second is that they can hardly be said to be public documents at all, for on the face of them it is stated that they were never confirmed and never acted on. The person who made these returns may have believed that the lands were devaswam property, but his statement to that effect is a mere private opinion, unless and until it is affirmed or acted on in some public way. It is remarkable that in the suit of 1833 a copy of one of these accounts was refused to one of the litigant parties, on the very ground that the account had never been confirmed and was only granted on its being discovered that a copy had already been given to his opponent. These documents should not have been treated as evidence."

Mr. Stratton's report no doubt was called for with a view to ascertain whether there were any lekhiraj and inam lands in the zamindari, but it was not acted upon for this purpose. Assuming however that it is evidence, we consider that it cannot outweigh the strong documentary evidence which shows that the village was not dedicated to this charity. The utmost that can be said is that paddy was taken from this village as well as from other villages for the choultry. There is nothing to show that a fixed amount of paddy was taken ; and in one year we find, as stated above, that nothing was spent from this village towards the charity. Further the grants of land in Yerpedu given by various Rajahs, as stated above, belie any idea of the village being dedicated to charity. On the face of it, therefore, it is clear that Mr. Stratton was misinformed when he reported that the whole village was alienated to charity.

In Appeal No. 283 of 1911, the judgment in which is filed as Ex. YY, Ayling and Srinivasa Ayyangar, JJ., referred to Ex. E in that case which was an appendix to Mr. Stratton's Report. This was in a suit relating to the Kalahasti village. The learned Judges observed:

"This report is based on the karnam's accounts of the villages of the zamindari and was prepared for the purpose of showing the total income received by the zamindar."

We do not know whether the first part of the statement was supported by the evidence in that case. In the present case it can only be said to be a conjecture; but the facts of that case were

(2) [1881] 3 Mad. 384=8 I. A. 143=4 Sar. 259 (P.C.).

different because there was a grant, Ex. A, as well as a stone inscription built into the wall of the temple purporting to be a contemporaneous record of the grant. The learned Judges say:

"Whatever doubts there may be if Ex. A stood alone, we have Ex. M, a stone inscription built into the wall of the temple, purporting to be a contemporaneous record of the grant. No objection was taken to its admissibility and a perusal of the document shows that it was substantially a duplicate of the grant."

In the present case there is no deed of grant of any sort.

In *Konwar Doorganath Roy* v. *Ram Chunder Sen* (3), their Lordships of the Privy Council laid down :

"A plaintiff who seeks to set aside an alienation of lands on the ground that they are debutter, i. e., dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mahal have been applied for a considerable period to the worship of an idol is not sufficient proof that the mahal is debutter."

In the present case the record shows conclusively that the whole income of the village was not dedicated to charity, that no fixed amount was granted and that in one year nothing at all was granted. Under these circumstances we agree with the learned Subordinate Judge in holding that it is not proved that the village was dedicated to charity.

There is however one argument which has been strongly urged upon us. It is a question of law which must be held to have been raised in paragraph 6 of the plaint. It is there stated that

"in O. S. No. 29 of 1910, on the file of the District Court of North Arcot, the village has been declared to be a trust village on a suit instituted by R. D. K. Thimmanayanim Bahadur Varu himself."

As noted above, the plaintiff who filed that suit raised no objection in his written statement in O. S. No. 7 of 1916 filed by the Rajah of Venkatagiri, nor in the execution proceedings evidenced by Ex. 5, that this village was an inam village though it was quite open to him to do so then, as it was not he but his father who had mortgaged the property. The Rajah of Venkatagiri did not choose to contest this suit O. S. No. 29 of 1910 and a decree was passed accordingly.

It is strongly contended that the judgment Ex. GG precludes the subsequent mortgagee from contending that the property is not trust property and that the mortgagor is not a trustee.

(We may note that no issue has been raised whether the mortgagees were dealing with the property bona fide as private property without knowing that it was trust property. This was an issue which it was for the defendants to raise and prove if they relied on it.)

Srinivasa Moorthy v. *Venkata Varada Ayyangar* (4), a decision of the Privy Council, is quoted where it was held that no person who has accepted the position of a trustee and has acquired property in that capacity can be permitted to set up an adverse title on his own behalf, until he has obtained a proper discharge from the trust with which he has clothed himself. *Grant* v. *Grant* (5) is also quoted.

On the other side, *Benode Behari* v. *Manmatha Nath* (6) and *Budh Singh Dudhuria* v. *Niradbaran Roy* (7) are relied on. In the former case, there had been an enquiry by the Government in 1842 and the revenue authorities had issued certain robokaries describing the lands as debutter. It was argued that these robokaries were equivalent to decrees establishing the dedication of the property to the idol and might therefore be regarded as documents of title. The learned Judges, Coxe and Chatterjea, JJ., did not accede to this argument. Coxe, J. said :

"Clearly the right of the idol to the land was not in controversy in those proceedings. All that the plaintiff in those proceedings was interested in claiming was that the land, whether it belonged to the idol or not, was subject to the assessment of the rent or revenue. In these circumstances it seems to me that the decision cannot be regarded as a document of title."

The other case *Budh Singh Dudhuria* v. *Niradbaran Roy* (7) is closely analogous to the present case. In that case it was held that a suit, the sole object of which is to eject a trespasser or to recover possession of trust property from the hands of a person who has acquired it on the basis of an improper alienation by a trustee, does not fall within the scope of S. 539, Civil P. C. What happened there was that defendant 3 had executed a mortgage in 1896 in favour of defendants 1 and 2 pleading two items of

(3) [1876] 2 Cal. 341=4 I. A. 52=3 Sar. 681 (P.C.).

(4) [1911] 34 Mad. 257=11 I. C. 447 (P. C.).
(5) [1865] 34 Beav. 623.
(6) [1912] 13 I. C. 425.
(7) [1905] 2 C. L. J. 431.

properties. Subsequently they came to know in certain insolvency proceedings that the mortgagor had described the property in question as debutter property. They accordingly corresponded with defendant 3 and eventually he executed in their favour an ekrarnama admitting that the property was not debutter. The property comprised in the mortgage of 1896 formed the subject of a suit in which the appellants were the plaintiffs and a decree was obtained. One of the mortgaged items was sold under that decree and was purchased by the decree-holders. The mortgage debt was not cleared by the proceeds of the sale and the decree-holders tried to proceed against the other item. A suit was brought against them and against defendant 3 to remove the latter from the office of trustee and declare the mortgage void. This property had a long history and the Judges held that the earlier documents did not indicate that there was an inalienable endowment. They also found that there was no reason for thinking that the land was ever represented as tied up in an endowment until it was desired to protect the rents and profits of the lands from attachment in the year 1856. Harington, J. says :

"It is true that the contention that the land was endowed land was then successful, and it is true that on that occasion evidence was produced which has not been produced before us, namely, the accounts of the dealings of the property, but at the same time as I read the judgment I think it was mainly based on a misapprehension of the nature of the question at issue in the resumption proceedings and on the effect of the decision in these proceedings. That being so, I am not inclined to place any weight on the proceedings in 1855-58."

Apparently the learned Judges in that case were only asked to deal with the judgment in 1856 as a piece of evidence. In the present case the precise contention raised before us does not appear to have been raised or argued as a specific issue at the hearing, there being only a general issue as follows :

"Is the plaint village trust property, and if so, are the mortgage and sale in favour of defendant 1 binding on the trust."

The issue however seems wide enough to cover the legal contention. The facts in the Calcutta case are almost exactly similar to those in the present case, and in one way it was a stronger case because in the legal proceedings of 1856 the evidence was actually led as to the nature of the property. It does not appear to us to be at all material for deciding the legal fact in question whether the judgment was based on a misapprehension as to the nature of the question at issue in the resumption proceedings. It may by argued that the decision of the Privy Council in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar* (4) can be distinguished from the present case, because although the plaintiff in O. S. 29 of 1910 certainly accepted the position of trustee he did not acquire the property by the decree but only got rid of fighting a mortgage created upon it. In the Privy Council case possession of properties under a will had been obtained. We consider that this legal question is of great importance. No decision of this Court has been quoted upon it. Whether the dictum of their Lordships of the Privy Council in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar* (4) is to be taken as overruling the view held in *Budh Singh* v. *Niradbaran Roy* (7) is not quite clear. As we feel some doubt as to what the real implication of their Lordships' decision is in a case like the present, we refer the following questions to a Full Bench:

(1) When a person assuming the position of trustee in respect of property as to which there was no previous dedication obtains from Court a declaration that that property is trust property and acts as such trustee, has he any title to mortgage the property on the footing that it is his private property?

(2) Is a subsequent alienee from him entitled to set up a defence in a suit filed by a succeeding trustee for a declaration as to the invalidity of the alienation that the property is not trust property.

Opinion

Anantakrishna Ayyar, J.—In this case two questions have been referred to the decision of the Full Bench and as it is admitted that if our answer to the second question should be against the appellant there is no necessity to answer the first question, we proceed to state such facts as are necessary to make our answer intelligible.

The plaintiff is the present Rajah of Kalahasti and he instituted the original suit out of which this reference has arisen for a declaration that the mortgage deed dated 21st September 1912, executed

by the Kalahasti Rajah whom we may call here Rajah No. 2 in favour of defendant 1, is not binding upon the trust, for a declaration that the village in question Yerpedu is property appertaining to a trust in connexion with a choultry charity, and to recover possession of the property. The plea of the defendants was that in fact there was no trust at all, that the properties belonged to the Rajah of Kalahasti in his personal capacity and that the mortgage was perfectly valid. The second question which has been referred to us is whether the defendants are entitled to set up the defence that they did in the present case, namely, that there was no real trust with reference to the village in question.

The history of this village in so far as the same is disclcsed by the evidence in this case is as follows. In 1896 the Rajah of Kalahasti who may be called as Rajah No. 1, by name Akkapa Nayanim Bahadur Varu, mortgaged this village to the Rajah of Venkatagiri under Ex. 7. The Rajah of Venkatagiri filed O. S. 2 of 1907 to recover the amount due on the basis of that mortgage making the mortgagor's son a party to the suit. The suit was in fact filed against Rajah No. 2 the mortgagor, Rajah No. 1 having died in the meantime. There was a decree passed in favour of the plaintiff. Subsequently however Rajah No. 2, instituted O. S 21 of 1910 on the file of the Court of the Subordinate Judge of North Arcot against the Rajah of Venkatagiri for a declaration that there was the trust in favour of a choultry created in respect of the suit village long prior to 1896 and and that the mortgage created in 1896 by Rajah No. 1 in favour of the defendant (the Rajah of Venkatagiri) was not binding on the trust. The defendant not having opposed the suit a decree "by consent" was passed in favour of the plaintiff as prayed for. Rajah No. 2 mortgaged the village in question in 1912 in favour of the present defendant for a sum of Rs. 80,000. In the mortgage deed it was recited that the properties belonged to the mortgagors and no mention of any trust was made in the mortgage. On the basis of that mortgage the mortgagee filed O. S. 7 of 1916 on the file of the Court of the Subordinate Judge of North Arcot to recover the amount due and obtained a decree. In execution of the decree the decree-holder became himself the purchaser of the properties and also obtained possession of them. Rajah No. 2 seems to have died in December 1919. Subsequent to that, Rajah No. 3 of Kalahasti instituted in 1922 the present suit for a declaration that the village of Yerpedu is trust property, and for recovery of possession of this village on the footing of its being trust property, the Rajah of Kalahasti for the time being, being alleged to be the trustee. The plea of the defendants that there was no trust at any time regarding this village was upheld both by the trial Court and also by the two learned Judges before whom this appeal came on in the first instance and who have made this reference to us. Having regard to the observations made by the Privy Council in *Srinivasa Moorthi* v. *VenkataVarada Ayyangar*(4) at p.265 the, learned Judges were in doubt as to whether it was open to a person who assumed the position of a trustee to mortgage the property subsequently as his private property. The second question referred to us is whether defendant 1 the mortgagee from Rajah No. 2 could set up the defence that there was no trust at all and that the property was liable for the amount of the mortgage due to him.

From the above statement of facts and from the finding of the two learned Judges concurring with the finding of the lower Court that there was in fact no trust with reference to this property it would follow that if it be held that it is open to the first defendant 1 to raise such a plea, then he has got a complete defence to the suit. The only question, therefore, is whether it is open to the defendants to raise such a plea. It was argued by the learned Advocate-General on behalf of the appellant that the effect of the decree in O. S. No. 21 of 1910 was in fact to create a valid trust in respect of this particular village. In the plaint in O. S. No. 21 of 1910 (Ex. GG) it is stated in para. 1, that the dedication of the village Yerpedu was made "long ago" for the maintenance of a choultry-charity and that the Rajahs of Kalahasti were the hereditary trustees thereof. In para. 7 it is mentioned that the mortgage of 1896 was not binding upon the trust, which, it is stated, had been in existence for a long time. We are unable to agree

with the contention of the learned Advocate-General that the effect of the decree in O. S. No. 20 of 1910 is to create a trust for the first time in respect of this property. It was not anybody's case in O. S. No. 21 of 1910 that the village in question was for the first time dedicated in trust by Rajah No. 2 in 1910. The case was that a trust had been created long prior to the suit of 1910; otherwise it is impossible to understand how a mortgage created in 1896 could be declared to be not binding on the property. If no trust existed already, it does not seem to have been the intention of anybody to create a trust for the first time in 1910. Anyhow different considerations would arise if the latter plea had been put forward. That was not so alleged in the plaint, and as we read the decree (Ex. GG-1), that was not the decree passed in that case.

In any event, it is enough for our present purpose to state that the effect of that decree, which was passed by consent of parties, could not be more than a private contract between the then plaintiff and the then defendant. The present defendants took the mortgage of 1912 from the Rajah of Kalahasti No. 2 not as representing any trust but in his private capacity and on the footing of the property being the mortgagor's own property; and that being so, we do not think that there is anything to prevent the present defendants from alleging and proving that there was no trust at all as alleged by the plaintiff. In this case any disability which it was argued attached to Rajah No. 2, would not in our view, attach to the defendants. As far as the defendants are concerned, the proceedings in O. S. No. 21 of 1910 could not be regarded as anything more—at the highest—than a piece of evidence, to be considered along with the other evidence in the case, in deciding whether any trust existed. In this view of the case we do not think it necessary for us to consider the effect of the observations of the Privy Council in *Srinivasa Moorthi* v. *Venkata Varada Ayyangar* (4). That would be necessary only in case we proposed to answer the first question referred to us; and it is admitted that, if our answer to the second question should be against the appellant, it is not necessary to decide the first question. We accordingly hold that it is open to the defendants to plead that there was no trust at all in this case, and that on the finding of the trial Court, confirmed by the learned referring Judges that there was in fact no trust at all, the suit as against the defendants was rightly dismissed. Our answer, accordingly, to the second question is that it was open to the defendants to set up the defence that in fact no trust at all existed with reference to the property in dispute in this case.

We do not, for the reasons already mentioned, consider it necessary to answer the first question referred to us. It is admitted that the answer to question 2 we have given would dispose of the whole suit, and that being so, the appeal is dismissed with costs.

Beasley, C. J.—I agree and have nothing further to add.

Curgenven, J.—I agree.

P.R.S./V.B. *Reference answered.*

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* A. I. R. 1931 Madras 103

RAMESAM, J.

Bhyraraju Ramaraju—Petitioner.

v.

Pulavarthi Lakshmiah — Plaintiff — Respondent.

Civil Revn. Petn. No. 1450 of 1929, Decided on 21st February 1930, from order of Dist. Munsif, Tanuku, D/- 8th July 1929, in E. P. No. 205 of 1929.

*** (a) Civil P. C. (1908), S. 39 and O. 21, R. 10—Transfer of decree to other Court for execution— Decree-holder applying for execution in anticipation, three days before arrival of decree at transferee Court — Such application is incompetent.**

Where a decree was transferred to another Court for execution on decree holder's application and where the decree-holder applied to the transferee Court for its execution in anticipation three days before the actual arrival of the decree to the transferee Court.

Held: that such an application for execution was incompetent as it was made in anticipation of the arrival of the decree to the transferee Court: *A. I. R.* 1929 *Mad.* 745 and *A. I. R.* 1928 *Mad.* 496, *Ref.* [P 104 C 2]

(b) Civil P. C. (1908), O. 21, Rr. 84, 85 and 72—Decree-holder allowed to become execution-purchaser and order for set-off made before sale — Actual bid minus deductions for poundage, etc., may become equal to more or less than decretal amount —In first and last case whole of set-off must be deemed as made on date of sale and whole amount deemed received on same day —Where bid larger than decretal amount R. 85 is applicable.

In a case where the decree-holder has been allowed to become an execution purchaser and where the order for set-off has been made be-

fore the sale, the actual amount of the bid minus the poundage and other deductions may be equivalent to the amount of the decree or more or less. Where it is equivalent to the amount of the decree or where it is less, the effect of the order for set-off is that the decree-holder need not pay any amount either on the date of the sale or some time after. The effect of the order of set-off is that the whole of the amount of the bid minus the poundage expenses should be taken as set-off against the decree amount and nobody looks forward for payment either on the date of the sale or fifteen days thereafter. But if the amount of the bid is far larger than the decree amount then though the decree-holder may be excused from depositing 25 per cent of the purchase money on the date of sale he has still got to deposit an amount fifteen days afterwards to make up the whole of the purchase amount. In such a case O. 21, R. 85, operates. But in a case where the amount of the bid is less or equal there is no scope for looking forward for payment under O. 21, R. 85. In such circumstances the whole of the set-off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realized eo instanti the sale is made.

[P 105 C 1]

(c) Civil P. C. (1908), O. 21, R. 72—Provisions of O. 21, R. 72, are subject to provisions of S. 73—Meaning explained — Civil P. C., S. 73.

The provisions of O. 21, R. 72, must be taken to be subject to the provisions of S. 73. This means that if there are persons by the time of the sale, who would be entitled to some rights under S. 73, that is, to claim rateable distribution the order under O. 21, R. 72, must be taken subject only to the operation of S. 73, and the decree-holder bidder cannot claim to set off his decree against the amount of the bid and refuse to pay the amount due to the other decree-holders claiming to be entitled under S. 73. But if there are no such persons entitled to claim rateable distribution under S. 73 either at the time of the sale or within fifteen days from the date of the sale then the order to set off completely works out as a payment on the date of the sale in cases where the amount of the bid is less or equivalent to the amount of the decree or fifteen days after the date of sale, where amount of bid is more than the amount of the decree as the case may be. In such a case there is no effect to be given to the words "subject to the provisions of S. 73" and decree-holder coming long after cannot claim the benefit of S. 73 by applying to the Court asking the decree-holder to deposit his amount and then describing it as "receipt of assets" and praying for rateable distribution out of it: 62 *I. C.* 857, *Ref.*; 59 *I. C.* 86, *Expl.*

[P 105 C 1, 2]

K. Kameswara Rao—for Petitioner.

P. Satyanarayana Rao—for Respondent.

Judgment. — The facts which give rise to this revision petition may be stated as follows: The petitioner before me obtained a money decree in O. S. No. 617 of 928 on the file of the District Munsif's Court, Tanuku against four judgment-debtors. In execution of that decree he brought certain properties belonging to all the judgment-debtors to sale. The sale was effected on 2nd April 1929. Prior to the sale he applied under O. 21, R. 72 for permission to bid in the auction and to set off the purchase amount against his decree as far as it goes. This application was ordered. When the sale was made on 2nd April 1929, giving operation to the order for set-off nothing was deposited by the petitioner nor was he asked to make any deposit. The respondent before me obtained a money decree in O. S. No. 33 of 1927 on the file of the Subordinate Judge's Court of Narasapur against three of the four judgment-debtors of the other suit. On 11th April 1929 he applied before the Subordinate Judge of Narasapur for transmission of his decree to the District Munsif's Court, Tanuku. It was dispatched on 12th April and reached Tanuku on the 15th April. In anticipation of the arrival of the decree the respondent applied for execution of his decree in the District Munsif's Court of Tanuku and for rateable distribution on the 12th April. The District Munsif of Tanuku has now allowed rateable distribution to the respondent. In the course of his judgment he relied on a case reported in *Arunachalam Chetty* v. *Somasundaram Chetty* (1). Hence this revision petition.

The first point argued before me is that the application of the respondent on 12th April is incompetent. This is true as is shown by the decisions in *Nanjunda Chettiar* v. *Nalla Karuppan Chettiar* (2) and *Ankineedu Prasad* v. *Jaggayya*, *A. I. R* 1929 *Mad.* 745. But these decisions do not show necessarily that the petition of 12th April though incompetent and useless on that date, did not become a good petition on the 15th after the receipt of the transmitted decree on that date. It is unnecessary to discuss this point further in view of my conclusion on the next point.

The second point argued for the petitioner is that his sale was completed on 2nd April 1929 and the proceeds were fully received on that date by way of set-off and therefore the respondent is not entitled to rateable distribution

(1) [1920] 59 I. C. 86.
(2) A. I. R. 1928 Mad. 496=109 I. C. 404.

as in any view his execution application can be deemed to be regarded as filed on the 15th. In reply to this argument, Mr. Satyanarayana relies on O. 21, Rr. 84 and 85 of the Code. R. 84 says that at the time of sale 25 per cent of the amount bid in auction should immediately be deposited subject to any order under O. 21, R. 72. R. 85 says that excluding the amount ordered to be set off under R. 72, the rest of the purchase money should be paid within fifteen days from the date of sale. Now in a case where the order for set-off has been made before the sale, the actual amount of the bid minus the poundage and other deductions may be equivalent to the amount of the decree or more or less. Where it is equivalent to the amount of the decree or where it is less, the effect of the order for set-off is that the decree-holder need not pay any amount either on the date of sale or some time after. The effect of the order for set-off is that the whole of the amount of the bid minus the poundage expenses should be taken as set-off against the decree amount and nobody looks forward for payment either on the date of the sale or fifteen days thereafter. But if the amount of the bid is far larger than the decree amount, then, though the decree-holder may be excused from depositing 25 per cent of the purchase money on the date of sale, he has still got to deposit an amount fifteen days afterwards to make up the whole of the purchase amount. In such a case O. 21, R. 85, operates. But in a case where the amount of the bid is less or equal there is no scope for looking forward for payment under O. 21, R. 85. In such circumstances in my opinion the whole of the set-off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realized eo instanti the sale is made. In this view the whole of the amount was realized on 2nd April. The execution application of the respondent must be deemed as made on the 15th. Therefore O. 21, Rr. 84 and 85, do not avail.

Then it is said that the order under O. 21, R. 72, must be taken to be subject to the provisions of S. 73. That is perfectly true. This only means that if there are persons by the time of the sale who would be entitled to some rights under S. 73, that is to claim rateable distribution, the order under O. 21, R. 72 must be taken subject only to the operation of S. 73 and the decree-holder bidder cannot claim to set-off his decree against the amount of the bid and refuse to pay the amount due to the other decree-holders claiming to be entitled under S. 73. But if there are no such persons entitled to claim rateable distribution under S. 73, either at the time of the sale or within fifteen days from the date of the sale, then the order to set-off completely works out as a payment on the date of the sale in cases where the amount of the bid is less or equivalent to the amount of the decree, or fifteen days after the date of sale where the amount of the bid is more than the amount of the decree, as the case may be ; and in such a case there is no effect to be given to the words "subject to the provisions of S. 73" and decree-holders coming long after cannot claim the benefit of S. 73 by applying to the Court asking the decree-holder to deposit his amount and then describing it as "receipt of the assets" and praying for rateable distribution out of it. This is clear from *Surendra Moham Sinha* v. *Kartick Chandra Sen* (3).

It is true that this last case which I mentioned does not throw any light on the effect of R. 85 and on the distinction I made between the cases where the amount of the bid is less or equivalent to the amount of the decree and the cases where the amount of the bid is more than the decree amount. The only other case I have got to discuss is *Arunachalam Chetty* v. *Somasundaram Chetti* (1). In that case two items were sold. The first item was purchased by the decree-holder who had previously obtained permission to bid and to set off. That sale was on 28th August 1918. The second item was sold on the same date, but the money was realized on 10th September 1918. The petitioner in the High Court applied for rateable distribution on 29th August 1918. From a perusal of the printed papers it does not appear that there was a prior execution petition pending. Seshagiri Iyer, J., in the High Court, reversed the order of the lower Court refusing rateable distribution and directed the decree-holder to deposit his amount and permitted rateable distribution even as against his purchase money. Two possible views can be taken of this

(3) [1921] 62 I.C. 857.

case. If the sales are all regarded as one sale and the assets to be realized by the sales cannot be split up into two parts, then the assets must be regarded as received only on 10th September. Undoubtedly the judgment is right on such a view. But another possible view is this. There were two separate sales and two separate purchasers One purchaser, namely the decree-holder, had a right to set off and he need not deposit any purchase money on the date of the sale, that is 28th August. There were no persons then entitled to any rateable distribution under S. 73 in so far as the decree-holder's purchase amount was concerned. In this view the judgment of Seshagiri Iyer, J., is erroneous and one would have to dissent from it. Which is the correct view in a case of several items purchased by different purchasers need not be settled now because that point does not arise in this case. In this case all the items were sold on the same day and all were purchased by the decree-holder for Rs. 3,100 (this becomes 2979-11-0 if poundage is deducted) and all the amounts must be regarded as set off on that day, the decree amount being 3,457-0-6. In such a case there being no persons having rights under S. 73 on the date of sale, the order under O. 21, R. 72, cannot be made subject to S. 73. I therefore allow the petition and dismiss the application of the respondent for rateable distribution with costs here and in the lower Court.

P.R.S./B.V. *Revision allowed.*

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* A. I. R. 1931 Madras 106

SUNDARAM CHETTY, J.

(*Cheedella*) *Seethiah* and *another*—Defendants—Appellants.

v.

Aravapalli Mutyalu— Plaintiff - Respondent.

Second Appeal No. 1231 of 1927, Decided on 8th September 1930, from decree of Principal Sub-Judge, Guntur,. in Appeal Suit No. 113 of 1925.

(a) Hindu Law— Maintenance—Widow of undivided brother — Joint property worth about Rs. 30,000—Absolute gift to widow of properties worth Rs. 1,500 in full discharge of her claim for maintenance held to be reasonable and binding on minor—Hindu law, alienation.

Where two undivided brothers held a joint property worth about Rs. 30,000 and an absolute gift of property worth Rs. 1,500 was made to the widow of the deceased brother by the surviving brother, as a guardian of the minor adopted son of the deceased brother in full discharge of the widow's claim for maintenance, without the liberty of reclaiming an increase of maintenance at any time :

Held : that under the circumstances it was a perfectly reasonable and moderate provision which was in no way detrimental to the interests of the coparceners. [P 107 C 2]

Held further : that under the circumstances it was within the competence of the natural guardian to do so and not beyond his powers. If this settlement could be regarded as a prudent one made by the guardian after a due consideration of the interests of the minor, it could not subsequently be questioned by the minor : 17 *I. C.* 609, *Ref.* ; *A. I. R.* 1926 *Mad.* 46, *Dist.* [P 108 C 2]

*** (b) Hindu Law—Maintenance—Gift to widow with absolute power of disposal over property gifted in lieu of her maintenance is not always invalid.**

A gift to widow by guardian of her husband's minor adopted son, of property forming a very small part of the whole property, with absolute power of disposal over it in lieu of her claim of maintenance is not always invalid, though prima facie it is beyond the competence of the guardian of a minor coparcener to do so. The validity and the binding nature of the transaction on the minor must be determined according to the nature and the circumstances of each particular case : *A. I. R.* 1926 *Mad.* 46, *Dist.* [P 108 C 1]

*** (c) Hindu Law—Alienation—Manager—Manager can absolutely alienate property to member of joint family for maintenance.**

The managing member of a joint Hindu family can alienate absolutely ancestral land by way of a provision for maintenance to a member of that family : 13 *I. C.* 802, *Foll.* [P 108 C 2]

(d) Hindu Law— Alienation —Coparcener —Bequest by deceased member of joint family to his wife of portion of property of his share in lieu of her maintenance with assent of coparceners is valid.

A bequest made by a deceased member of a joint Hindu family to his wife of a portion of the joint property appertaining to his share in satisfaction of her claim for maintenance would be a valid disposition when made with the consent of the remaining coparceners : 26 *I. C.* 208; *A. I. R.* 1923 *P. C.* 54 and 40 *Mad.* 1122, *Ref.* [P 108 C 2]

V. Ramadas and *K. Subba Rao*—for Appellants.

V. Govindarajachari—for Respondent.

Judgment.—Defendants 2 and 4 are the appellants, This appeal arises out of a suit filed by the plaintiff-respondent

to recover possession of the plaint mentioned dry land, 6 acres 84 cents, in extent and assessed at Rs. 8-9-0, Government cist, together with past and future mesne profits. The plaintiff claims the suit property under a gift deed executed to him by the late Cheedalla Venkamma, the widow of Maddi Ramayya, who was an undivided brother of defendant 1 and the adoptive father of defendant 2. The said Venkamma got the suit land under a registered deed of settlement (Ex. C) executed in her favour by defendant 1 for himself and as guardian of defendant 2 (who was then a minor) on 20th October 1910 in satisfaction of her claim for maintenance. This deed was executed in pursuance of the oral directions given by her late husband, for the benefit of the family and with due regard to the worth of the family. The plaintiff states that he became entitled to the suit land by reason of the gift made by Venkamma to him in consideration of his having undertaken to protect her till her death. Defendants 1 to 3 raised several contentions attacking the validity of the plaintiff's claim. Defendant 4 is a tenant of the suit land.

Certain findings of fact arrived at by the lower appellate Court have to be taken as undisputed for the purpose of this second appeal. Maddi Ramayya and his brother defendant 1 were members of a joint family and the former died as an undivided member. Defendant 2 who is the son of defendant 1 was adopted by Maddi Ramayya himself during his lifetime. The settlement deed (Ex. C) is a genuine document and was not obtained by Venkamma by undue influence or fraud. The provision for the maintenance of Venkamma made under Ex. C was quite fair and reasonable, having regard to the circumstances of the family of Maddi Ramayya.

The main question argued in the second appeal is whether the disposition of property in favour of Venkamma under the settlement deed, Ex. C, is valid and binding on her adopted son defendant 2. Its validity is sought to be established on the plaintiff's side on more than one ground.

It may first be considered as a provision made for her maintenance by one who was bound to maintain her. She being the adoptive mother of defendant 2, there is no doubt that she was entitled to a reasonable provision being made for her maintenance according to the status and worth of the family, to which she belongs. According to the evidence on the plaintiff's side, Maddi Ramayya and defendant 1 owned 30 acres of land and Rs. 20,000 cash as their joint family property. Even defendant 1 had to admit that his family owned 23 acres of the land at the date of Ramayya's death. The learned Subordinate Judge has dealt with the worth of the family in para. 26 of his judgment and found that the amount of cash owned by the family should be far more than Rs. 4,000 which defendant 1 chose to admit. The estimation given by the plaintiff's witnesses was preferred by the lower appellate Court as true and far more probable. What was given to Venkamma for maintenance under Ex. C was only Rs. 500, worth of land besides Rs. 1,000 for her maintenance, clothing and residence. She was allowed to take her own stridhanam jewels worth Rs. 500. Taking her husband's individual share to be one-fourth of the aforesaid joint family properties (one-fourth share being taken by the adopted son), the gift of properties worth Rs. 1,500 to Venkamma in full discharge of her claim for maintenance without the liberty of claiming an increase of maintenance at any time, seems to be a perfectly reasonable and moderate provision which is in no way detrimental to the interests of the adopted son.

That this is a fair and reasonable provision is the concurrent finding of both the Courts below. Treating Ex. C as a deed evidencing the disposition of the minor's property by his natural father and guardian in settlement of his adoptive mother's claim for maintenance it should in the circumstances of this case be held to be within the competence of the natural guardian and not beyond his powers. If this settlement could be regarded as a prudent one made by the guardian after a due consideration of the interests of the minor it could not subsequently be questioned by the minor: vide *Vembu Iyer* v. *Srinivasa Ayyangar* (1). Inasmuch as the land worth Rs. 500 was given to Venkamma under Ex. C with absolute rights of disposal, it is contended on behalf of the appel-

(1) [1912] 17 I. C. 609.

lants that the settlement is invalid and not binding on defendant 2. Reliance is placed on the decision reported in *Deivachila Ayyangar* v. *Raghupathi Venkatachariar* (2).

It is true that the learned Judges in that case have held that an absolute alienation of immovable property for the purpose of providing for the maintenance of the stepmother would be invalid and beyond the powers of the guardian. But it seems to me to be difficult to hold on a careful perusal of the judgment in that case, that the learned Judges meant to lay down as an unconditional rule of law that an absolute alienation of any portion of the family property in favour of one entitled to maintenance, if made by a guardian of the minor who was bound to provide for such maintenance, would be ipso facto invalid and unenenforceable. On p. 319 it is observed by Spencer, J., that the more important question to be decided was whether the alienation of joint family properties can be justified under the circumstances of that case. The test was whether the absolute disposition would be a prudent act considering the circumstances of that case. The learned Judges held that an absolute disposition would be prima facie beyond the competence of the guardian. It should not be taken that a presumption raised on account of the fact of the disposition being an absolute one is in every case an irrebuttable presumption. In a case it may be clearly shown that an absolute gift of a small portion of the joint family property in satisfaction of the claim for maintenance would be far more advantageous to the family than the grant of a much larger portion of the property for her life enjoyment alone. That being so, the validity and binding nature of the alienation made by the guardian is a question of fact to be determined according to the circumstances of each case. In the present case, I have no hesitation to hold that the provision in question is a fair and reasonable one and is in no way detrimental to the interests of the minor.

Inasmuch as Ex. C was executed by defendant 1 also, and as he was doubtless the manager of the family, the settlement may even be deemed to be one effected by him as the manager of the family in respect of a portion of the family property. It has been held by a Bench of this High Court in *Seeni Ammal* v. *Angamuthu Nadar* (3) that the managing member of a Hindu family can alienate absolutely ancestral land by way of a provision for maintenance to a member of that family. The gift in question being a fair and reasonable one it was within the legitimate powers of a managing member to make in satisfaction of the claim for maintenance.

It is further proved in this case that this arrangement or settlement in favour of Venkamma was made in pursuance of the oral directions given by her late husband and assented to by defendant 1 who was also representing the minor defendant 2 as his natural father and guardian. Ex. C itself recites that Venkamma's husband said that out of the property which he was likely to get, if he should effect a division of his share, he was intending to give her land worth Rs. 500, Rs. 300 for residence, cash Rs. 700, besides her ornaments worth Rs. 500, in full settlement of her claim for maintenance with absolute powers of disposal over the properties so given to her. It is further alleged that defendant 1 gave his assent to what his brother Ramayya proposed to do. From the recital in Ex. C it would appear that he gave these directions when he intended to adopt defendant 2. It seems that even subsequent to the adoption when Maddi Ramayya was about to leave for Pittapur for treatment, he repeated the aforesaid oral directions in the presence of some respectable persons as spoken to by the witnesses on the plaintiff's side and that the arrangement proposed by him was assented to by defendant 1: vide para. 22 of the lower appellate Court's judgment. There is no doubt that defendant 1 assented to that arrangement not only on his own behalf but also on behalf of defendant 2, his minor son, in whose welfare he was highly interested. If this should be considered as a bequest by the late Maddi Ramayya of a portion of the family property appertaining to his share, in favour of his wife in satisfaction of her claim for maintenance, it would be a valid disposition inasmuch as it was made with the consent of the remaining coparcener or coparceners. The decisions in *Arunachalam Pillai* v.

(2) A. I. R. 1926 Mad. 46=88 I. C. 967.

(3) [1912] 13 I. C. 802.

Sampurnathachi (4) and *Appana Patrachariar* v. *Srinivasachariar* (5), fully support the validity of such a transaction. It is unnecessary to discuss the reasoning adopted by the learned Judges in coming to that conclusion: vide also the decision of the Privy Council in *Lakshmi Chand* v. *Mt. Anandi* (6), which is to the same effect. The settlement in question made under Ex. C being in perfect consonance with the oral bequest made by the deceased Maddi Ramayya with the consent of defendant 1 who sufficiently represented the interests of defendant 2 also, it must be deemed to be valid and defendant 2 cannot now question it. There is no doubt that this was accepted as a fair arrangement by all the parties, inasmuch as there was no objection to it by defendant 2 for about ten years thereafter during the lifetime of Venkamma.

Lastly, the settlement in question is sought to be supported on the ground that it is an ante-adoption arrangement between the adoptive father and the natural father of the minor who acted as his guardian. The recital in Ex. C indicates that it was an ante-adoption arrangement. But in the plaint there is no specific mention of any ante-adoption arrangement nor is the validity of the settlement sought to be based on any arrangement. The lower appellate Court has however proceeded to view the settlement even as an ante-adoption arrangement because of the recitals in Ex. C itself. As regards this question, considerable stress was laid by the learned advocate for the appellant on the decision of their Lordships of the Privy Council in *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (7). It is argued that a gift of any portion of the property to the widow absolutely under an ante-adoption agreement would be invalid according to the principle enunciated by their Lordships in that case. Reliance is placed strongly on the following passage at p. 526 in their Lordships' judgment:

"As soon however as the arrangements go beyond that, that is, either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law."

In the previous paragraph their Lordships have observed:

"But the consensus of judgments seems to solve those two questions in this way, namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are therefore prepared to hold that custom sanctions such arrangements."

In view of the aforesaid observations it is argued that the grant of a life interest in the whole property to the adoptive mother under an ante-adoption agreement would be valid as having the sanction of custom, but even an absolute gift of a microscopical portion of property in her favour by virtue of such arrangement would be altogether invalid. This contention may have great force if before the word "property" in the expression "either give the widow property absolutely" some such word as "any" was used by their Lordships. The interpretation of the exact nature of the pronouncement made by the Privy Council in the aforesaid judgment was the subject for consideration in a recent case decided by a Full Bench of this High Court and reported in *Raju* v. *Nagammal* (8). A correct interpretation of what was meant by their Lordships of the Privy Council in the case of dispositions in favour of the adoptive mother under ante-adoption agreements is doubtless beset with some difficulty. This question having been carefully considered and decided after a full discussion by the learned Judges in *Raju* v. *Nagammal* (8), I take that interpretation as binding on me. If the decision in this case mainly rested upon the ante-adoption agreement alone the matter will be governed solely by the Privy Council decision. But, as I have already stated, the settlement is valid in two other aspects. In the result, the decision of the lower appellate Court is confirmed and this second appeal is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

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(4) [1914] 26 I. C. 208.
(5) [1917] 40 Mad. 1122=40 I. C. 118.
(6) A. I. R. 1926 P. C. 54=95 I. C. 566=53 I. A. 123=48 All. 313 (P. C.).
(7) A. I. R. 1927 P. C. 139=101 I. C. 779=54 I. A. 248=50 Mad. 503 (P. C).
(8) A. I. R. 1928 Mad. 1289=113 I. C. 449=52 Mad. 128.

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SUNDARAM CHETTY, J.

Pichaiyappa Chetti and *another* Defendants—Appellants.

v.

Govindaraju Mudaly and *others* — Plaintiffs—Respondents.

Second Appeal No. 1273 of 1927, Decided on 10th October 1930, from decree of Dist. Judge, North Arcot, in Appeal Suit No. 14 of 1926.

(a) Transfer of Property Act (1882), S. 74—*A* mortgaging property to *C* and *D*—*D's* mortgage prior to *C's*—*C* becoming owner of property in discharge of his mortgage debt—*D's* claim against *A* time-barred—*A* then selling suit property to *B* to pay *D's* mortgage amount and paying it—*B* could not be subrogated to *D's* rights as neither S. 74 nor doctrine of conventional subrogation could be applied to facts of the case, and S. 92 did not govern the case—Transfer of Property Act (as amended by Act 20 of 1929), S. 92.

A had mortgaged his properties to *C* and *D*. *D's* mortgage was prior in time to that of *C*. *C* had become the owner of the mortgaged properties in discharge of his mortgage-debt. *D's* claim against *A* had become time-barred and he had not even personal remedy left against *A*. After this *A* sold the suit property to *B* for payment of *D's* mortgage amount and paid it to *D*. *B* sued *A* to be subrogated to the rights of *D* against *A*.

Held: that under the circumstances *B* could not be so subrogated as neither S. 74 nor the doctrine of conventional subrogation would apply to the facts of the case, because *B* was a mere stranger to the mortgage and *A* was under no legal obligation to pay the mortgage-debt. Hence both of them were volunteers and the doctrine of subrogation was not applicable to the case of a volunteer. S. 92 (as amended by Act 20 of 1929) has no retrospective effect and hence could not govern the present case: 36 *Mad.* 426, *Rel. on.*; 9 *Cal.* 961 (*P.C.*); 22 *I. C.* 253; *A. I. R.* 1927 *Mad.* 204 and 32 *All.* 25, *Ref.*; *A. I. R.* 1921 *Mad.* 51, *Foll.*; 21 *Mad.* 143; 31 *Mad.* 439; 33 *Mad.* 331 and 35 *Bom.* 438, *Dist.* [P 111 C 1]

(b) Civil P. C. (1908), O. 6, R. 10—Mistaken bona fide belief and good faith must be alleged in pleadings; they are not to be presumed.

Where a mistaken bona fide belief and good faith are the grounds for applying the equitable rule of subrogation, they must be distinctly alleged in the pleadings and proved. They are not matters for legal presumptions, but have to be made out in the particular case: 51 *I. C.* 57 and *A. I. R.* 1921 *Mad.* 51, *Expl.* [P 113 C 1]

S. Jagadisa Ayyar and *Rajagopala Iyer*—for Appellants.

V. Balarama Ayyar—for Respondents.

Judgment.—This is a second appeal preferred by defendant 1 (on whose death during the pendency of this appeal, his legal representative was added as appellant 2) and arises out of a suit brought by the plaintiff-respondent 1 for the recovery of a sum of money alleged to be due under Ex. B, a registered mortgage-deed dated 20th May 1912 and executed by defendant 2's late husband Kuppuswami Naidu in favour of defendant 3 for Rs. 790. Both the lower Courts have given a decree in plaintiff's favour for the recovery of the amount claimed by sale of the mortgaged properties.

In order to show how this plaintiff sues to recover the sum due under the mortgage-deed Ex. B, which was executed not in his favour, but in favour of defendant 3, the plaint alleges that after the death of the mortgagor (Kuppuswami Naidu), his widow, defendant 2, sold the suit properties to plaintiff under the sale deed dated 7th July 1920 (Ex. A) for Rs. 1,470 for the purpose of discharging the mortgage-debt due to defendant 3 under Ex. B, that the plaintiff and defendant 2 have paid the mortgage-amount to defendant 3, and that in these circumstances, the rights under the mortgage-deed Ex. B, have accrued to the plaintiff. It is further alleged in the plaint, that defendant 1, though he was aware of this mortgage, obtained a sale of the suit properties, and has been in enjoyment thereof, and that in any event, the suit properties are liable to the plaintiff as a charge for the amount of the prior mortgage under Ex. B discharged by him. Defendant 1 contended that the plaintiff's claim in this form is invalid and legally unsustainable, that when he (defendant 1) purchased the suit properties, Kuppuswami Naidu said the suit mortgage-debt had been discharged, that subsequent to his purchase the present plaintiff wilfully got another sale-deed executed, stating falsely that the mortgage-debt was not discharged and that he is not entitled to sue on the mortgage-bond in question.

The facts which may be taken to be beyond dispute may be briefly stated at the outset. The original owner of the suit properties was the late Kuppuswami Naidu (the husband of defendant 2). He created two mortgages over them, the earlier under Ex. B in favour of defendant 3, and the later under Ex. 2 in favour of defendant. On 21st August 1918 he sold the properties to defendant under Ex. 3 for Rs. 1,000, in discharge of the mortgage-debt to defen-

dant 1 under Ex. 2 and in consideration of the receipt of Rs. 25 in cash. This sale is an absolute one, and was found to be valid in the prior litigation : vide Exs. C and D. After the death of Kuppuswami Naidu, his widow (defendant 2) sold the same properties to the present plaintiff under the sale-deed Ex. A which is dated 7th July 1920. By the conveyance under Ex. 3 defendant 2's husband parted with his entire interest, and he had no right or interest whatever in the suit properties after that sale. Defendant 2, as his heir, had absolutely no right or interest in these properties, when she purported to sell them to the plaintiff under Ex. A. The sale under Ex. A is void and no interest in the suit properties passed to the plaintiff by this sale. The personal remedy under the mortgage-deed Ex. B was also clearly barred, when defendant executed the sale-deed to plaintiff. She had no interest in the equity of redemption, nor was the personal remedy against her husband subsisting.

Having these facts in view, it has to be seen whether the plaintiff has established his claim to be subrogated to the rights of the mortgagee under Ex. B, by reason of the discharge of that debt with his (plaintiff's) money (the consideration for the sale to him under Ex. A). On the question whether Ex. B was already discharged by Kuppuswami Naidu himself, the finding of both the Courts below is in the negative. On the mere ground that Ex. B was discharged with the money paid by the plaintiff, the learned District Judge allowed the right of subrogation to the plaintiff, as a matter of course, without any consideration of the law on the point.

It is urged on behalf of the appellant that the lower appellate Court has ignored the fundamental principles on which the equitable right of subrogation is founded. The question for determination in this case is not altogether free from difficulty.

It is clear that S. 74, T. P. Act, has no application to the present case, as it deals only with the right of subrogation, declared in favour of a subsequent mortgagee, by his discharging a prior mortgage. The plaintiff has therefore no statutory right of subrogation. S. 92, T. P. Act, (as amended by Act 20 of 1929) has no retrospective effect, and cannot govern the present case.

The question is whether the plaintiff can invoke for his aid the doctrine of conventional subrogation. As to this I may refer to the exhaustive judgment of Sundara Iyer, J., in *Narayana Kutti Goundan* v. *Pechiammal* (1), wherein the learned Judge has quoted the principles of law, citing *Wilkins* v. *Gibson* (2) in the following terms :

"It has been said that subrogation was a "benevolent" doctrine and equity would apply it in any case in which justice required it ; and under the sanction of this classic expression cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be, and we therefore hold, that a subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor he would be bound to pay or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made with the debtor, or creditor, that he would be subrogated to the rights and remedies of the creditor."

The principle is also laid down in Sheldon on Subrogation (Edn. 2) in para. 240 as follows :

"The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or property of his own."

In the light of these principles, how does the plaintiff's claim stand? As I have stated already, the sale to the plaintiff under Ex. A, is void, as the vendor (defendant 2) herself had no interest whatever in the properties, and nothing to convey. It cannot be said that the plaintiff had some interest in these properties to protect, for which he paid off the prior mortgage debt. It was defendant 1 who was the owner of these properties ; when the plaintiff got the sale-deed Ex. A from defendant 2, defendant 2 was not the owner of the equity of redemption, nor was she under any legal obligation to pay the mortgage debt under Ex. B, as even the personal remedy against the mortgagor had become barred. She was not the debtor who was bound to pay that debt, nor was the plaintiff bound to pay that debt, in the event of default by defendant 2. There is nothing to warrant the inference of an express or implied agreement with the creditor (mortgagee) that he (the plaintiff) would be subrogated to his rights. The endorsement on Ex. B

(1) [1912] 36 Mad. 426=15 I.C. 206.
(2) [1901] 113 Georgia 1=38 S.E. 374.

recites that it was defendant 2 who received the money from the plaintiff, and paid the mortgage debt. Even in the sale-deed Ex. A, it is stated that the vendor (defendant 2) received the sale amount in cash from the plaintiff, got the mortgage deed cancelled and handed it over to the plaintiff. This recital is consistent with the endorsement on Ex. B itself. There is absolutely no basis in this case, for inferring an express or implied agreement with the debtor or creditor, that the plaintiff should be subrogated to the rights of the creditor (mortgagee under Ex. B). In short, the plaintiff's position in making this payment, seems to be only akin to that of a volunteer, who was under no obligation to pay, and had no interest of his own to protect by making such payment.

A number of decisions have been relied on by either side.

The learned advocate for the appellant relies on *Mohesh Lal* v. *Mohant Bawan Das* (3), *Karuppan Ambalagaran* v. *Sakuth Levvai* (4), *Govinda Padayachi* v. *Lokanatha Iyer* (5), *Ponnammal* v. *Pichai Thevan* (6) and *Shiam Lal* v. *Ram Piari* (7). The case in *Govinda Padayachi* v. *Lokanatha Iyer* (5) seems to be almost on all fours with the present case. As in that case, on the date of the sale to plaintiff under Ex. A, the vendor (defendant 2) had no right to redeem the mortgage in question, the equity of redemption having already been sold away by her husband (the mortgagor) to defendant 1, and the personal remedy against the mortgagor not also subsisting, the learned Judges have observed at p. 118, in the said case, that when the mortgagor has no debt to pay and no right in property to preserve he would, if he offered to repay the mortgage money, be as much a volunteer as any stranger ; and there is every reason against allowing him to intrude between the mortgagee and those actually interested in the property. The present plaintiff is exactly in that predicament. He should be deemed to be a mere intruder between the mortgagee and the real owner (defendant 1).

The decisions in *Syamalarayudu* v. *Subbarayudu* (8), *Chamaswami* v. *Padala Anandu* (9), *Palamalai Mudaliyar* v. *South Indian Export Co.* (10) and *Sambu* v. *Nama* (11), relied on for the respondent, are inapplicable to the circumstances of the present case. They are cases, where the person who made the payment to discharge an incumbrance had some interest or concern in the property to protect, which he acquired under a voidable sale, which would be good until it is set aside at the instance of a creditor, or a person claiming under a prior contract for sale, or under a sale whereby he was in actual possession of the property, but which was subsequently found to be invalid. But in the cases dealt with in *Karuppana Ambalagaran* v. *Sakuth Levvai* (4) and *Shiam Lal* v. *Ram Piari* (7), the party who claimed the right of subrogation, acquired no interest whatever in the property, the sale being void, or purely nominal and colourable. Similarly in the present case, defendant 2's sale under Ex. A conferred no right or interest on the plaintiff in the suit properties, and there is no allegation in the plaint that he was put in possession at least, but on the other hand, the allegation in para. 7 of the plaint is that defendant 1 obtained a sale of the properties and has been in enjoyment thereof.

Some of the decisions relied on by the learned advocate for respondent 1 seem to allow the right of subrogation on grounds of justice, equity and good conscience, where it is shown that the plaintiff obtained a sale in perfect good faith, bona fide believing that the transferor had title to the property, though it subsequently turned out that the sale was altogether invalid. In these cases the distinction between a void and voidable sale, was not kept in view, but the bona fide belief in the vendor's title and good faith were considered sufficient to accord relief by applying the doctrine of subrogation. The decision in *Ammani Ammal* v. *Ramaswami Naidu* (12) is strongly relied on. Even in *Govinda Padayachi* v. *Lokanatha Iyer* (5), this principle is recognized, by stating it with approval, and observing that the claim is allowed, when the mistake relates to the actual

(3) [1883] 9 Cal. 961=10 I.A. 62=4 Sar. 424 (P.C.).
(4) [1914] 22 I.C. 253.
(5) A.I.R. 1921 Mad. 51=62 I.C. 291.
(6) A.I.R. 1927 Mad. 204=99 I.C. 687.
(7) [1910] 32 All. 25=4 I.C. 706.
(8) [1898] 21 Mad. 143.
(9) [1908] 31 Mad. 439.
(10) [1910] 33 Mad. 334=5 I.C. 33.
(11) [1911] 35 Bom. 438=12 I.C. 362.
(12) [1919] 51 I.C. 57.

existence of an interest, and there is also a good faith. But where a mistaken bona fide belief and good faith are the grounds for applying the equitable rule of subrogation, they must be distinctly alleged in the pleadings and proved. They are not matters for legal presumption, but have to be made out in the particular case. Such an allegation is conspicuous by its absence in the present plaint. In the absence of any such plea, there was no room for an issue on this point. In no portion of the plaint, it is alleged that when he obtained the sale deed Ex. A the plaintiff was under a bona fide mistaken belief that defendant 2 had some right or title to the properties, or acted in good faith without the knowledge of the previous sale by her husband. When no such plea was even set up in the plaint, I do not think there is any justification for giving a new turn to the basis for the plaintiff's claim in this second appeal.

I am therefore of opinion that the plaintiff is not entitled to be subrogated to the rights of the mortgagee under Ex. B, as he has no statutory right of subrogation, and as the doctrine of conventional subrogation too cannot be invoked for his aid. Even apart from this there is no scope for giving relief, on any other recognized equitable ground.

The plaintiff's claim to enforce the mortgagee's rights under Ex. B, for which he has filed this suit must fail. I may refer to a representation made by the advocate for respondent 1 (plaintiff) during the course of his arguments, that if the plaintiff's claim is held to be unsustainable the ex parte defendant 3 (the mortgagee under Ex. B) should be transposed as the plaintiff, and a decree should be passed in his favour. Plaintiff's own case is that the mortgage debt due under Ex. B to defendant 3, was discharged. There is no question of the validity of that discharge. Defendant 3 cannot be given a decree for the recovery of his mortgage money, after his debt has been paid to him.

In the result the decrees of the Courts below are set aside, and the plaintiff's suit is dismissed. But on a consideration of the peculiar circumstances of this case I think it reasonable to direct the parties to bear their own costs throughout, and I order accordingly.

P.R.S./B.V. *Appeal allowed.*

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A. I. R. 1931 Madras 113

SUNDARAM CHETTY, J.

Uppalapati Hemadri—Plaintiff—Appellant.

v

Kodali Seshamma and *others*—Defendants—Respondents.

Second Appeal No. 1378 of 1927, Decided on 23rd October 1930, from decree of Sub-Judge, Masulipatam, in Appeal Suit No. 170 of 1926.

(a) Negotiable Intruments Act (1881), S. 35—S. 35 does not apply to case of pro-note payable on demand.

Section 35 does not apply to the case of a promissory note payable on demand, because no question of maturity mentioned in the section can arise in the case of such pro-notes; *A. I. R.* 1925 *Mad.* 132, *Ref.* [P 114 C 2]

(b) Negotiable Instruments Act (1881), Ss. 35 and 93—Last paragraph of S. 35 does not mean that endorser is liable without notice of dishonour given to him, by endorsee and it does not refer to endorsement of negotiable instrument after its dishonour.

The wording of S. 93 is general and wide enough to cover the case of an endorsement of a pro-note before or after dishonour and the obligation of an endorsee to give notice of dishonour by non-acceptance or non-payment to the endorser exists whether the pro-note was dishonoured or not before the endorsement. The last paragraph of S. 35 cannot be taken to mean that the endorser is liable even without a notice of dishonour being given to him by the endorsee. That paragraph even does not refer to the case of an endorsement of a negotiable instrument after its dishonour. It means that after the aforesaid dishonour referred to in the first part of the section, the endorser is liable as on an instrument payable on demand and that liability is akin to that of the maker.

[P 114 C 2; P 115 C 1]

P. Panini Rao—for Appellant.

P. Satyanarayan Rao—for Respondents.

Judgment.—This second appeal arises out of a suit filed by the plaintiff-appellant for the recovery of a sum of money, alleged to be due on a promissory-note payable on demand (Ex. A), which was executed by defendant 1 in favour of defendant 2, who subsequently endorsed it to the plaintiff. A decree was passed against defendant 1, the maker of the pro-note, and defendant 2. The lower appellate Court dismissed the suit as against the endorser (defendant 2) as no notice of dishonour was given to her by the plaintiff. The correctness of that view is now questioned by the appellant.

There is no allegation in the plaint that any notice of dishonour was given to the endorser (defendant 2) nor is there an iota of proof in respect of it.

The only allegation in the plaint is, that in spite of demands made by defendant 2 prior to the transfer and by plaintiff subsequent to the transfer defendant 1 did not pay the amount of the note. It is urged, that if an opportunity is given, the plaintiff is prepared to prove the dishonour of the note prior to its transfer by defendant 2. But the appeal was argued on the assumption of the truth of that allegation, and the question is whether the plaintiff is entitled to a decree against defendant 2 as the endorser of a promissory note payable on demand, without having given a notice of dishonour to her (defendant 2) inasmuch as there was a dishonour of the pro-note even before the endorsement.

In support of his contention the learned advocate for the appellant relied on the last portion of S. 35, Negotiable Instruments Act. That section runs thus:

"In the absence of a contract to the contrary, whoever endorses and delivers a negotiable instrument before maturity . . . . . is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such endorser as hereinafter provided. Every indorser after dishonour is liable as upon an instrument payable on demand."

This section distinctly deals with the transfer of a negotiable instrument before maturity. We have to refer to S. 22 of the Act, to see what is meant by "maturity" and to what kind of negotiable instruments, is that expression applied. That section is:

"The maturity of a promissory note or bill of exchange is the date at which it falls due. Every promissory note or bill of exchange which is not expressed to be payable on demand at sight or on presentation is at maturity on the third day after the day on which it is expressed to be payable."

The wording of this section makes it clear, that a promissory note or a bill of exchange can be said to be at maturity, only when it specifies a date on which the amount is payable. Therefore the term "maturity" used in this Act, can have no application to a pro nissory note payable on demand That being so, it seems to me, that S. 35, which deals with the transfer by endorsement and delivery of a negotiable instrument before maturity does not apply to a promissory note payable on demand. This view has for its support the decisions of two learned Judges of this High Court. In the decision reported in *Jagannadha Reddiar* v. *Lakshmana Reddiar* (1) Ramesam, J., has held that the extent and nature of the liability of the endorser of note payable on demand is not governed by S. 35 of the Act. In a later decision (unreported) in *Civil Revision Petition No.* 301 *of* 1927, Anantakrishna Ayyar, J., has held that S. 35 could not apply to the case of a promissory note payable on demand, because no question of maturity mentioned in the section could arise in the case of such promissory notes.

Even assuming that S. 35 applies (but I am clear, that it does not apply) I have to state that the last clause of that section does not really help the appellant's contention. There is some ambiguity in that clause, but after some careful scrutiny it vanishes. It is urged by the learned advocate for the appellant that the last clause of S. 35 refers to an endorser of a dishonoured promissory note or bill of exchange, and declares his liability as upon an instrument payable on demand. He contends that no notice of dishonour is needed to enforce the liability of such an indorser. If this should be the correct interpretation, the last paragraph of S 35 would be in conflict with the mandatory provision in S.93, which says that when a promissory note is dishonoured the holder thereof must give notice of dishonour to all other parties whom the holder seeks to make severally liable thereon, except the maker of the note. The wording of S. 93 is general and wide enough to cover the case of an endorsement of a promissory note before or after dishonour, and the obligation of an endorsee to give notice of dishonour, by non-acceptance or non-payment, to the endorser, exists, whether the promissory note was dishonoured or not before the indorsement. The last paragraph of S. 35 cannot be taken to mean that the endorser is liable, even without a notice of dishonour being given to him by the endorsee.

It is even doubtful whether the last clause of S. 35 really refers to the case of an endorsement of a negotiable instrument after its dishonour. The previous portion of the section relates to the endorser's liability for compensation for any loss or damage caused to the en-

(1) A. I. R. 1925 Mad. 132=80 I. C. 952.

dorsee of a negotiable instrument before its maturity (and consequently before its dishonour) by reason of its dishonour subsequent to the endorsement. The latter clause of the section may be understood to mean that after the aforesaid dishonour the endorser is liable as upon an instrument payable on demand, and that liability is akin to that of the maker. But this liability is subject to the condition fixed in the proviso embodied in the first part of the section. In this view also, there would be no conflict between S. 93 and the last paragraph of S. 35 of the Act.

For the foregoing reasons I hold that the liability of defendant 2 as endorser, is not enforceable, as no notice of dishonour was given to her by the plaintiff, even if there was dishonour of the pro-note prior to its endorsement to him.

Another ground urged by the learned advocate for respondent 3 for non liability of the endorser in this case is that there was no presentment of the pro-note for payment as required by S. 64 of the Act. There is no allegation in the plaint about the presentment of the note. Section 64 lays down that in default of such presentment the other parties thereto (an endorser comes within this category) are not liable thereon to such holder. Exception is made in the case of the maker where a pro-note is payable on demand and is not payable at a specified place. In the decision in *Civil Revn. Petn No.* 301 *of* 1927, referred to above, the view expressed by the learned Judge is that presentment for payment is necessary to makethe endorser of a pro-note payable ondemand liable to the endorsee: vide als s. 74. In the result this second appeal fails and is dismissed with costs of respondent 3.

P.R.S./B.V. *Appeal dismissed.*

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* A. I. R. 1931 Madras 115

RAMESAM, J.

Madura Co. Ltd., Alleppy—Defendant—Petitioner.

v.

P. C. Xavier—Plaintiff—Respondent.

Civil Revn. Petn. No. 983 of 1929, Decided on 17th March 1930, from judgment of Sub-Judge, Cochin, D/- 1st April 1929.

(a) Civil P. C., (1908), S. 20—Actual contract for despatch of goods entered in Native State—First item of performance performed (weighed and loaded) in British territory—British Court has jurisdiction.

Although the actual contract for the despatch of goods takes place in a Native State, but the very first item of performance of the contract which is contemplated by both the parties, namely, the entrusting of the goods by the consignor to the consignee, takes place in British territory and the goods are actually weighed and loaded there, the British Court has jurisdiction to entertain a suit for damages for breach of such a contract. [P 116 C 2]

***(b) Railways Act 1890, S. 4 (d)—General contract between Railway Company and another company to take goods delivered at out-agencies of the railway and to deliver them at railway stations does not make the other company Railway Company.**

Where there is a general contract between a Railway Company and another company that the latter company has to take the goods delivered at the out-agencies of the Railway Company, carry the goods by their boats and hand them over to the railway stations of the Railway Company and in return for this service to get a certain percentage of the charges, such an agreement does not make the company working the boats a Railway Company and it does not cease to be a common carrier of goods: 11 *P. R.* 1912 and *A. I R* 1914 *P. C.* 40, *Ref.* [P 117 C 1]

(c) Carriers Act (1865), S. 8—Liability—Basis of, enunciated.

The liability of common carriers must be regulated under the Carriers Act. They cannot claim to have their liabilites determined on the basis of Risk Note Form H on the ground that under contract between them and Railway Company, they convey goods in their boats from outstations to the stations of Railway Company.

Under the Carriers Act negligence is presumed by the loss of goods, and no question of misconduct arises and if the common carriers fail to rebut the presumption with which every case starts, by showing that they are not guilty of such negligence as would make them liable, they are liable for damages. [P 117 C 2, P 118 C 1]

N. R. Sesha Ayyar—for Petitioner.

V. K. John—for Respondent.

Judgment.—This is a revision petition by the petitioner who is described as Madura Co. Ltd. Alleppey, against the decree of the Subordinate Judge of Cochin, in a suit by the respondent-plaintiff P. C. Xavier, timber merchant, for damages for injury caused to certain packages containing shooks handed over to the defendant company at the Muttancherry Station which was the out-agency of the S. I. Ry. Co. The petitioner-company is a company incorporated with its registered office at Calcutta. The objects of the company are: (1) to build, purchase, hire or otherwise acquire and hold steam and other ships, boats, launches and other vessels, (2) to carry on the business of shipping owners, managers of shipping property, freight contractors, carriers by land and sea, etc. (3) to deal in coal; (4) to

purchase lands, wharfs, warehouses, etc., (5) to carry on the business of general merchants ; (6) to carry on all or any of the above businesses as principals or agents ; (7) to make agreements and arrangements with other companies or amalgamate with other .companies and other objects. The company has got several branch offices, for instance, one at Cochin for carrying goods. But it has got a branch office at Alleppy which is the head office for all the branch offices which are in the nature of out-agencies for the S. I. Ry. Co. One such out-agency branch office is at Muttancherry and it is known as the S. I. Railway Out-agency Office. The contracts are entered into by the consignors of goods in that office for the purpose of sending goods from the boating station across the Cochin backwater to be handed over to the railway station at Ernakulam and thence to be carried to the final place of destination. The petitioner company would take a railway consignment receipt in the Form H provided by the Railways Act and would give to the consignors a counter receipt for the goods delivered. The goods are actually handed over to the petitioner company at the boating station in British Cochin though Muttancherry is in the Native State. The boats then start from that place and carry the goods to the railway station at Ernakulam which is within the jurisdiction of the Sub-Court. These boats are referred to as vallams in the evidence on record. The Subordinate Judge finds that the goods were loaded from the Kalvetti Canal, which is in British territory. Three objections were taken : (1) that the Subordinate Judge's Court at Cochin has no jurisdiction to try the suit ; (2) they are not liable as the sinking of the boat was due to an accident and not to any misconduct of the boatman ; and (3) the amount of damages.

The Subordinate Judge found that as the goods are delivered in British territory to the petitioner company the cause of action arises within the British territory and it has got jurisdiction to decide the case. On the second point the Subordinate Judge states that the evidence shows that three boats started but one of the boats capsized and that there was a strong gale and shifting of the sail ending in the capsizing of the boat. The Subordinate Judge says that misconduct should include mismanagement or wrong management, and negligence and incompetence in the steering of the boat comes under wrong mismanagement. Therefore he thought that a case of misconduct is made out. As to the amount of damages, his opinion is that the plaintiff has made out a prima facie case which was not rebutted by the defendant. He therefore gave a decree.

In revision those three points were repeated by the learned advocate for the petitioner. On the first point I think the Subordinate Judge is right. Though the actual contract is entered into in the Muttancherry office which is within the Native State, the very first item of performance of the contract which is contemplated by both the parties, namely the entrusting of the goods by the consignor to the consignee, takes place in the Kalvetti Canal where the plaintiff has got his place of business. It is there that the goods were weighed and loaded into the defendant's boats. This is enough to give jurisdiction to a British Court. It is unnecessary to rely on the fact that the place where the boat's delivery of the goods takes place, namely, Ernakulam is within the British territory. I therefore agree with the finding of the Subordinate Judge on the first point.

The next point is whether the defendant company is liable. The learned advocate for the petitioner argues that he is not liable for misconduct and that the Subordinate Judge erred in construing that incompetence in steering the boat comes under the heading of misconduct. I am inclined to agree with this argument of the learned advocate for the petitioner. But then it may be necessary to examine on what basis the liability of the defendant company rests. Apparently in the lower Court both sides assumed that the liability of the defendant-company rests upon the form taken from the consignor namely, Form H which limits the liability to misconduct of the railway servants. But Form H embodies the contract with regard to the journey as if made between the consignor and the Railway Company and unless this portion of the journey can be regarded as made on a railway, prima facie that contract and the limitations imported by that form apply only to the journey from Ernakulam to the place of destination. Of course if the journey on the back-

water can be regarded as journey on the railway, then Form H may help the petitioner company in respect of that portion also. For that purpose we have to see whether the backwater is a railway. In the Railways Act, S. 4, defines a railway; under Cl. (d), S. 4 railway includes all ferries, ships, boats etc., which belong to or hired or worked by the authority administering the railway. Here the boats do not belong to the S. I. Ry. Co. Nor are they worked by that authority. Nor were they hired by the S. I. Ry. Co. What we have got here is a general contract between the S. I. Ry. Co., and the petitioner company under which the petitioner company has to take the goods delivered at the out-agencies of the S. I. Ry. Co., carry the goods by their boats and hand them over to the railway stations of the S.I.Ry.Co., and in return for this service they get a certain percentage of the charges which are prima facie charged on the railway scale under the Form H and which are sent along with the passenger fares by demand drafts every day to the Railway Company. This agreement between the defendant company and the Railway Company was not produced in the lower Court and when I called for it in revision it has been produced before me and I am not able to say that as an effect of this agreement the particular boats carrying the goods were hired by the Railway Company. All that we have is a general contract by which all the work of carrying boats on the backwater is done by the petitioner. Therefore I cannot hold that the backwater is a railway within the meaning of S. 4 (d), Railways Act. The learned advocate for the petitioner referred me to a case in *India General Navigation & Ry. Co.* v. *Harcharn Das* (1).

In that case the question was not raised in the lower Court that the defendant was not a Railway Company. If the water-way became a railway within the meaning of the Railways Act, the company working the boats would be a Railway Company but the point was not raised and the learned Judges of the Punjab Chief Court said that they would not allow the point to be raised in appeal. In another case from Calcutta which was tried by Rankin, J., as he then was, reported in *Dekhari Tea Co.Ltd.* v. *Assam Bengal Ry. Co. Ltd.* (2) and which went up on appeal to the High Court before Sanderson, C. J., and Richards, J., and which was finally disposed of by the Privy Council in *India General Navigation & Ry. Co.* v. *Dekhari Tea Co.* (3), the India General Navigation & Ry. Co., did shipping work from Gauhati to Chandpur. The A. B. Ry. Co. had its own railway line between these stations prior to 1913. But in 1913 the railway line broke down with the result that the Railway Company entered into a contract with the India General Steam Navigation Ry. Co., for carrying their goods brought in by the Railway Company from Gauhati to Chandpur. For this purpose a special flotilla of ships was arranged by the shipping company and this flotilla would go direct from Gauhati to Chandpur without stopping in intermediate ports like their other ships carrying goods not handed over by the Railway Company. It was held by the Calcutta High Court and also by the Privy Council that the shipping company did not cease to be carriers on account of this arrangement, that they were still common carriers under the Carriers Act and quoad the business of carrying the goods handed over by the company, it cannot be said that they became a Railway Company and ceased to be carriers. I think this decision applies to the present case. It is true that there is no evidence available in this case to show that there are other boats carrying other goods to the said place by the backwater of the petitioner.

It is admitted that they have got another office. This must be, I suppose, for carrying goods by the backwater. At any rate this little difference does not enable me to say that the petitioner company which is certainly a common carrier under the Memorandum of Association ceased to be a common carrier quoad the business of taking the goods from the South Indian Railway out-agency at Muttancherry. If they are common carriers the Form H cannot be held to have regulated their liabilities for this portion of the journey and that must be regulated under the Carriers Act. Under the Carriers Act, negligence is presumed by the loss of goods, and no question of

(1) [1912] 111 P. R. 1912=15 I. C. 12.

(2) [1920] 47 Cal. 6=57 I. C. 406.
(3) A. I. R. 1924 P. C. 40=80 I. C. 1038 = 51 I. A. 28=51 Cal. 304 (P.C).

misconduct arises and unless the defendant rebuts the presumption with which every case starts, by showing that they are not guilty of such negligence as would make them liable, the decree should stand. The only question now is whether I should call for fresh finding or accept the finding of the Subordinate Judge as a finding at least on negligence. It is true that I cannot accept the finding of the Subordinate Judge as a finding of misconduct. But seeing that he finds that it is due to incompetence in management I do not see why I should not accept this as a finding on negligence. Accepting this as a finding of negligence I think the petition should be dismissed with costs and no purpose can be served by calling for fresh evidence in this case.

P.R.S./K.N. *Petition dismissed.*

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* A. I. R. 1931 Madras 118

MADHAVAN NAIR, J.

Official Receiver, Coimbatore — Petitioner—Appellant.

v.

M. Rm. K. A. R. Rm. Arunachalam Chettiar—Respondent.

Appeal No. 63 of 1929, Decided on 28th October 1930, from appellate order of Dist. Judge, Coimbatore, D/- 4th March 1929, in A. S. No. 70 of 1929.

*** Provincial Insolvency Act (1920), S. 28—Hindu father adjudicated insolvent—Power of sale destroyed by previous attachment—Official Receiver cannot appropriate sale proceeds of the son's shares—Hindu Law, father.**

On the insolvency of the father of a joint Hindu family it is only his own share of the family property that vests in the Official Receiver. The shares of his sons do not vest in the Official Receiver. With respect to those shares what vests in the Official Receiver is only the father's power of disposal. [P 119 C 2]

Where the entire property belonging to the judgment-debtor and his sons had been attached before the judgment-debtor was adjudicated as an insolvent and the petition for adjudication was presented after the date of the attachment, it follows that the father's power of disposal of the sons' shares had been destroyed by the existing attachment of those shares; and the Official Receiver could not get any power to deal with the sons' shares by reason of the order of adjudication. [P 119 C 2]

When the power of sale is once destroyed by the existing attachment, the Official Receiver has no right to appropriate the sale proceeds accruing from the sale of the sons' shares: *A.I.R.* 1928 *Mad.* 479, *Foll.* and *A.I.R.* 1928 *Mad.* 785, *Ref.* [P 120 C 1]

T. M. Krishnaswami Ayyar and *N. Sivaramakrishna Ayyar*—for Appellant.

K. S. Krishnaswami Iyengar—for Respondent.

Judgment.—The Official Receiver of Coimbatore is the appellant. One Arunachalam Chettiar obtained a money decree in O. S. 206 of 1926 against one Krishnasami Goundan. The joint family properties of the judgment-debtor and his three sons had been attached before judgment. These were proclaimed for sale in execution of the decree. In the meanwhile, Krishnasami Goundan was declared insolvent and the Official Receiver and the judgment-debtor, the insolvent, applied by E. A 15 of 1928 and E. A. 14 of 1928 for stopping of the sale in execution. The decree-holder opposed these applications and they were dismissed; but the Subordinate Judge directed that the proceeds of the sale in execution should be sent to the Official Receiver for distribution amongst the general body of the creditors of the insolvent. Accordingly, a sum of Rs. 5,177-11-0 was sent to the Official Receiver.

A holder of another decree against Krishnasami Goundan applied for a rateable distribution of the amount sent to the Official Receiver and an order was passed on that application, E. A. 256 of 1928, asking him to apply for the transfer of the amount sent to the Official Receiver to the execution Court. Arunachalam Chettiar, the decree-holder, in O. S. 206 of 1926 also applied by a memc for three-fourths of the amount being sent for on the ground that the insolvent's properties alone were vested in the Official Receiver and that he was entitled to the shares of the insolvent's three sons in the amount. E. A. 256 of 1928 was dismissed owing to the absence of the petitioner and his vakil. In response to the order of the Court on the respondent's application, the Official Receiver sent back the money, that is, three-fourths of the amount to the execution Court and presented the application, E. A. 379 of 1928, out of which this C. M. S. A. arises praying that Arunachalam Chettiar, the decree-holder in O. S. 206 of 1926, must not be paid any portion of the amount and that the sum should enure to the benefit of the general body of the creditors of Krishnaswami Goundan.

The question for consideration is whether this three-fourths of the amount

should go to the decree-holder in O. S. 206 of 1926, the respondent in this Court, or to the general body of Krishnaswami Goundan's creditors. The Subordinate Judge held that the decree-holder was bound by the order passed on E. A's. 14 and 15 of 1928, as he failed to prosecute an appeal which he filed against that order and further, that the money must go to the general body of creditors because the attachment effected in execution was an attachment of the father's right to dispose of his sons' shares to pay his own debts "not being immoral or illegal" and that the same right vested in the Official Receiver on the adjudication of the judgment-debtor as insolvent. He therefore ordered that the amount should be sent back to the Official Receiver. On appeal, the learned District Judge set aside the order of the Subordinate Judge. This C. M. S. A. has been filed by the Official Receiver against the order of the learned District Judge.

The first question for decision is whether the order passed by the Subordinate Judge on E. A's. 14 and 15 of 1928 bars the right of the respondent to apply for the return of the fund in question. The appellant contends that, since it was decided that the money realized in execution should be sent to the Official Receiver, it is no longer open to the respondent to ask for the return of that money. He argues that the order operates as a bar on the ground of constructive res judicata. In those applications the petitioners relied on S. 52, Provincial Insolvency Act, to stop the sale, but as the property was only attached and had not come into the possession of the Court the applications were dismissed; and the Court made a direction that the proceeds of the sale should be sent to the Official Receiver for distribution amongst the creditors. The decree-holder, the respondent, preferred an appeal against the order dismissing his application but he did not prosecute it. It is clear that the question regarding the respective rights of the decree-holder in O. S. 206 of 1926 and the Official Receiver as regards the sale proceeds did not arise for decision in those petitions. It is no doubt true that the learned Judge passed an order to the effect that the proceeds of the sale should be sent to the Official Receiver, but having regard to the fact that the question which the Court had to decide was whether the sale should be stopped, I cannot consider the direction made by the Subordinate Judge as a judicial determination of the respective rights of the parties to the sale proceeds. As this was not the question for decision there was no obligation on the part of the decree-holder to raise the contention that he is entitled to three-fourths of the amount. I agree with the opinion of the District Judge that the decree-holder, the respondent, is not precluded by the order on E. A's. 14 and 15 of 1928 from asking that the amount in question should be returned by the Official Receiver to the execution Court.

The next point is whether the view of the Subordinate Judge that this money should go to the general body of creditors on the ground that the attachment effected in execution was an attachment of the father's right to dispose of his sons' shares to pay his own debts "not being immoral or illegal" is right. On the insolvency of the father of a joint Hindu family it is only his own share of the family property that vests in the Official Receiver. The shares of his sons do not vest in the Official Receiver. With respect to those shares what vests in the Official Receiver is only the father's power of disposal. In this case the entire property belonging to the judgment-debtor and his sons had been attached before the judgment-debtor was adjudicated as an insolvent. The petition for adjudication was presented after the date of the attachment. It therefore follows that the father's power of disposal of the sons' shares had been destroyed by the existing attachment of those shares; and the Official Receiver cannot therefore get any power to deal with the sons' shares by reason of the order of adjudication: see the decision in *Gopalakrishnayya* v. *Gopalan* (1). If so, the Subordinate Judge's view that the attachment effected was an attachment of the father's right to dispose of his sons' shares to pay his own debts is clearly wrong. This was the view of the District Judge and I agree with that view; but it is argued by Mr. Krishnaswami Ayyar that the moment a property had been sold the entire sale proceeds become available to the Official Receiver for distribution amongst the general body of creditors.

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(1) A.I.R. 1928 Mad. 479=111 I.C. 505=51 Mad. 342.

His contention is that the Official Receiver is precluded only from selling the shares of the sons; and that the suspension of that power does not in any way affect his rights to appropriate the sale proceeds realized from the sale. When the power of sale is once destroyed by the existing attachment, I do not think the Official Receiver has any right to appropriate the sale proceeds accruing from the sale of the sons' shares. No authority is cited in support of the proposition contended for by the appellant. I do not think that the decision of the Full Bench in *In the matter of Baluswami Ayyar* (2), which holds that the institution of a suit by the sons against their father for partition after the latter's adjudication as an insolvent extinguishes the right of the Official Assignee to alienate privately the sons' shares for the father's debts can in any way be interpreted as supporting the appellant's contention, nor do I think that S. 51, Insolvency Act, relied on by Mr Krishnaswami Ayyar, can be used for that purpose as under that section the Official Receiver is entitled to the benefit of the execution only against the property of the debtor (the insolvent). I may say that the argument based on S. 51, Provincial Insolvency Act, was not put forward in either of the Courts below.

In the result the C. M. S. A. fails and is dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

(2) A.I.R. 1928 Mad. 735=112 I.C. 541=51 Mad. 417 (F.B.).

A. I. R. 1931 Madras 120

MADHAVAN NAIR, J.

(*Haji A. S.*) *Abdul Muhammad Rowther* and *others*—Plaintiffs—Appellants.

v.

Seethalakshmi Ammal and *others* — Defendants—Respondents.

Second Appeal No. 889 of 1926, Decided on 3rd September 1930, from decree of Sub-Judge, Tanjore, in Appeal Suit No 43 of 1925.

(a) Decree—Construction of—Future maintenance held charged on the property.

Where properties are specified in the decree and it is stated that future maintenance is to be recovered from those properties by selling them without attachment and this method is to be resorted to "in default of measuring the paddy on the due date."

Held: that the decree made the future maintenance a charge on the said properties. [P 121 C 2]

(b) Hindu Law—Maintenance—Decree for future maintenance, creating charge on properties—Future maintenance can be realized in execution proceedings—Practice—Relief.

Where a decree makes maintenance a charge on specified properties, the decree-holder is entitled to realize the maintenance by executing the decree without having recourse to any suit: 10 *Mad.* 283 (*F.B.*); 24 *Mad.* 689; 42 *I. C.* 975, *Ref.* [P 122 C 1]

(c) Transfer of Property Act, S. 52—Alienation of property having maintenance charge created on it by decree is invalid.

A lis in a mortgage suit continues until the actual sale in execution of the decree The same principle applies in respect of maintenance suits in which the decree declares the maintenance claim a charge on the properties: 37 *Bom.* 621, *not Foll.* [P 122 C 2]

S. Varadachariar and *A. V. Viswanatha Sastri*—for Appellants.

V. Sundaresa Aiyar—for Respondents.

Judgment.—The plaintiff is the appellant. The suit out of which the second appeal arises was for recovery of possession of properties from defendants 1, 4 and 5. The properties originally belonged to the family of defendants 2 and 3. Defendant 1 sued defendants 2 and 3, the coparceners of her husband in O. S. No. 46 of 1914 for the maintenance due to her and for charging the said maintenance on the properties included in that suit. That suit was compromised and a razinama decree was passed in favour of the present defendant 1. After the said decree, defendant 2 sold the suit properties and other properties to the present plaintiff under Ex. A dated 5th July 1917. Subsequently defendant 1 applied for execution of the decree in O. S. No. 46 of 1914 and the suit properties were sold in execution of the decree for recovery of the arrears of maintenance accrued due subsequent to the date of the decree and defendant 1 herself purchased the properties for Rs. 601 under Ex. 4 and obtained possession of them through Court. She subsequently sold the properties to defendants 4 and 5. The plaintiff who had purchased the suit properties under Ex. A, tried to set aside the sale, but having failed in his efforts, he instituted the present suit to recover possession of the properties from defendants 1, 4 and 5.

The District Munsif gave him a decree as prayed for on payment to defendant 5, of Rs. 601, the amount mentioned in defendant 1's sale certificate, Ex. 4. The lower appellate Court set aside that decree and dismissed the plaintiff's suit.

The main question for consideration in the lower Courts was, whether the razinama decree in O. S. No. 46 of 1914 declared a charge on the suit properties as regards the future maintenance decreed to defendant 1. On this point the District Munsif was of opinion that the future maintenance awarded to defendant 1 was not made a charge on the suit properties by the decree. The learned Subordinate Judge took a different view and held that the decree created a charge on the properties as regards the future maintenance.

Mr. Varadachariar on behalf of the appellant argues that on a proper construction of the decree it will be clear that only the past maintenance due to defendant 1 had been made a charge on the properties but not the future maintenance ; and secondly that even if there is such a charge, still the plaintiff to whom no notice was given of the proceedings in execution or of the sale, is entitled to recover the properties on payment of the amount for which the properties were purchased by defendant 1.

I shall first deal with the question, whether the decree creates a charge on the suit properties with respect to the future maintenance awarded to defendant 1. The relevant terms of the decree, Ex. 1, are as follows : Para. 1 refers to the arrears of past maintenance due to defendant 1 and para. 2 refers to the future maintenance. In para. 1 the arrears of past maintenance are specifically made a charge on the suit properties. After specifying the amounts due to defendant 1, it is stated in the paragraph that "the same has been made a charge on the property described in the plaint." It is further stated that

"if the said amount is not paid within the said period, the plaintiff to recover the same with interest at 1 per cent per mensem from the date of default by executing the decree and selling the plaint-mentioned properties without attachment and by proceeding against the defendants."

In para. 2, which refers to the future maintenance and which is the paragraph we have to deal with, the words "the same has been made a charge on the property described in the plaint" do not occur. After specifying the amount of furture maintenance for each year it states that

"in default of measuring the paddy on the due date the plaintiff to recover the value thereof at the rate prevailing during that period with interest at 1 per cent per mensem by executing the decree and selling the plaint-mentioned property without attachment and by proceedings against the defendants."

It is argued by Mr. Varadachariar that reading the two paragraphs together there can be no doubt that while a charge has been created with respect to the past maintenance by the words "the same has been made a charge on the property described in the plaint," the absence of such words creating a charge in para. 2 relating to the future maintenance shows clearly that the parties did not intend to make the future maintenance a charge on the properties. This contention has considerable force, but I am not inclined to accept it. Even though the words "the same has been made a charge on the property described in the plaint" appearing in para. 1 do not appear in para. 2, still there are words in para 2 which in my opinion are sufficient to create a charge in favour of defendant 1 in respect of the future maintenance also. The properties are specified, and it is stated that future maintenance is to be recovered from those properties by selling them without attachment and this method is to be resorted to as stated in the paragraph, "In default of measuring the paddy on the due date." I think that these words used in the paragraph show that there was a present intention in the minds of the parties to make the properties specified in the decree a security for the payment of the amount of future maintenance. The provision in the decree that future maintenance can be recovered by sale without attachment should not be understood as pointed out by the learned Subordinate Judge as a mere clause dispensing with the rules of procedure. In my opinion this provision shows that it was put in with the object of creating a present charge with respect to the future maintenance also. No reason is alleged as to why the parties desired to treat defendant 1's claim to future maintenance differently from her claim to the past maintenance. I agree with the learned Subordinate Judge's construction of this part of the decree and hold that the razinama decree in O. S. No. 46 of 1914 made the future maintenance due to defendant 1 a charge on the suit properties.

The next question is, that assuming there was a charge, is the present plaintiff entitled to recover possession of the

properties on payment of the amount of the future maintenance for which the properties were sold and purchased by defendant 1. It is true that the plaintiff had no notice of the sale proceedings, but the question is: when the maintenance is charged on specific properties by the decree, are not subsequent alienations of the properties affected by that decree ; or in other words, does not the principle of lis pendens apply to such cases ? In support of the contention that the sale in execution does not affect the plaintiff, the subsequent purchaser, and that he is entitled to recover possession on paying to defendant 1 the amount of maintenance due to her, the learned advocate for the appellant relied on *Bhoje Mahadev Parab* v. *Gangabai* (1) which seems to support him. It may be said that the law is well settled that where a decree makes maintenance a charge on specified preperties, the decree-holder is entitled to realize the maintenance by executing the decree without having recourse to any suit : see *Muttia* v. *Veerammal* (2), *Minakshi Achi* v. *Chinnappa Udayan* (3) and *Sowbagia Ammal* v. *Manika Mudaliar* (4). In the case of mortgage suits, subsequent alienations of the suit properties pending the decree are subject to the doctrine of lis pendens. In the case of such suits it has been held that the lis continues even after the decree, i. e. until the actual sale in execution of the decree. The decision in *Bhoje Mahadev Parab* v. *Gangabai* (1) seems to follow the view for which there is some authority that the lis terminates after the decree. This decision has not been followed in Madras. In *Ramaswami Ayyangar* v. *Govinda Ayyar* (5), Seshagiri Ayyar, J. observes at p. 841 :

"The sounder view is to hold that the property continues to be subjected to lis pendens until the sale is actually effected."

In this connexion attention may be drawn to the amendment to S. 52, T. P. Act, introduced by Act 20 of 1929. By the amendment a new explanation has now been added to that section, which says that for purposes of this section the pendency of a suit continues

"until the suit or proceedings has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained or . . . ."

The explanation seems to embody the Madras view. After the amendment, there can be no doubt as to the law on this point. Even before the amendment as I stated, the view in Madras was that the *lis* in a mortgage suit continues until the actual sale in execution of the decree. I think the same principle may be applied in respect of maintenance suits in which the decree declares the maintenance claim a charge on the properties. In this view it follows that the alienation in favour of the present plaintiff by defendant 2 is invalid having regard to the charge created by the decree in O. S. No. 46 of 1914 and defendant 1 is entitled to execute the decree without giving any notice to the plaintiff, the subsequent purchaser. I therefore hold that the plaintiff has no right to say that the purchase of the properties by defendant 1 should be set aside on his paying the amount of maintenance claim for which the properties were sold. The second appeal is therefore dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

(1) [1913] 37 Bom. 621=21 I. C. 54.
(2) [1887] 10 Mad. 283 (F.B.)..
(3) [1901] 24 Mad. 689.
(4) [1917] 42 I. C. 975.
(5) [1916] 38 I. C. 1.

A. I. R. 1931 Madras 122

RAMESAM AND CORNISH, JJ.

Venkata Narasimha Rao Bahadur, Zamindar Garu—Petitioner.

v.

Municipal Council, Narasaraopet and *others*—Respondents.

Civil Misc. Petn. No. 128 of 1930, Decided on 16th April 1930.

(a) Certiorari—Writ of—When and under what circumstances it may be issued stated.

Where it is laid down in the statutes or bye-laws made under the statutes that proceedings under them shall not be removed by the writ of certiorari then certiorari is said to be taken away by such statutes; that is, it is taken away only by express negative words and not merely by words which direct that certain matters shall be finally determined. But even in cases where certiorari is taken away, a writ may be issued if the authority acted without jurisdiction. [P 123 C 2]

Where proceedings of a Municipal Council do not contain even a resolution of the council but merely record facts relating to the election of the Chairman and declaration of the returning officer, declaring the votes, obtained by each candidate and who got the majority of votes, they cannot be treated as the act of any tribunal, judicial or quasi-judicial. Nothing was done by the council in the nature of judicial act to which the remedy of a writ of certiorari would be applicable. There was no question of the validity of the voting papers. The council or even the Chairman did not purport to

enquire into any matter or weigh the evidence relating to any matter in dispute or consider it in any manner that can be considered judicial or quasijudicial. The act of presiding member in declaring the result of the poll is a purely ministerial or administrative act and a writ of certiorari cannot be granted in respect of such an act : *Exparte Bradlaugh* (1878) 3 *Q. B. D.* 509 11 *Cal.* 275 ; *Rex.* v. *Woodhouse*, (1906) 2 *K. B.* 501 ; *Prichard* v. *Mayor of Bangor*, (1888) 13 *A. C.* 241, *Ref.* [P 123 C 2; P 124 C 1]

(b) Words and Phrases—Judicial—Meaning of.

The term "judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but a judicial act may be an act done by competent authority upon a consideration of facts and circumstances and im posing liability or affecting the rights of others. And if there is a body empowered by law to inquire into facts, make estimates to impose a rate on a district, the acts of such a body involving such consequence would be judicial acts : *Frome United Breweries Co.* v. *Bath Justices*, (1926) *A. C.* 586, *Foll.*

[P 123 C 2]

Ch. Raghava Rao and *B. T. M. Raghavachari* —for Petitioner.

P. Venkataramana Rao and *V. Subramaniam*—for Respondents.

Ramesam, J.– This is an application by Sri Rajah Malraju Venkatanarasimha Rao Bahadur Garu of Narasaraopet for a writ of certiorari to be issued to the three respondents who are : (1) the Chairman of the Narasaraopet Municipal Council elected at a meeting on 5th November 1929, (2) the Municipal Council and (3) the Vice-Chairman of the Municipal Council who presided at the meeting of 5th November for electing the Chairman and for setting aside the alleged resolution of a meeting on that day declaring respondent 1 to have been duly elected as Chairman. The petitioner is the other candidate for election.

An application was made to the Government, by the petitioner for setting aside the election on the ground of various irregularities in the election ; but the Government while finding that

"the action of the Councillors in violating the provisions of R. 4 of the rules for the election of Chairman and Vice-Chairman of the Municipal Councils prescribing secret voting was highly irregular"

did not interfere with the election in question and passed an order leaving the aggrieved parties to the legal remedies. Immediately after the said order of the Government (on 10th December 1929) the present petition was filed. We issued an interim writ. The Municipal Council of Narasaraopet appear by counsel and oppose the application.

The first point that would suggest itself is the question whether the writ of certiorari ought to be issued when there is another remedy open. Under the election rules an election petition lies ; but unless the statutes or bye-laws made under the statutes take away the remedy by certiorari the writ may be issued. Where it is laid down in the statutes or bye-laws made under the statutes that proceedings under them shall not be removed by the writ of certiorari then certiorari is said to be taken away by such statutes : that is, it is taken away by express negative words and not merely by words which direct that certain matters shall be finally determined : vide Halsbury, Vol. 10, S. 345. But even in cases where certiorari is taken away a writ may be issued if the authority acted without jurisdiction: vide Halsbury, S. 348. This was the procedure adopted in *Ex parte Bradlaugh* (1): see also *Nando Lal Bose* v. *Corporation for the Town of Calcutta* (2). It ought to be done under exceptional circumstances only.

The next question is whether in this matter the resolution which is sought to be set aside is an act of a judicial authority. The writ lies for the purpose of quashing the determinations of bodies who are entrusted with judicial functions out of the ordinary course of legal procedure: vide Halsbury, S. 320. Even in respect of such bodies the writ lies only in judicial as distinguished from ministerial acts. In *Frome United Breweries Co.* v. *Bath Justices*, (3), Lord Atkinson quoted the dictum of May, C. J., in *Reg* v. *Dublin Corporation* (4) as follows:

"In this connexion the term "judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon a consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there is a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequence would be judicial acts."

(1) [1878] 3 Q. B. D. 509=47 L. J. M. C. 105=26 W. R. 758=38 L. T. 680.
(2) [1885] 11 Cal. 275.
(3) [1926] A. C. 586.
(4) [1878] 2 L. R. Ir. 371.

In the present case, we find that the proceedings of the council dated 5th November 1929 do not contain even a resolution of the council. They recorded the facts relating to the election and the declaration of the returning officer (the Vice-Chairman) declaring the votes obtained by each candidate and who got the majority of the vote. I am unable to see in this the act of any tribunal judicial or quasi-judicial. There was no question of the validity of the voting papers. The council or even the Chairman did not purport to enquire into any matter or weigh the evidence relating to any matter in dispute or consider it in any manner that can be considered judicial or quasi-judicial. On this ground we dismiss the application with costs of respondents 1 and 2, advocate's fee being fixed at Rs. 25.

Cornish, J.—I am of the same opinion. The affidavits disclose irregularities in the manner of voting which might have been challenged in an election petition. But there was nothing done by the Municipal Council in the nature of a judicial act to which the remedy of a writ of certiorari would be applicable. When this case was first argued it was represented to us on the strength of the petitioner's affidavit that the council had passed a resolution adopting the election of respondent 2, as the Chairman of the council. But respondent 2's affidavit which has since been filed denies that there was any resolution of the council upon the matter, and this appears to be the fact from an examination of the council's minute book. The council did not, therefore profess to "exercise some right or duty to decide," which, as Fletcher Moulton, L. J. has explained in *Rex* v. *Woodhouse* (5) at p. 535, is necessary to provide scope for the writ of certiorari. All that was done was to record in the minute book the result of the poll as declared by the presiding member. The act of the presiding member in declaring the result of the poll was a purely ministerial or administrative act: see *Pritchard* v. *Mayor of Bangor* (6). And a writ of certiorari cannot be granted in respect of such an act; *Rex* v. *Woodhouse* (5).

The learned counsel for the petitioner has argued that the presiding officer was under a duty to decide upon the validity of the votes given in such circumstances, and that he must be deemed to have decided that notwithstanding the irregularity in the voting, the voting papers were valid. Reference has been made to the following passage in Lord Halsbury's judgment in *Pritchard* v. *Mayor of Bangor* (6) in regard to the functions of the Returning Officer at a Municipal Election.

> "He is to do therefore the things which the statute expressly says he shall do, namely to count the votes, that is to say, the written papers so put into the ballot boxes, and according to their number to declare which candidate is elected. One function is no doubt given to the Returning Officer, and that is a judicial function, with regard to the question of the validity of the voting papers as papers, to see whether they comply with the statute or whether there is any objection to them."

Those are precisely the functions given to a presiding member by the rules framed under the Madras District Municipalities Act for the election of a Chairman. He is to count the voting papers placed in the ballot box and those papers are to be marked only by the voters placing a cross against the name of a candidate on the papers. R. 6 provides that any voting paper which contains the signature of the voter or on which the cross is placed against more than one name shall be invalid. A voting paper which on the face of it offended against R. 6 would not be counted by the presiding officer. But with this exception the rules give him no power to adjudicate upon the validity of a vote. In my judgment, nothing done by the presiding officer in the declaration of the result of the poll exceeded his strictly ministerial functions, and accordingly there is no ground for the grant of certiorari in respect of anything done by him.

P.R.S./K.N. *Application dismissed.*

(5) [1806] 2 K. B. 501=75 L. J. K. B. 745=22 T. L. R. 603=70 J.P. 485=95 L.T. 399.
(6) [1883] 13 A. C. 241.

A. I. R. 1931 Madras 124

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

C. Jagannadham Pillai—Plaintiff—Appellant.

v.

Official Assignee, Madras, and *others*—Defendants—Respondents.

Original Side Appeals Nos. 71, 98 and 108 of 1926, Decided on 22nd July 1930, from judgment of Beasley, J., D/- 23rd July 1926.

(a) Transfer of Property Act (1882), S 100—Title-deeds deposited with letter. "Herewith title-deeds are deposited as per agreement, etc."—This does not constitute instrument of charge.

Where a letter accompanied the title deeds sent for depositing them with mortgagee and was to the effect " Herewith the title-deeds are deposited as per agreement, etc.,"

Held: that a mere note saying " Herewith the title deeds etc.," would not constitute an instrument of charge. A detailed statement containing the terms of the agreemnt, the amount of the debt to be secured, rate of interest, terms of payment, particulars of the security etc., on the other hand, would clearly amount to an instrument of charge : *A. I. R.* 1916 *P. C.* 115 and *A. I. R.* 1923 *P. C.* 50, *Ref.*; *Shaw* v. *Foster*, (1872) 5 *H. L.* 321, *Rel. on.* : *A. I R.* 1924 *Mad.* 547, *Dist.* [P 127 C 2]

(b) Registration Act (1908), S. 17—Letter accompanying deposit of title-deeds referring to memorandum of agreement recording terms of mortgage by deposit of title-deeds—Both together constitute document within terms of S. 17.

Where a letter accompanying the title-deeds to be deposited with mortgagees referred to a memorandum of agreement recording the terms of mortgage by deposit of the title deeds.

Held: that if the letter in the present case had embodied the terms of the mortgage, it would have been registrable as a record of the mortgage transaction. The mere fact that some other paper had to be read in order to ascertain those terms did not make any difference. Both these documents read together constituted a document within the terms of S. 17, which was compulsorily registrable.

[P 128 C 1]

(c) Civil P. C. (1908), O. 34, R. 5—Personal covenant to pay may be proved by invalid mortgage and personal decree may be passed on that basis.

A personal covenant to pay may be proved by a mortgage found invalid. The trial Court, on finding a mortgage to be invalid for any cause, may give a decree on the personal covenant which it contains provided that it be not barred : 32 *Mad.* 410, *Rel. on.* ; *A. I. R.* 1925 *P. C.* 169, *Expl.* [P 128 C 1]

T. P. Meenakshisundaram—for Appellant.

Advocate-General and *V. Rajagopala Iyer*—for Respondents.

Curgenven, J.—These three appeals, arising out of two suits tried by Beasley, J., as he then was, may be disposed of together since they relate to the same set of transactions. Jagannadham Pillai and one Somasundaram Chetti (now dead) carried on a hardware and machinery besiness in partnership from 1913 to 1923. One of the two suits (C. S. No. 358 of 1924) was brought by Jagannadham Pillai for dissolution of this partnership and for accounts. At the trial it was agreed that the partnership was no longer subsisting so that it became a suit for accounts only. The case for the defendants, who were the sons of Somasundaram Chetti was that the accounts had already been settled between the partners and indeed on two occasions. In 1920 there was a settlement with effect to the end of December 1918, with the result that Jagannadham Pillai received Rs. 13,800 as his share of the profits. Again in 1923 there was a second settlement up to the termination of the partnership ; and, probably because post war conditions were not favourable to a business of this kind, a considerable loss had to be divided and Jagannadham Pillai made himself liable, by means, to which I will subsequently refer, for the share to which his partnership related. He now repudiates both these so-called settlements of account on the ground that he was in fact no party to them and that they are in fraud of his interests. If it is to be held that they did amount to settlements, his further plea is that owing to certain errors they are not binding upon him.

These pleas are raised in the face of a number of written admissions accepting his liability. The partnership agreement was originally an oral one. But on 11th June 1920, when Jagannadham Pillai's share was reduced from 1/4th to 1/5th, the agreement Ex. A was executed. This contains a statement subscribed to by Jagannadham Pillai that accounts had been taken up to 31st December 1918 and that he had received the amount due to him. Again when, to provide for his ultimate liability he executed the promissory note Ex. E on 25th May 1923, he made a similar admission with regard to the profit due up to the end of 1918. Then as regards the second settlement, Ex. E itself is the most important piece of evidence of its acceptance by Jagannadham Pillai, and this document was followed by what purported to be a mortgage by deposit of title-deeds ; and the agreement to enter into this mortgage comprises another admission, and further such admissions are to be found in the stock books of the partnership. In all, as the plaintiff had to admit, he acknowledged a debt of Rs. 62,000 to the defendants in five different documents. Yet he has had the effrontery to state in evidence that he had no

opportunites of looking into the accounts and that he signed these documents blindly trusting the honesty of Somasundaram Chetti. He can hardly pretend that he is a man without any business abilities or exprerience because for 20 years he was in charge of the hardware department of Messrs. Oakes & Co., drawing a salary of Rs. 100 a month and 10 per cent commission on sales. His evidence contains a number of prevarications regarding his acquaintance with the accounts, but the admission that he makes as regards his signing some of the rough accounts proves, what is indeed only in accordance with probabilities, that as manager he was responsible for maintaining them. How far he is prepared to go will be seen from his assertion that he understood the promissory note Ex. E to be something in the way of a security bond for losses which might subsequently be incurred in the business. There is no doubt in my mind that on each occasion the plaintiff was perfectly well aware of what he was signing and that he must have given his agreement after a verification of the accounts. An attempt has been made to cast doubt upon the truth of the second settlement by reason of some discrepancy in regard to dates. In the written statement 31st July 1920, is given as the date when accounts up to 31st December 1918, were made up, while the date of Ex. A, as we have seen, is 11th June 1920. However such a difference may be accounted for, no reason has been given for the view that it indicates the evidence regarding the settlements to be false.

Accepting then the fact of these two settlements, it remains to consider whether the plaintiff is entitled to have them reopened. It is unnecessary to discuss the principles upon which such reopening should be allowed, because he has failed not only to establish any kind of fraud but any kind of error. Before us he has raised five objections to the correctness of the accounts and I will briefly deal with these seriatim:

(1) He states that he was to draw a salary of Rs. 200 per mensem in addition to his share in the profits and that this he has not been allowed credit for. The only bases for this assertion are firstly the fact that he was drawing a sum of Rs. 100 or Rs. 150 per mensem and secondly that there are certain entries showing credit for salary of Rs. 2,400 per annum. As regards the monthly drawings they are nowhere described as salary, and it may equally well be that they represent advances from possible profits for maintenance purposes. Indeed the admitted circumstance that the plaintiff was charged interest on these drawings seems to point unmistakably to this supposition. The same account undoubtedly shows a number of such advances which were certainly not salary In the firm's establishment ledger there is a debit for 12 months' salary of Rs. 2,400. But it has been plausibly suggested that this was made for income-tax purposes, and when we turn to Jagannadham Pillai's own ledger we find not only a credit but also a debit entry, the two cancelling out. This may have been done to tally with the establishment ledger, but it certainly does not establish the claim for salary which, it may be noted, is not provided for in the agreement, Ex. A.

(2) This objection relates to debits under date 21st November 1918 amounting to Rs. 14,573-10-9. In his particulars of errors and fraud filed in the suit the plaintiff admitted as correct entries to the extent of Rs. 9,600-9-3, and denied his liability as regards the balance. When however he was orally examined upon this matter he confesssd that he could not say which items were right and which were wrong. This objection is therefore worthless.

(3) It has been said that the plaintiff derived a profit of Rs 13,800 in respect of the first settlement and this objection relates to a payment of this sum on 23rd June 1920. The plaintiff admits that such a payment was made but denies that it was in respect of the profit. His learned advocate has endeavoured to persuade us, but without success, that if it were such profit it should not have found place where it does in the accounts. It is quite clear that it should be so shown. As regards the plaintiff's version, he has to admit the remarkable concidence that this sum is identical with what the accounts show the profits should be, and he gives the very lamest explanation why, if not as profits, he drew this large sum, some of it going in discharge of documents which are not produced and some being given

away as presents. There is no foundation shown for this objection.

(4) The plaintiff complains that he was charged interest upon advances drawn against profits, whereas no counter-interest was allowed upon profits left in the firm. It should be explained that Somasundaram Chetti & Sons had a money-lending business and acted as bankers to the partnership and the real objection seems to be that they did not allow interest upon moneys in deposit with them. As to this it can only be said that, whatever the merits of the objection, no materials are upon the record to show what sums, if any, were so in deposit. This point cannot therefore be substantiated.

(5) This relates to a debit of Rs. 5,137-8-0 made on 31st December 1920, in respect of Jagannadham Pillai's share of income-tax up to 1918. It is objected that this item should have found a place in the 1918 settlement. But there is nothing to show that the figure was available when these accounts were settled. Since the plaintiff does not contend that its inclusion in the second settlement caused him prejudice, it is difficult to see what this objection amounts to.

These are all the criticism brought to our attention. None of them is deserving of any consideration. The suit for an account was properly dismissed and O. S. A. No. 71 of 1926 must be dismissed with costs.

The remaining two appeals, O. S. Nos. 98 and 108 of 1926 arise out of C. S. No. 592 of 1924, which was a suit brought by Somasundaram Chetti's legal representatives against Jagannadham Pillai upon a mortgage by deposit of title-deeds. Reference has already been made to the promissory note Ex. E which Jagannadham Pillai executed on 25th May 1923 for a sum of Rs. 62,017-13-8 due by him to the firm. This was followed on the following day (26th May) by an agreement to deposit title-deeds, Ex. 4, and on 27th the title-deeds were sent with a letter, which begins as follows:

"I have the honour of herewith sending you with the intention of delivering and depositing the same with you as per the memorandum dated 26th May 1923, executed by me in your favour the title-deeds and papers relating to the property . . . . . ."

and then follows a reference to the schedules annexed to the letter. The question the learned Judge had to decide in order to discover whether or not the mortgage was valid, was whether this letter required registration as embodying a bargain between the parties. The view which he has taken is that, since this letter makes reference to the memorandum of agreement of the previous day, the two documents must be read together, and so read they clearly embody the terms of the transaction. The Privy Council has laid down the law upon this subject in *Pranajvandas Jagjivvn Das Mehta* v. *Chan Ma Phee* (1) and *Subramanian* v. *Lutchman* (2). It had been previously stated by Lord Cairns in the leading case of *Shaw* v. *Foster* (3) as follows :

"Although it is a well-established rule of equity that a deposit of a document of title without more, without writing or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that that general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the document by which alone you must be governed."

In the present case there is no doubt that the act of depositing was accompanied by the letter under reference, a circumstance which distinguishes this case from some others as, for instance, *Krishnaiya* v. *Ponnuswami Ayyar* (4). Then does the letter amount to an actual written charge? It is clear that the answer to this question depends upon the degree of formality which marks the document. A mere note saying "Herewith the title-deeds" would not constitute an instrument of charge. A detailed statement containing the terms of the agreement, the amount of the debt to be secured, rate of interest, terms of repayment, particulars of the security, on the other hand, clearly would amount to such a document. While the letter under reference does enumerate the properties intended to be mortgaged it says nothing about the

(1) A. I. R. 1916 P. C. 115=35 I. C. 190=43 I. A. 122=43 Cal. 895 (P.C.).
(2) A. I. R. 1923 P. C. 50=71 I. C. 650=50 I. A. 77=50 Cal. 338 (P.C.).
(3) [1872] 5 H. L. 321=42 L. J. Ch. 49=20 W. R. 907=27 L. T. 281.
(4) A. I. R. 1924 Mad. 547=84 I. C. 629=47 Mad. 398.

other particulars in express terms ; but it makes it clear that further information is to be obtained from the memorandum dated 26th May, and turning to this memorandum and reading it in its turn with the promissory note, we obtain all the particulars of the transaction. The question is whether the procedure adopted amounted to recording those terms in a document requiring registration under S. 17, Registration Act. Only one case has been brought to our attention relating to a document which refers to terms not expressly recited in it, and that is an unreported case decided by Madhavan Nair and Jackson, JJ.: *A. S. Nos.* 64, 117 and 176 *of* 1924. But in that case it was found that the document referred to a bargain which had already been completed, and to particulars which had not previously been reduced to writing. In the present instance, it is, I think, clear that if the letter, besides referring to the memorandum of agreement, had also embodied its terms, it would have been registrable as a record of the transaction ; and the mere fact that some other paper, whether an agreement or any other record is immaterial, had to be read in order to ascertain those terms does not seem to me to make any difference in principle. I think that the learned Judge is clearly right in holding that the two documents, for the purpose of deciding this point, must be read together as the letter intends them to be, and so read they do constitute a document within the terms of S. 17. I would hold therefore that the mortgage is invalid for lack of registration.

This disposes of the plaintiffs' appeal in this suit. The learned Judge however considered that it was open to him to give a decree upon the promissory note, and against this decree the defendant has appealed The decree was preceded by an order allowing amendment of the plaint, so as to comprise a prayer for a personal decree upon the promissory note. This order has been attacked before us, principally on the ground that when it was made, the claim under the promissory note was time barred. But I do not think we need consider whether or not the amendment should have been allowed because on the plaint as it originally stood it seems clear that a decree of this character could be granted. Apart from a general prayer :

"for such further and other reliefs as to this Honourable Court may seem meet or the nature of the case may require,"

para. 14 of the plaint asks that the defendant be directed to pay to the plaintiffs the sum named and goes on in the ordinary terms of a mortgage suit, to ask for the sale of the properties and if the proceeds are not sufficient, for a personal decree. It was I think clearly within the competence of the Court, upon failure of the mortgage, to give such a decree on a plaint so framed. It has been held by a Full Bench of this Court in *P. V. M. Kunhu Moidu* v. *T. Madhavan Menon* (5) that a personal covenant to pay may be proved by a mortgage invalid for defect of attestation, and I think it is incontestable that a trial Court on finding a mortgage to be invalid for this or any other reason, may give a decree on the personal covenant which it contains, provided of course that it be not barred. The only case to the contrary cited before us is *Gajadhar Mahton* v. *Ambika Prasad Tiwari* (6), where their Lordships of the Privy Council decided, clearly in the special circumstances of that case, that they should not themselves give a decree of this nature. Nor do I think that where, as here, the debt is embodied in a promissory note which forms the basis of the invalid mortgage the Court is any more disqualified from giving a decree upon that note. In the result I would dismiss both these appeals with costs.

Bhashyam Ayyangar, J.—I agree.

P.R.S./B.V. *Appeals dismissed.*

(5) [1909] 32 Mad. 410=1 I. C. 1.
(6) A. I. R. 1925 P. C. 169=87 I. C. 292=47 All. 459.

A. I. R. 1931 Madras 128

ANANTAKRISHNA AYYAR, J.

Mahammad Beari and *others*—Defendants—Appellants.

v,

Badava Beari and *another*—Plaintiffs—Respondents.

Second Appeal No. 442 of 1926, Decided on 11th September 1930, against decree of Sub-Judge, Kanara, in A. S. No. 16 of 1925.

(a) Civil P. C. (1908), S. 100—Whether particular user imposes additional burden on servient heritage, is question of fact—Easements Act (1882), S. 23.

Whether any particular user of the passage by the dominant owner is or is not materially more burdensome than the original user to

the servient heritage, is essentially a question of fact, on which a finding should always be had from the lower Courts: *A. I. R.* 1926 *Bom.* 537; *Taffvale Ry.* v. *Gorden Canning*, 2 *Ch.* 48; *Milner's Safe Co., Ltd.* v. *G. W. & City Ry.* 1 *Ch.* 208; *Whimbledon* v. *Dixon* 1 *Ch. D.*362 *Ref.*, 23 *Bom.* 595, *Rel. on.* [P 131 C 1]

(b) Easements Act (1882), S. 23—Residential house changed into godown—Additional burden is imposed by using bullock carts over passage which was used as passage for residential house.

Where a house is used as a godown for storing merchandise, instead of it being used for residential purposes, the use of bullock carts over passage leading to godown for goods-carrying, will throw additional burden on the servient tenant: 13 *Cal.* 136, *Dist.* [P 132 C 2, P 133 C 1]

B. Sitarama Rao—for Appellants.

S. T. Srinivasagopalachari and *K. P. Sarvothama Rao*—for Respondents.

Judgment.—The defendants are the appellants in this second appeal. The plaintiff and the defendants are neighbours, the plaintiff being the owner of Survey No. 1565 and defendant 3 being the owner of Survey No. 1566. It is said that defendants 1 and 2 claim under defendant 3. The plaintiff's suit was for a declaration that the wall marked *H* in the plan, between the plaintiff's and defendant's properties, was the plaintiff's own wall, that the defendants had no right of passage through the pathway marked *D* and the defendants should close the doorway marked *H* (1) and for a mandatory injunction to give effect to the above declaration. The defendants pleaded that wall *H* was their wall, that it was built on a portion of Survey No. 1566 which belonged to them, and that plaintiff was not entitled to any relief in respect of wall *H*. With reference to the passage *D* they claimed a right of way through the same to the buildings *F* and *J*. There was also some dispute with reference to a small building *T* just to the west of *F*. The trial Court came to the conclusion that the plaintiff was not entitled to wall *H* since it was constructed wholly on defendant's land, Survey No. 1566. It also found that the defendants were not entitled to any right in respect of building *J*. It gave a decree in favour of the plaintiff as follows:

"That the plaintiff is the absolute owner of Survey No. 1565 subject to a right of way in favour of defendants only for their men and goods along the passage *D* and for the beneficial enjoyment of their building;"

and it restrained the defendants by an injunction from using the passage *D* in excess of such right of way. The learned advocate for the respondent-plaintiff suggested that the word "building" used in the decree is with reference to the building *F*. Both sides were dissatisfied with the decision of the trial Court with the result that the plaintiff preferred an appeal No. 16 of 1925, while the defendants filed a memorandum of objections in the appeal, each party claiming the whole of what each wanted in the trial Court.

The learned Subordinate Judge noted six points for determination in appeal. He agreed with the trial Court with reference to the ownership of wall *H* and that the defendants were not entitled to any easement in respect of building *J*. As regards the small building *T*, agreeing with the trial Court, he held that it was not a nuisance and that the plaintiff was not entitled to any relief in respect of the same. As regards the passage *D*, the appellate Court found that from about 1899 or 1900 the occupant of *F* under the defendants, one Ali Beari, was using the passage *D* and the doorway *H* (1) in connexion with *F* and that, after Ali Beari vacated the premises, for a few years prior to the plaint the same was used by the defendants for the passage of men with or without goods. The learned Subordinate Judge found that during Ali Beari's time the same was being utilized for use in connexion with *F* as a residential building. The learned Subordinate Judge also found that the user for just a few years prior to the plaint mentioned by him in para. 18 of his judgment materially increased the burden of the servient heritage, and being of opinion that the same could not be reduced by the servient owner without interfering with the lawful enjoyment of the easement, he came to the conclusion that S. 43, Easements Act, applied and that the defendant's rights of easement, which existed, became extinguished by the permanent change of the dwelling house *F* into a warehouse.

The learned Subordinate Judge accordingly modified the decree passed by the first Court in that respect. The modification appears in his decree which is printed at p. 7 of the pleadings book. It is as follows:

"That the defendants and their men be, and hereby are, permanently restrained from using the passage *D* and the doorway *H* (1) shown in

the said plan, and they are likewise directed to close the said doorway."

The subsequent clause of the appellate decree gives the plaintiff the right to have the doorway closed through Court in case the defendants fail to do so. The plaintiff's suit in other respects was dismissed. This second appeal has been preferred by the defendants.

The only questions that have to be considered are: (1) whether the learned Subordinate Judge was right in his view that the right of easement which he found to have been acquired with reference to *F* as a residential building has been extinguished in the circumstances; and (2) whether he was right in directing the defendants to close the doorway *H* (1). I will take up the second point first. The doorway *H* (1) has admittedly been existing in the wall *H* which belongs to the defendants. The plaintiff has no right to ask the defendants to close *H* (1) any more than he has got a right to ask them to close any other portion of the defendant's wall or building. If the defendants are found not to have acquired any right of easement with reference to *H* (1) it would be open to the plaintiff to do what he likes in his own premises which would have the effect of rendering *H* (1) useless for the defendants. But the lower appellate Court's direction to the defendants to close *H* (1) is not warranted by law. The decree will be modified in that respect, and the said direction will be deleted from the decree, along with the consequential direction enabling plaintiff to recover cost of the same from the defendants.

The substantial question however for decision between the parties is, What rights defendants have at present with reference to the use of passage *D* with reference to the building *F*? The learned advocate for the appellant contended that the learned Subordinate Judge was in error in applying S. 43, Easements Act, which contemplated a case where permanent structural changes have been brought about in the dominant heritage, and the result was that the burden on the servient heritage was accordingly materially increased in such a way that the same could not be reduced by the servient owner without interfering with the lawful enjoyment of the easement. In such a case the section declares that the easement acquired in respect of the dominant heritage should be deemed to have been extinguished. He argued that in the present case there were no permanent structural changes effected with reference to *F* and that therefore the provision of law applicable to this case is S. 23 which enacts that the dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. He referred me to *Jesang* v. *Whittle* (1), and *Mancharsha Sorabji* v. *Virji Vallabhdas* (2). In *Jesang* v. *Whittle* (1) it was held that the right of way enjoyed for agricultural purposes might be used for the purpose of a factory provided no additional burden was thereby imposed on the servient heritage. A similar view was taken in *Mancharsha Sorabji* v. *Virji Vallabhdas* (2).

On behalf of the respondent his learned advocate referred me to several English decisions in support of his contention, that the same principle would apply both where there were permanent structural changes in respect of the dominant heritage and also where there was substantial increase of burden with reference to the user in respect of the right claimed. The English cases reported in *Whimbledon and Putney Commons Conservators* v. *Dixon* (3), *Bradburn* v. *Morris and Morris* v. *Bradburn* (4), *Milner's Safe Co. Ltd.* v. *Great Northern and City Railway* (5), and *Taffavale Railway* v. *Gorden Canning* (6), were quoted by the learned advocate for the respondent. He also cited *Desai Bhaoorai* v. *Desai Chunilal* (7), as supporting his suggestion. In considering the question whether any particular user is materially more burdensome than the original user, the learned advocate mentioned to me the cases reported in *Jama Prasad* v. *Gopinath* (8), and *Gajadhar* v. *Kishore Lal* (9), both of the Allahabad High Court, where particular users were held to constitute in-

(1) [1899] 23 Bom. 595=1 Bom.L.R. 37.
(2) A.I.R. 1926 Bom. 537=98 I.C. 239=50 Bom. 635.
(3) [1876] 1 Ch.D. 362.
(4) [1876] 3 Ch.D. 812.
(5) [1907] 1 Ch. 208=75 L.J.Ch. 807=95 L.T. 321.
(6) [1909] 2 Ch. 48=78 L.J.Ch. 492=100 L.T. 845.
(7) [1900] 24 Bom. 188=1 Bom.L.R. 658.
(8) [1913] 19 I.C. 984.
(9) [1926] 97 I. C. 169.

creased burden on the servient tenement in respect of the users concerned. Having carefully considered the cases cited by the learned advocates on both sides I think that the question for decision is clear. It is not, as I understand it, the case of the parties that there was any structural change in respect of *F*. At any rate, I have not been shown any finding in the judgment of either of the lower Courts which would support that view. As I understand their judgments, what they have found is that while Ali Beari was in possession of *F* it was being used as a residential building, and in connexion with the said user the said Ali Beari was using the passage *D*, and also *H* (1) which seems to have been opened about 1900. It is also clear from the observations of the learned Subordinate Judge that just a few years prior to the present suits the defendants had been using the passage *D* and the doorway *H* (1), not simply for residential purposes connected with *F* but for purposes connected with the user of *F* as a warehouse. The question is whether the defendants are entitled to do so. That will depend on the combined effect of S. 23 relied on by the learned advocate for the appellant and S. 28, which section also was relied on by the learned advocate for the respondent. The case, in my view, is not one that comes under S. 43. The question therefore for consideration by the lower appellate Court is whether the user by the defendants of the passage in question does or does not impose any additional burden upon the servient heritage. This is essentially a question of fact. The lower appellate Court will have to consider this aspect of the case and record a finding on this question.

As remarked in *Taff Vale Railway* v. *Gorden Canning* (6) at p. 55 :

"The question which arises is a question of fact, namely whether what the defendants are claiming the right to do is such as substantially to increase the burden of the easement."

That in fact is the decision in *Jesang* v. *Whittle* (1). As laid down by the learned Judges, Parsons and Ranade, JJ., at p. 597 :

"The test to be applied is to see whether any additional burden has been or will be imposed on the servient heritage of the plaintiff by the use made or sought to be made of the way by the defendant."

They further observe :

"There has been no inquiry made upon this point, and an incidental remark only about it is made in the judgment of the lower Court. We ask the Judge of the lower appellate Court to find on the issue embodied in these words after taking evidence, and to certify to this Court his finding thereon."

It seems to me that in the case before me I might as well follow not only the principle laid down by the learned Judges in that case, but also the particular procedure adopted by them, though they did so with reference to the circumstances of that case. In *Milner's Safe Company Ltd.* v. *Great Northern and City Railway* (5), at p. 226, Kekewich, J., quoted a passage from the judgment of James, L. J., in *Wimbledon* and *Putney Commons Conservators* v. *Dixon* (3), at p. 368, which is as follows:

"I am satisfied that the true principle is the principle laid down in these cases, that you cannot, from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever forms or for whatever purposes that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, qua field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built."

In some of the English cases quoted by the learned advocate for the defendant, the learned Judges discuss the effect of what, in our Act, is provided for by Ss. 23 and 43 together. But the cases decided by the Bombay High Court in *Jesang* v. *Whittle* (1) and *Manchersha Sorabji* v. *Virji Vallabhdas* (2) were cases arising under S. 23.

I do not think it necessary to discuss the other decision cited by the learned advocates on both sides, because I think the law on the point is not open to any serious doubt. I therefore think that the learned Subordinate Judge was in error in thinking that the easement acquired in connexion with *F* over the passage *D* and *H* (1) for use as residential purposes has been extinguished by the particular user referred to by him for just a few years prior to the plaint. The question to be considered is whether the new user imposes any additional burden on the servient heritage.

Before disposing of this appeal I call upon the lower appellate Court to record a finding on the question :

"Whether the user had by the defendants which is complained of by the plaintiff imposes any additional burden on the servient heritage."

Fresh evidence on this point should be allowed to be adduced by both sides. Eight weeks for the finding and ten days for objections.

[In compliance with the order contained in the above judgment, the Subordinate Judge of South Kanara submitted the following]

Finding.—I therefore decide the point in the affirmative.

This second appeal coming on for final hearing after the receipt of the above finding upon the issue referred by this Court for trial the Court delivered the following judgment.

In this case I called for a finding on the question:

"Whether the user had by the defendants and which is complained of by the plaintiff imposes any additional burden on the servient heritage."

I gave liberty to the parties to adduce additional evidence on this point. The present learned Subordinate Judge of South Kanara has returned a finding in the following terms:

"The plaintiff and his witness now examined say that the defendants use bullock carts as well as hand carts for carrying goods through the passage *D*. Certainly if *F* is used as a godown for storing merchandise instead of its being used for residential purposes, it will throw additional burden on the servient tenement of the plaintiff. I therefore decide the point in the affirmative."

The defendants have preferred a memorandum of objections, and their learned advocate drew my attention to the case in *Jarulal Mullick* v. *Gopal Chandra Mukerji* (10) a decision of the Privy Council. That was not a case decided under the Easements Act because the Easements Act is not in force in Calcutta. Their Lordships made the following observation at p. 142 "A servitude gained for one purpose cannot lawfully be used for another" and then they proceeded to point out that the servient owner could not complain because the dominant owner who had acquired a right of way to cleanse his privy was using the way for the very same purpose though more frequently than before. They held that the servient owner was not entitled to object to what the dominant owner was doing in that case. My attention was also drawn to the cases reported in *Wimbledon and Putney Commons Conservators* v. *Dixon* (3), *Taff Vale Railway* v. *Gordon Canning* (6), *Jesang* v. *Whittle* (1) *and Mancharsha Sorabji* v. *Virji Vallabhdas* (2). The learned advocate for the appellants also suggested that the test which was laid down in the earlier English cases namely that the purpose for which the easement was acquired should not be different is probably not the law in England at present. But whatever it is I have to decide this case in the light of the provisions contained in S. 23. Easements Act. Under that section :

"a dominant owner may from time to time alter the mode and place of enjoying the easement provided that he does not thereby impose any additional burden on the servient heritage."

In this case it was argued by the learned advocate for the appellants that, as the defendants would be entitled to a right of way through the passage *D* at all times of the day even if their property was used only for residential purposes there is really no addition of any burden by their property being used for trade purposes because the learned advocate argued the passage will have to be kept open practically at all times and there is no specific evidence as to how any additional burden is imposed upon the servient tenement. The learned Subordinate Judge has found as a matter of fact that the defendants now use bullock carts as well as hand carts for carrying goods through the passage *D*. That surely is a circumstance which would add to the burden and if I understood the argument of the learned advocate properly he did not contest that so far as the use of the bullock carts and hand carts carrying goods through the passage *D* is concerned the defendants are by their present user adding a further burden on the servient tenement and they would not be justified in doing so. I think that the learned Subordinate Judge was entitled on the materials before him to come to the conclusions with reference to the use of the passage *D* by the defendants for trade purposes that its use even for purposes other than for the passage of bullock carts and handcarts but for trade purposes and not for residential purposes would add to the burden on the servient tenement. He has discussed the evidence and come to the conclusion that

"certainly if *F* is used as a godown for storing merchandise instead of its being used for residential purposes it will throw additional

(10) [1886] 13 Cal. 136 = 13 I. A. 77 (P. C.).

burden on the servient tenement of the plaintiff."

The cases I have mentioned in my prior order calling for findings decide that the question whether additional burden is imposed or not is essentially ordinarily one of fact and I think that the learned Subordinate Judge had materials before him on which he was entitled to come to the conclusion which he arrived at, namely that the defendants were by their user throwing additional burden on the servient tenement of the plaintiff.

The result is, as I have already mentioned in my prior order, the defendants would be entitled to keep open their doorway *H* (1) and all directions given in the decree of the lower appellate Court relating to *H* (1) would be deleted from that decree. The decree which is to be passed in favour of the plaintiff would be that the defendants and their men be and hereby are permanently restrained from using the passage *D* in connexion with their premises except in connexion with use of their premises as a residential house or in respect of any other use of the same if the result of the said user would be that an additional burden would be imposed on the servient tenement. As regards costs I direct that the parties do bear their own costs in all the Courts in the circumstances each having succeeded in part and failed in part.

P.R.S./B.V. *Decree modified.*

A. I. R. 1931 Madras 133

SUNDARAM CHETTY, J.

(*Pujari*) *Ayilu Reddi* — Appellant — Plaintiff.

v.

(*Pujari*) *Venkata Reddi* and *others*— Respondents—Defendants.

Second Appeal No. 188 of 1928, Decided on 29th October 1930, against decree of Dist. Judge, Chitoor, in Appeal Suit No. 169 of 1926.

(a) Civil P. C. (1908), O. 41, R. 22 (4)—Word "default" in the rule includes any default made by appellant which would amount to non-prosecution of the appeal e. g., non-paying of deficit court-fees.

The word "default" occurring in the rule includes any default made by the appellant which would amount to non-prosecution of the appeal and consequently includes the non-payment of deficit court-fee by the appellant in spite of the express order of the Court directing him to pay it, and entailing the dismissal of appeal. In such a case the respondent is entitled to have his memorandum of objections heard : 4 *Pat. L. J.* 164, *Rel. on.*; *A.I.R.* 1929 *Mad.* 429 and 11 *P. R.* 1912, *Ref.* [P 134 C 2]

(b) Civil P. C. (1908), O. 41, R. 22—Cross-objection dismissed owing to dismissal of first appeal for default by appellant—Second appeal to set aside dismissal of cross-objection—Question of dismissal of first appeal cannot be decided on the same second appeal—New second appeal should have been filed.

A cross-objection in the first appeal was dismissed owing to the dismissal of the first appeal for appellant's default and a second appeal was filed by the respondent to set aside the dismissal of cross-objection and the appellant also wanted to get the question of the dismissal of the first appeal decided as well by means of memorandum of objections.

Held : that such a course could not be allowed but a new second appeal should have been filed. [134 C-2 ; P 135 C 1]

S. Jagadesa Ayyar—for Appellant.

G. Krishnaswami Ayyar—for Respondent.

Judgment.—This second appeal arises out of a memorandum of cross-objections filed by the present appellant in A. S. No. 169 of 1926 on the file of the District Court of Chittoor. This memorandum of objections was dismissed by the learned District Judge without hearing it on the merits, because the appeal itself was rejected for non-payment of deficient court-fee which the appellants were directed to pay under an order of Court. It is now contended on behalf of the appellant, that the lower Court was wrong in not hearing the memorandum of objections in spite of the rejection or dismissal of the appeal. The general rule is that the memorandum of objections has to be heard, when the appeal itself is heard and decided on the merits. Before the passing of the Code of Civil Procedure of 1908, there was no express provision as to whether a memorandum of objections could be heard or not when the appeal itself was withdrawn or allowed to be dismissed by the appellant for non-prosecution. Under O. 41, R. 22, Cl. (4) of the present Code, provision is made for the hearing of the memorandum of objections even when the original appeal is withdrawn or dismissed for default. In the present case, the original appeal cannot be deemed to have been withdrawn. But the question is, whether it should be deemed to have been dismissed for default within the meaning of the aforesaid rule.

It is argued on behalf of the appellant, that the word "default" does not can-

ncte simply default in appearance, but it is comprehensive enough to include other kinds of default, such as non-prosecution of the appeal. O. 41, R. 18, contemplates the dismissal of an appeal on account of failure of the appellant to pay the requisite charges for service of notice on the respondent. That is one kind of default for which an appeal may be dismissed. R. 10, O. 41, provides for the rejection of an appeal if security for costs demanded by the Court is not furnished by the appellant within the time fixed. That is another kind of default which entails the dismissal of the appeal. The decision of the Patna High Court reported in *Mowar Sheobaksh Singh* v. *Mowar Thakur Deyal* (1) is a direct authority for holding that the rejection of an appeal for failure to furnish security for costs under R. 10, O. 41, amounts to a dismissal for default within the meaning of R. 22, Cl. (4) of the same order. In such a case, it has been held that the respondent is entitled to have his memorandum of objections heard. Though there is no direct authority, it seems to me clear that the dismissal of an appeal for non-payment of the necessary process fees for service of notice on the respondent would be a dismissal for default within the meaning of R. 22, Cl. (4). There is also an observation by Phillips, J., in *Shunmughasundaram Mudaliar* v. *Ratnavelu Mudaliar* (2) at p. 478 (of 56 *M. L. J.*), that dismissal for default contemplated in R. 22, Cl. (4), is dismissal for default of prosecution. The point arising for decision in this case, is, whether the non-payment of deficit court-fee by the appellant in spite of the express order of the Court directing him to pay would be default within the meaning of R. 22, Cl. (4). In this connexion the wording of O. 17, R. 3, may also be taken into consideration.

The non-performance of any act necessary to the further progress of the suit would be a default which would entail the dismissal of the suit. If it be so, the non-payment of the deficit court-fee which is a necessary step for the further progress of the appeal could well nigh be deemed to be default for which an appeal could be dismissed or rejected. That being so, there is good ground for holding that the rejection or dismissal of the appeal in the present case would be a dismissal for default within the meaning of R. 22, Cl. (4), O. 41, Civil P. C. There is a decision of a single Judge of the Punjab Chief Court reported in *Dunichand* v. *Azizkhan* (3), in which it has been held that in a case of this kind the memorandum of objections cannot be heard and determined. Beyond referring to O. 41, R. 22, Cl. (4), as laying down two exceptions to the general rule, the learned Judge has not discussed the meaning and import of the word "default" in that rule. No reasons appear to have been given for holding that default in the payment of deficit court-fee would not come within the meaning of the expression "default" in that rule. The other rulings referred to above would at least indicate that the word "default" cannot be restricted to default in appearance, but would also cover other kinds of default. It seems to me that a reasonable construction of the word "default" occurring in that rule would include any default made by the appellant which would amount to non-prosecution of the appeal. This view seems to be in accordance with the underlying principle, that it should not be left to the mere volition of the appellant to prevent the respondent from having his memorandum of objections heard. I am, therefore, of opinion that it was in the power of the appellant to have averted the dismissal of the appeal by supplying the deficit court-fee within the time fixed by the Court. Owing to his default, the appeal had to be dismissed. The respondent in a case like this, may very well invoke the benefit of R. 22, Cl. (4), O. 41, Civil P. C.

As I hold that the memorandum of objections should be heard by the lower appellate Court in spite of the rejection or dismissal of the appeal, it is unnecessary to consider the further question whether this is a fit case in which the memorandum of objections should be converted into or treated as an appeal and delay excused under S. 5, Lim. Act.

There is a memorandum of objections filed by the defendants in this appeal. By means of this memorandum of objections, it is not open to them to challenge the correctness of the rejection of their appeal by the lower appellate Court. The

(1) [1919] 4 Pat. L. J. 164=50 I. C. 729.
(2) A. I. R. 1929 Mad. 429=121 I. C. 16=52 Mad. 521.
(3) (1912] 11 P. R. 1912=10 I. C. 207.

main appeal before this Court is against the dismissal of the present appellant's memorandum of objections in the lower Court. The proper course for the defendants was to have appealed against the dismissal or rejection of their appeal. That matter cannot be raked up by means of the present memorandum of objections.

The only other question remaining is the order as to costs made by the lower appellate Court when it dismissed the memorandum of objections. That order seems to have been passed in the special circumstances of this case and I do not think fit to interfere with the exercise of the lower Court's discretion. The present memorandum of objections is dismissed, but without costs. The main appeal is allowed and the memorandum of objections filed by the present appellant is remanded to the lower appellate Court for re-hearing and disposal on the merits. As regards the costs of this appeal, the defendants-respondents will pay one-half of the appellant's costs and bear their own. The other costs will abide the result of the memorandum of objections to be heard by the lower appellate Court. The court-fee paid on the memorandum of appeal will be refunded to the appellant.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 135

WALLACE AND BARDSWELL, JJ.

Narasimha Raghavachari—Plaintiff—Appellant.

v.

Secy. of State—Defendant--Respondent.

Appeal No. 184 of 1927, Decided on 28th August 1930, from decree of Dist. Judge, North Arcot, D/- 21st February 1927, in Original Suit No. 7 of 1926.

Land Tenures (Madras)—Ekabogam mirasidar—Nature and extent of such rights is varying and claimant has to prove what right he possesses as ekabogam mirasdar even in village close to Chingleput border.

The nature and extent of mirasdari rights is varying throughout the Presidency and a person claiming ekabogam mirasidari rights has to prove what rights, if any, he possesses, as an ekabogam mirasdar. It cannot be assumed that because he is styled as ekabogam mirasidar and has been the sole pattadar in the village close to Chingleput border he must have certain privileges. Proof is always needed that the words "ekabogam mirasdar" still have the same significance that was originally attached to them and have not become a mere expression like the title of a sinecure holder : 40 *Mad.* 410, *Rel. on.*; 11 *Mad.* 149 ; 6 *Mad.* 303 and 21 *Mad.* 433, *Ref.* [P 136 C 2, P 137 C 1]

T. Rangachari, *A.C. Sampath Aiyangar* and *T. R. Srinivasa Ayyar*—for Appellant.

Govt. Pleader—for Respondent.

Bardswell, J.—This appeal is by the plaintiff. He is manegar of a village in the North Arcot District within about three miles of the Chingleput District border. He claims to be ekaboga mirasidar of the suit village of Melnarama. The word "ekabogam", according to the Glossary in the North Arcot District Manual of 1895, means the possession or tenure of all the lands of a village by a single individual or family without any cosharer. S. No. 128/1, the extent of which is 66-83 acres, has been assigned by the Revenue Divisional Officer of Cheyyar to some Adi-Dravidas of a neighbouring village and the plaintiff says that the grant is in violation of his right to the said lands as, in his capacity as ekaboga mirasidar, he and his ancestors before him have been in exclusive possession of all the village lands, including waste, poramboke and communal lands. Even if the Government reclaims any waste land for the purposes of cultivation and in the interests of revenue it has no right to assign it to strangers, but the plaintiff as ekaboga mirasidar has a preferential right to an assignment in his favour. He has therefore sued for a declaration that the order of the Revenue Divisional Officer of Cheyyar of 3rd June 1924, assigning the suit land to some Adi Dravidas, is illegal, ultra vires and not binding on him. His suit has been dismissed and so he is appealing.

In his evidence the plaintiff as P. W. 1 defines his mirasi rights as meaning that he alone is to be pattadar of all assessed lands in the village, that no land is to be assigned to anyone else, and that he is entitled to the assignment of trees and to the rocks in the village. There is no doubt but that mirasi rights such as those to which the plaintiff lays claim used to be enjoyed to a considerable extent throughout the Presidency, but, as has been pointed out in *Seshachala Chetty* v. *Chinnasami* (1) those rights gradually got lost, though they survived in the districts of Chingleput and Tanjore. They also survived in the

(1) [1917] 40 Mad. 410=40 I.C. 909 (F.B.).

North Arcot District which is the district with which we are now concerned, as is shown by the North Arcot District Manual of 1881, in which a reference is made to a mirasi right to the hereditary possession of cultivable lands, as well as to the gradual transfer in some instances of all the shares of the several mirasidars to one individual, in which case the village that came into the possession of a single person was styled as ekabogam; and it is remarked that instances of such a form of tenure are still to be found in those parts of the district which border on Chingleput. But a little later on the same District Manual refers to a report by a Collector of the district, soon after the cession of the Carnatic, that the mirasi system had no existence in North Arcot. There is a less ambiguous statement of the position in the revised District Manual of 1895, from which the remark as to there still being instances of the mirasi tenure to be found in North Arcot District is omitted.

Further, it is to be observed that both these editions of the District Manual say that the hereditary mirasi rights over cultivable land belonged only to the Vellalas, whereas the plaintiff in the present case is a Brahmin. It is, indeed, stated that mirasi privileges, which were termed swastiams, were enjoyed by Brahmins, but even the earlier edition of the District Manual does not refer to any such privileges as still continuing. The claim then of the plaintiff is not one that starts with the initial advantage of being rendered probable, in the light of what has been shown to be the practice, by any recognized authority upon the state of affiairs in the District of North Arcot.

There is no doubt as to the continuance of some such mirasi privileges as are claimed by the plaintiff in the Chingleput District. What is the nature and extent of such privileges has been discussed in *Seshachala Chetty* v. *Chinnasami* (1). The learned Judge who has decided the suit under appeal thinks that, considering that the suit village is within a short distance of the Chingleput borders, it is not unreasonable for plaintiff to claim that his village is a mirasi village after the Chingleput pattern. He points out that the village is not an ordinary ryotwari village, in that no pattadar other than the plaintiff is to be found in it, and he thinks therefore that the plaintiff is entitled to rely on his position as involving the existence of some right greater than that of the ordinary ryot. The learned Judge has then proceeded to consider what such right may be with reference to *Seshachala Chetty* v. *Chinnasami* (1), and has come to the conclusion that in the light of that case the plaintiff has not, on the facts, established his right to such a decree as that for which he has sued. We are of opinion that in so dealing with the case the learned Judge has not looked at it from the right angle. It cannot be presumed merely from the geographical position of his village and from the fact that he is, or has been hitherto, the only pattadar in it that the plaintiff must be a mirasidar after the pattern of the mirasidars of Chingleput.

It is not even as if there was any evidence to show that the suit village had at one time belonged to Chingleput District and had been transferred to the District of North Arcot. Even, too, in *Seshachala Chetty* v. *Chinnasami* (1) it has been held by Kumaraswami Sastri, J., that. though in mirasi villages the rights of Government over waste are subject to the rights of the mirasidars, yet the nature and extent of such rights are not uniform throughout the Presidency but vary, and that the onus is on the mirasidars to prove that any specified incident attaches to mirasi rights in any particular district or portion thereof; and Sadasiva Iyer, J., in his order of reference in the same case, has pointed out that from the decision in *Sakkaji Rau* v. *Latchmana Goundan* (2) it is clear that the extent of the mirasi right in one village was not the same as that of the mirasi right in another village even in the same district. It is therefore absolutely incumbent on the plaintiff to prove what rights, if any, he possesses as ekabogam mirasidar and we cannot start with the assumption that, because he is styled ekabogam mirasidar, as is shown to be the case, and has been hitherto the sole pattadar in a village that lies close to the Chingleput border, he must have certain privileges and then proceed to see what those privileges are, with reference not to any evidence on record but only to opinions expressed as to those privileges in *Seshachala Chetty* v. *Chinnasami* (1) or any other reported decisions.

(2) [1878] 2 Mad. 149 (F.B.).

Proof that the plaintiff has the privileges which he claims is entirely wanting. He says that he had a sanad which was filed in some proceedings in 1880, but he does not explain why this sanad, or a copy of it, could not be put in. He merely says that he never got it back. None of his witnesses shows, or even attempts to show, that only he has the right to patta for all the cultivable land in the village. On the other hand he himself has admitted that his cultivation of the suit land has been treated as unauthorized apparently without his making any protest. The witness who is most favourable to him is the karnam, D. W. 2, who has described him as ekabogam mirasidar in official documents, who would call him hereditary mirasidar of the village and who says that "mirasidar" means owner of the village. This witness however does not say what rights attach to the position of an ekabogam mirasidar, while the mere fact that the plaintiff is so described goes for very little. Proof is needed that the description still has the same significance that originally attached to it, and has not become a mere expression like the title of a sinecure holder. Such proof is entirely lacking. There is, of course, the fact that he has been hitherto the sole pattadar in the suit village ; but it is for him to show that this is by virtue of some right which he possesses, and this he has not done. The existence of such a right in him cannot be merely inferred. As to the meaning of "owner" which D. W. 2 gives to the word "mirasi," it is one that can only be accepted with qualification. The Glossary in the North Arcot District Manual of 1895 explains mirasi tenure as that under which the lands of a village are divided among certain families who are called mirasidars, while *Seshachala Chetty* v. *Chinnasami* (1) indicates that the right of a mirasidar to cultivate land in a village was not an absolute but a preferential one, and Wallis, C. J., has remarked in his judgment in this case that even as regards cultivable waste the mirasidar's ownership has not been fully established.

In the same case it has been remarked by Ayling. J. that he could find no authority in support of any right of recovery by the mirasidars of arable waste granted by Government to another person. It is, of course, at such a recovery that the plaintiff is aiming in this suit. The samo opinion has been more strongly expressed by Turner, C. J., in *Subbaroya* v. *Sub-Collector of Chingleput* (3), when he says that a civil Court cannot compel the revenue authorities to make settlement with a particular person, and that in that matter the discretion of the revenue authorities is uncontrolled. This view has been referred to with approval in *Theivu Pandithan* v. *Secy. of State* (4).

We may note that the decision in *Seshachala Chetty* v. *Chinnasami* (1), to which many references have been made in this judgment and which has been called a great deal to our attention on the hearing of this appeal, is one as to whether or no, in a mirasi village, a mirasidar was to be presumed to be the owner of the gramanatham. The decision was adverse to the mirasi claims of presumptive ownership and that is all that the case decides, all that is said as to the general rights of a mirasidar being by way of discussion. Nonetheless we should have to treat the opinions of the various learned Judges who dealt with the case with considerable respect, could the plaintiff show that his was a case to which they applied. This however he has failed to do, while even that decision itself, in the judgment of Kumaraswami Sastri, J., is an authority showing that the plaintiff must establish the rights to which he lays claim by evidence. As he has entirely failed to achieve this, his suit has been rightly dismissed. The appeal fails and is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

(3) [1883] 6 Mad. 303.
(4) [1898] 21 Mad. 433 (F.B.).

A. I. R. 1931 Madras 137

WALLACE AND PANDALAI, JJ.

Ediga Chagapuram Pedda Nagappa—Plaintiff—Appellant.

v.

Paramala Venkatarami Reddi—Defendant--Respondent.

Appeal No. 243 of 1927, Decided on 8th October 1930, from decree of Dist. Judge, Kurnool, in Original Suit No. 16 of 1926.

(a) Contract Act (1872), S. 74—Provision in bond for higher rate of interest on default of payment of principal and interest by certain date held penal by lower Court—Meaning put on bond not impossible though

strained—High Court refused to interfere—Civil P. C. (1908), S. 100.

The bond provided that on failure to pay the principal and interest under it by a certain date, a higher rate of interest on the said aggregate amount was to be paid. The lower Court found that it was a clause under which interest at the default rate was payable from the date of the bond and on that understanding the clause was held to be penal. The plaintiffs and defendants had also adopted the same interpretation in lower Court. After the finding that the clause was penal the plaintiff wanted to amend his plaint in appeal, not having so done in the lower Court.

Held : that though the actual construction of the words in the bond by the lower Court may be rather strained, yet the meaning put on them was not an impossible one. As the plaintiff and the defendant had also adopted the same meaning, there was no necessity to reject the interpretation put on the clause by the lower Court and, so interpreted, the clause was a penal clause. [P 138 C 2]

(b) Contract Act (1872), S. 74 — Court should give reasons for refusing to award compensation on default of payment on proper date.

When there is a stipulation in a bond as to the penalty for default of payment on proper date a Court should give reasons for refusing to award compensation for default of such payment. Ordinarily compensation for default ought to be given and it is within the discretion of a Court to fix a figure for that default. [P 138 C 2]

Venkatasubba Rao Kotta—for Appellant.

V. Pattabhiramasastri — for Respondent.

Wallace, J.—The only question raised in this appeal is the matter of interest which the lower Court has decreed on the mortgage bond on which the suit was based. The plaintiff is the appellant and he claims that the lower Court was wrong in disallowing enhanced interest on default in the payment of the mortgage amount under the bond. The bond provided that on failure to pay the principal and interest under it by one year from the date of the bond the mortgagor was to pay on "the said aggregate amount interest at the rate of Re. 1-8-0 per cent per month," that is, 18 per cent was the default rate, 15 per cent was the original rate. The lower Court has found that this is a clause under which interest at the default rate is payable from the date of the bond, and on that understanding it has held that the clause is a penal clause and cannot be enforced at all. The plaintiff here argues that the interpretation of the bond by the lower Court was under a misapprehension of the meaning of the words. But although the actual construction of the words in the bond by the lower Court may be rather strained, we cannot say that the meaning attributed to the words by the lower Court is an impossible one. And when we find that the plaint itself adopted that interpretation and the defendant in his written statement also adopted it, we are unable to hold that it was anything else but the intention of the parties that that should be the meaning put on the bond. It is evident that the plaintiff in the lower Court also stood upon this interpretation of the bond because he did not there ask to amend his plaint. But now that the lower Court has decided that that interpretation involves that the clause is a penal clause, he has before us put in a petition to amend his plaint. The object of that petition is clear. We can see no reason therefore for rejecting the interpretation put upon this clause in the bond by the parties themselves and by the lower Court, and we are not prepared to disagree from the decision of the lower Court that, so interpreted, the clause was a penal clause.

The lower Court however has not awarded any interest at all as a penalty for default, or granted any compensation for the defendant's failure to pay; and the reasons it gives for that are that the original rate, 15 per cent, itself is very high, and that the security was presumably ample. It does not give any reasons for holding that the original rate of 15 per cent is very high. A Court ought to give reasons for refusing to award compensation on default of payment on the proper date. We think as an ordinary rule that compensation for default ought to be given, and it is within the discretion of the Court to fix a figure for that default. In this case we think it will be sufficient if we fix a rate of 16 per cent, payable on the principal amount from the date of default; and this will be the compensation for default. The lower Court's decree will be amended accordingly and each party will bear his own costs in this appeal.

P.R.S./B.V. *Decree amended.*

A. I. R. 1931 Madras 138

PANDALAI, J.

Ramanathan Chettiar, In the matter of.

Civil Revn. Petn. No. 1229 of 1930, Decided on 26th August 1930, from order of Dist. Judge, Ramnad, D/- 11-8 1930.

(a) Madras Local Boards Act (14 of 1920), S. 216 (1) (a)—Applicability.

Section 216 (1) (a) does not apply to the case of a person who is permanently residing within the local area and who has given his home-address as the place to which notices were to be sent, but who for purposes of business had temporarily left for a place outside the local area. [P 139 C 2]

(b) Madras Local Boards Act (14 of 1920), S. 56 (h)—Scope.

The failure to attend meeting during three consecutive months is to be computed forward from the date of the first failure not backward from the last. [P 140 C 1]

T. Rangachariar and *A. Srirangachariar*—for Petitioner.

Judgment.—Petition to revise the order of the learned District Judge of Ramnad dismissing the petitioner's application under S. 57, Local Board's Act, to be declared entitled to continue as a member of the Taluk Board of Sivaganga and as such also a member of the District Board of Ramnad.

The petitioner was elected in 1927 as a member of the Taluk Board of Sivaganga and was also elected by that Board in 1927 to the District Board of Ramnad. The question to be decided was whether the petitioner having admittedly failed to attend meetings of the Taluk Board for three consecutive months February to May 1930, he had not ceased to hold office by virtue of S. 56 (h) of the Act. That meetings were held on 27th February 1930, 29th March 1930, 29th April 1930 and 17th May 1930, and that the petitioner was absent at all of them, was admitted. The petitioner's absence was due to his being at Rangoon. His case before the learned Judge appears to have been that on his leaving for Rangoon he had orally instructed the President to send notices of meetings to his Rangoon address and that as this had not been done he could not be said to have absented himself and that the meetings themselves were therefore not properly constituted. The learned Judge found that notices of meetings were sent to the petitioner to his home address at Nattarasankottai according to the previous practice, that the petitioner had left no instructions with the President or anyone else to send him notices to Rangoon and that his own letter Ex. 1, dated 12th June 1930, written in the handwriting of P. W. 1, belied his statement that he did not know of the dates of meetings. I infer that the learned Judge thought, what indeed is obvious enough on the facts, that the notices sent to the petitioner's house must in the usual course have been forwarded to him at Rangoon and that his failure to attend which he ascribed in Ex. 1 to his ill health could not be due to want of notice. It is now argued that though petitioner may have left no instructions to send the notices to Rangoon, still the President knew that he (petitioner) was in Rangoon, as letters passed between them; vide Exs. A and B, and that therefore he was bound to send the notices to him at Rangoon by registered post under S. 216 (1) (c). S. 31 enables Local Boards to make supplementary regulations in addition to the rules in Sch. 2 inter alia in regard to the manner in which notice of meetings shall be given. Though no formal regulations appear to have been made by the Sivaganga Taluk Board and there is no provision in Sch. 2 in that behalf, the practice of the Board appears to have been to send notices of meetings to the addresses given by members by post.

Section 216 applies generally to all notices required to be sent by the Act or by any rule, bye-law, regulation or order made under it and it provides four alternative methods of serving notices, the latter alternative to be adopted on failure of the former. Cl. (c) is the third of the alternative to be adopted, if the notice cannot be personally given or tendered (the first alternative) or if it cannot be left at his last known place of abode or business or by giving or tendering it to some adult member or servant of his family (the second alternative.) If neither of these methods is feasible, Cl. (1) (c) provides that if the person does not reside in the local area and his address elsewhere is known to the President the notice is to be sent to him by registered post. This provision clearly, has no application to the notices of meetings addressed to the petitioner, if for no other reason than that his was not a case of a person who was residing outside the local area, but of one who was permanently residing within the local area and had given his home address as the place to which the notices were to be sent but who for purposes of business had temporarily left for Rangoon. It would be absurd to apply this provision in the petitioner's case who did or should make arrangements for letters addressed to

his house to be sent to him at Rangoon and to require the President, because he happened to know that petitioner had gone to Rangoon temporarily on business. to send meeting notices to Rangoon. I hold that S. 216 (1) (c) has no application to the case.

The only other point urged is that the petitioner had not ceased to hold office by his absence at the four meetings mentioned. The contention appears to be that the three months calculated from 27th February ended on 27th May till which day the petitioner continued in office and that as the next meeting was on 27th June, when he was present, he did not vacate his seat at all. This argument proceeds on a confusion of thought. The failure to attend meetings during three consecutive months is to be computed forward from the date of the first failure, not backward from the last. Computed from 27th February, the petitioner had failed to attned meetings for three consecutive months at the latest on 27th May, although as a matter of fact the meeting for May was held on 17th May and there were no meetings between 17th and 27th May. After 27th May at the latest the petitioner ceased to hold office by reason of his failure and the fallacy of petitioner's argument lies in assuming that he continued to be a member after 27th May and up to 27th June. The learned Judge's order was right. This petition is groundless and is dismissed.

P.R.S./P.N. *Petition dismissed.*

A. I. R. 1931 Madras 140

BEASLEY, C. J., AND CURGENVEN, J.

(*Raiah Kocherlakoa*) *Venkata Jagannatha Rao Garu* — Defendant —Appellant.

v.

(*Maharajah Ravu*) *Venkata Kumara Mahipati Surya Rao Bahadur Zamindar Garu* and *others* — Plaintiffs — Respondents.

Appeals Nos. 409 and 452 of 1925, Decided on 1st May 1930, from decrees of Govt. Agent, East Godaveri, D/- 6th July 1925, in Original Suit No. 4 of 1924.

(a) Transfer of Property (Amendment) Act (27 of 1926), S. 2 — Valid attestation explained.

Where the attestors did not see the executant sign the instrument, and the executant did not acknowledge to them that she had signed it and the attestors did not sign the instrument in presence of the executant, the instrument cannot be said to be properly attested within the meaning of S. 2 [P 141 C 1, 2]

(b) Transfer of Property Act (1882), Ss. 54 and 118—Price in S. 54 means money only—Where consideration is partly money and partly forbearance to take proceedings to set aside sale, transaction is not sale nor exchange.

Price in S. 54 means money only.

Where the consideration for transfer is something in addition to half the value of the property i.e. forbearance on the one side to take proceedings to set aside a Court sale the transaction cannot be described as a sale. Nor is it an exchange there being no mutual transfer of ownership of one thing for the ownership of another as a right to sue or take proceedings cannot be the subject of ownership : *A.I.R.* 1922 *Mad.* 311; 9 *Mad.* 141 and 25 *Bom.* 696, *Ref.* [P 143 C 1]

(c) Guardian and Ward — Guardian can incur liability on behalf of minor only to the extent to which minor's property would be liable under his personal law binding upon him.

No decree can be passed against a minor on his attaining majority or his estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. [P 143 C 2]

Where in return for a transfer of conditional ownership of property the guardian of a minor enters into a personal obligation on his part to pay for it, the property of the minor can be proceeded against in satisfaction of the debt owing under the personal covenant. The minor cannot at once approbate the bargain by retaining the property and reprobate it by the plea that his guardian has no authority to acquire it by making a promise on his behalf to pay the cash consideration so as to bind him: 42 *Mad.* 185, *Ref.* [P 143 C 2 ; P 144 C 1]

(d) Practice—Relief—Mortgage — Personal covenant—Mortgagee claiming on what he considers to be valid mortgage need not base his claim in alternative on personal covenant — High Court can in proper case entertain application for personal decree though not put forward in plaint.

A person claiming on what he considers to be a valid mortgage need not base his claim in the alternative on the personal covenant and ask for a personal decree. The High Court can entertain such an application (for personal decree) even if it has not been on terms put forward in the plaint. There is discretion in the Court to amend the pleadings if such amendment should appear to be necessary : *A. I. R.* 1921 *P. C.* 8, *Ref.* [P 144 C 2]

(e) Pleadings—Waiver — Party having full opportunity to take a plea not taking it must be deemed to have waived it.

Where a party had full opportunity of putting forward his defences to a mortgage, namely that it is not binding on him, but does not choose to do so, must be deemed to have waived the plea.

If he does not take any such plea with regard to the mortgage, he cannot take it with regard to the personal covenant contained in the mort-

gage deed as the same defences are open to him in both the cases. [P 145 C 1]

f) Transfer of Property Act, (1882), S. 100 - No charge can be claimed in absence of proof of circumstances suggesting implied intention to create charge.

No charge on property can be claimed in absence of proof of circumstances suggesting an implied intention to create a charge. [P 145 C 2]

T. Rangachariar—for Appellant.

Advocate-General S. Srinivasa Iyengar; *S. Venkatesa Iyengar* and *C. Rama Rao*—for Respondents.

Appeal No. 409 *of* 1925

Beasley, C. J.— The plaintiff's suit was for a mortgage decree for Rs. 1,88,487-15-6 representing principal and interest alleged to be due under a mortgage deed Ex. A. This deed arose out of the compromise already dealt with in Appeal No. 446 of 1925. It will be remembered that under that compromise dated 29th November 1920, one of the properties purchased in the Court sale, viz. Polavaram village with its hamlets was agreed to be retained by the Rajah of Polavaram in consideration of the payment of the sum of Rs. 1,39,986-1-0 to the plaintiff. The compromise was entered into by the Rajah's adoptive mother. This amount had been deposited in Court by the plaintiff, being the balance remaining after the Court sale of defendants' properties by the plaintiff. Being unable to pay this sum in cash defendant 1's adoptive mother as his guardian executed in favour of the plaintiff on 14th December 1920 a bond for that amount repayable with interest at 9 per cent per annum on the security of the Polavaram village and its hamlets. This bond is Ex. A. Alternatively the plaintiff claims that he is entitled to a vendor's lien over these properties for the unpaid purchase money and that there is a statutory charge in his favour.

The Judge in the Court below allowed the suit finding that the suit bond Ex. A was a valid one. Defendant 1 however contended that Ex. A was not validly attested because the attestors did not see the executant sign, nor did the executant acknowledge to them in their presence that she had signed it and that she was not present at the attestation. If (1) the attestors did not see the executant sign Ex. A, (2) the executant did not acknowledge to them that she had signed it and (3) the attestors did not sign the instrument in the presence of the executant, then the instrument has not been properly attested within the meaning of S. 2, T. P. (Amendment Act) 27 of 1926. Ex. A, on the face of it, bears the signature of the adoptive mother and guardian of defendant 1. The witnesses are B. Venkata Rao and Chengalva Kondayya. Then execution is admitted by Prakka Subramaniam, the agent of defendant 1's adoptive mother and guardian. This is witnessed by Kandukuri Subbayya and the before-mentioned B. Venkata Rao. There is nothing on the face of the document to show that even the acknowledgment of the execution of the document by Venkata Buchayamma, the adoptive mother and guardian of defendant 1 was made in the presence of these witnesses; but there is a still greater defect because the signature of Venkata Buchayamma upon the evidence clearly was not affixed in the presence of the two attesting witnesses. It must be remembered that this lady was a gosha lady. The evidence of the attesting witnesses is as follows: P. W. 1 Appayya, the clerk of defendant 1 and the writer of Ex. A says that Buchayamma observed gosha, that the attesting witnesses were at her house when the deed was sent inside for her signature and that after its return with her signature they attested. The next witness, Chengalva Kondayya, says that he saw Buchayamma sign it, that Venkata Rao the other attesting witness also saw and that after they had seen her sign they attested it. He further states:

"I do not remember seeing her sign any other document. The documents are sent in by dasis. We should stand outside the wall so that we should not see her. The dasi brings back the papers after signature. I do not know the name of the dasi who took in Ex. A. She brought it back signed . . . . . I attested on the verandah near the window of the Rani's room . . . . . I saw Rani sign through the window. It is about breast high from the ground. She was sitting. I stood . . . . . Rani sat on the floor when she signed. The window was jhilmil. Two planks were broken. I saw through the broken plank . . . . . We both saw through that hole. I suppose Venkata saw."

The other attesting witness was not called. The evidence of Chengalva Kondayya seems to me to be palpably false. It is obvious that at the trial the necessity for strict compliance with the Transfer of Property Amendment Act, 27 of 1926, had become apparent and so Kondayya's duty in the witness box was to show that both he and the other attesting witnesses

had actually seen the Rani sign the document and thus we have the evidence that both the attesting witnesses looked through the window two planks of which were conveniently broken to enable them to see the Rani who was sitting also most conveniently in a direct line with the broken window planks. This evidence is so improbable and is obviously for the purpose of getting within the provisions of the Transfer of Property Amendment Act, that it must be rejected. Ex. A therefore must be held to be invalid for want of proper attestation.

Then the learned Advocate-General argues that the plaintiff has a vendor's lien on the property for the unpaid purchase price. In order to substantiate this claim Ex. A must be a sale by the plaintiff to the defendant. Two objections are taken to this claim: (1) that the Polavaram village never passed to the plaintiff at the Court sale and he therefore had no ownership in the property to pass by conveyance to defendant 1 and (2) that, even if he had, Ex. A does not amount to a sale of that property at all. A sale is defined by S. 54, T. P. Act, as

"a transfer of ownership in exchange for a price paid or promised or part paid and part promised,"

and it is contended by Mr. Rangachari on behalf of defendant 1 that "price" means money only and that if the consideration for the transfer of immovable property is partly money and partly something else, then the transaction ceases to be a sale. In this connexion he relies upon *Madam Pillai* v. *Badrakali Ammal* (1) a Full Bench decision. In that case a husband orally transferred lands to his wife to be enjoyed by her during her lifetime in discharge of future maintenance and it was held that this not being a gift or a sale might be made without writing. Dealing with S. 54, T. P. Act Sir Walter Schwab, C. J. on p. 617 (of 45 *Mad.*) states.

"In this case one has to consider whether there was a price paid or promised by the transferee. Now "price" has a well-defined meaning. It means money, but not necessarily money handed over in current coin at the time, but includes money which might be already due, or might be payable in future."

With this opinion Coutts-Trotter, J., (as he then was) agreed. Another case referred to was *Queen-Empress* v. *Appavu* (2). That was a case under the Abkari Act, and it was held that the payment of wages in liquor does not amount to a sale of liquor within the meaning of S. 2, Abkari Act. Hutchins, J., in dealing with this question, states at p. 142:

"The question still remains whether a payment of wages by liquor is included in the general term "selling." It seems to us that it is not. Both in the Contract Act and the Transfer of Property Act a sale is defined to be an exchange of property for a price. S. 118 of the latter Act deals with exchanges for other considerations than a money payment, and thereby indicates that a price included money only, and that is the ordinary meaning of the word "price."

In *Samaratmal Uttamchand* v. *Govind* (3) the question for determination was whether agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under Art. 5, Sch. 1, Stamp Act (2 of 1899), and are liable to stamp duty of eight annas each as agreements "not otherwise provided for" and it was held that they were so liable. Chandavarkar, J., in delivering the judgment of the Full Bench quotes from Benjamin on Sale, 4th Edn., pp. 2 and 89, as follows:

"The difference between a sale and an exchange is this: that in the former the price is paid in money, whilst in the latter it is paid in goods by way of barter."

He then proceeds:

"The distinction has been observed by the legislature in this country, as will appear on a reference to S. 118 relating to exchange and the sections relating to sales in the Transfer of Property Act."

Section 118, T. P. Act, is as follows:

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an exchange."

From Ex. B, the compromise petition, it is obvious that the payment by the Rajah of Polavaram of Rs. 1,39,986-1-0 was only part of the consideration for the transfer to him of the property in question, because it is there stated that it is out of regard for defendant 6's family, and in consideration of his not taking any proceedings to set aside the sale, that the transfer is made. It is conceded that the value of the property is more than three lakhs of rupees and therefore the price agreed to be paid for it is less than half of its real value.

(1) A. I. R. 1922 Mad. 811=68 I. C. 687=45 Mad. 612.

(2) [1886] 9 Mad. 141=1 Weir 645.
(3) [1901] 25 Bom. 696=3 Bom. L. R. 384.

This circumstance alone would not be sufficient to deprive the transaction of its nature of a sale because a vendor is perfectly entitled to sell his property if he so desires to another for less than its real value, and it still remains a sale. But the facts are quite different here because it is clear that the consideration for the transfer was something in addition to half of the value of the property. There was to be a forbearance on the side of the Polavaram family to take proceedings to set aside the sale, and if "price" means money only, as clearly it does, then this transaction cannot be described as a sale. It was not, in my opinion, even an exchange, because S. 118, T. P. Act, deals with mutual transfer of the ownership of one thing for the ownership of another. No doubt the ownership of Rs. 1,39,000 old was agreed to be exchanged for the ownership of the property. That, by itself, would be a sale; but it is coupled with the other consideration, namely the forbearance to take proceedings. In my view there can be no such ownership as that. A right to sue or to take proceedings cannot, in my view, be the subject of ownership. In the view I have taken upon this point it is not necessary to consider whether or not the plaintiff ever got such an ownership in the property as would enable him to transfer it to anyone. The sale to him of this property was never confirmed by the Court and it is extremely doubtful whether under such circumstances he could claim to dispose of the property as its owner, although he might transfer such incomplete right to the property as he then had and I do not propose under the circumstances to say anything more than to observe that it is a point about which I have considerable doubt.

Then the learned Advocate-General claims that he is at least entitled to a decree against the general assets of the Raja of Polavaram ranking of course with the other claimants for a rateable distribution. His claim therefore is to fall back upon the personal covenant to pay contained in the mortgage on his failure to succeed on the footing of the mortgage. In this connexion he relies upon *P. V. M. Kunhu Moidoo* v. *T. Madava Menon* (4), where it was held by a Full Bench that a document which purports to be a mortgage, but is not a mortgage owing to non-compliance with the provisions of S. 59, T. P. Act, regarding attestation is not a document which is required by law to be attested within the meaning of S. 68, Evidence Act and is admissiable to prove the personal covenant to pay therein which is not required by law to be attested. This case of course does not deal with the position of a personal covenant by minor or on a minor's behalf and the plaintiff has to go a step further. So another case relied upon by the Advocate-General and more directly in point is *Ramajogayya* v. *Jagannadhan* (5), a Full Bench case. There it was held by Ayling and Seshagiri Aiyar, JJ., that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate no decree can be passed against the minor on his attaining majority or his estate, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject and that a decree can be passed against the estate of a Hindu minor for a debt contracted by his guardian for the marriage of his sister.

Sir John Wallis, C. J., however held that a decree cannot be passed against a minor on his attaining his majority or his estate on a covenant entered into on his behalf by a guardian for his benefit. In the view of the latter the only cases where a minor's estate can be made liable are those under S. 68, Contract Act, namely, a liability to persons who have supplied him during his minority with necessaries suited to his condition in life. The only exceptions according to Sir John Wallis are those cases where a creditor may have his rights of subrogation but not a right to direct recourse. Seshagiri Iyer, J., with whose opinion Ayling, J., agreed, was of opinion that a guardian can, on behalf of a minor, incur a liability which is under the Hindu law binding upon him. This is not limited to a liability for necessaries only. But the true test is not whether the transaction is for the benefit of the minor. The question whether or not this obligation was one which was binding on the minor seems to me to be

(4) [1909] 32 Mad. 410=1 I. C. 1.

(5) [1919] 42 Mad. 185=49 I. C. 872 (F. B.).

answered by the attitude adopted by him in the suit. It is quite true that in his written statement he pleads that he was a minor when the mortgage was executed and that it is not binding upon him and an issue was taken upon this plea, and it is quite clear that at the trial defendant 1 did not adduce any argument or evidence in support of that plea. He was there attacking the mortgage, but it is quite clear to me that if he was unable to attack the mortgage upon that ground he is unable to attack the covenant on that ground. The defence open to him upon the mortgage was equally open to him as regards the covenant and he did not attempt at the trial to substantiate his plea. If he had done so, he would have been met with the answer that he could not, whilst retaining the property, set up the plea that his guardian had no authority to enter into an obligation under which he came into possession of the property. He would have been met therefore with the answer that if his guardian had no authority to acquire the property on his behalf, he would be bound to restore the property to the plaintiff. As before mentioned, he did not put forward any such plea; and he must be taken to have waived the question as to whether or not the covenant entered into on his behalf by his guardian was binding upon him. The answer must be that it was and, being so, he is liable to have a decree passed against his personal assets.

I do not think that it makes any difference upon this point whether the plaintiff actually got complete ownership of the property in question irrespective of the confirmation by the Court of sale or not. He obviously got something and if it were necessary to complete the transaction and get the confirmation of the sale by the Court, obviously that confirmation could be got at any time by a request being made for it. Put at its highest against the plaintiff, he had a conditional ownership of the property in question and that he was entitled to transfer to defendant 1 for a consideration. That he did. In return for that transfer, the guardian of the minor entered into a personal obligation on his part to pay for it and it is clear to me that the property of the minor may be proceeded against by the plaintiff in satisfaction of the debt owing under that personal covenant. A point was taken by Mr. Rangachari that the plaintiff did not claim in his plaint a personal decree against defendant 1. That is quite true. He did not do so in terms. He was in that suit claiming on the mortgage and it seems to me unreasonable to hold that claiming on what he considered to be a valid mortgage he ought neverthless to have based his claim in the alternative on the covenant and asked on it for a personal decree against defendant 1. In this connexion mention may be made of a decision of the Privy Council, viz. *Bisvanath Prasad* v. *Chandra Narayan Chowdry* (6). In that case a suit was instituted to enforce a mortgage bond. In the trial Court the learned District Judge made a decree in favour of the plaintiff. This decree was reversed upon appeal by the High Court of Calcutta on the ground that the mortgage was invalid for want of registration. On appeal to the Privy Council this judgment was affirmed. On p. 517 (*of* 48 *Cal.*) their Lordships made the following observations:

"As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to deal with such a claim. At the same time their Lordships think it desirable in this case that the plaintiffs should have an opportunity of bringing this matter before the High Court. If any such application is made, it will be for the High Court to consider whether any such claim is open upon the present pleadings and, if not, whether any amendment raising it should be made, and further, whether under all the circumstances the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of this claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs."

In that case no argument was presented to the High Court in support of the alternative claim. Here we have had that claim fully argued. It is obvious from the decision above referred to that the High Court can entertain such an application even if it has not been in terms put forward in the plaint. There is discretion in the Court to amend the pleadings if such amendment should appear to be necessary. In my view, no such

(6) A. I. R. 1921 P. C. 8=63 I. C. 770=48 I. A. 127=48 Cal. 509.

amendment is necessary because I am of opinion that the greater claim, namely, that on the footing of the mortgage, includes the lesser claim, namely that on the corresponding covenant, and I am satisfied that we have had before us all the materials necessary to decide this point. If it were a question of amendment of the pleadings, I should most certainly have acceded to any request for such an amendment but I do not think any question of the amendment of the pleadings now arises. Nothing prejudicial to the case of defendant 1 is caused by this action, because, as I have already stated, no defences other than those which were open to defendant 1 in the mortgage suit are open to him on a claim under the covenant. He had full opportunity for putting forward his defences to the mortgage, namely that it was not binding on him. For good reasons he did not choose to do so and, as before stated, that plea had been waived. I cannot imagine that any other plea can possibly be open to him here. Under these circumstances therefore the appeal must be dismissed and there must be a decree for the amount claimed payable out of the property in the hands of defendant 1. Defendant 1 is directed to pay the plaintiff's costs of this appeal and in the Court below.

Curgenven, J.— The evidence that the mortgage bond was duly attested is almost beneath criticism. According to the amended definition of "attested" inserted in the Transfer of Property Act by Act 27 of 1926, it has to be shown in the circumstances of the present case (a) that each of the two witnesses saw the executant sign, or received from her a personal acknowledgment of her signature; (b) that each witness signed the instrument in the presence of the executant.

The evidence shows that the document was taken to the Rani, who was gosha, by a dasi. She signed it inside a room. Neither the writer nor the attestors entered the room. The writer (P. W. 1) says that neither the attestors nor himself saw her sign. Only one attestor is examined. He says that he did see the executant sign, because two slats of the venetian shutter to the window were broken and he was able to look through. His co-attestor did the same thing. Evidently it was purely by chance that they did this, and not by arrangement and in order to fulfil some legal requirement. It can hardly be doubtful that the evidence has been got up to afford formal proof that the bond was duly executed. The second condition, too, that the executant should be present when the witnesses sign does not seem to have been complied with The only conclusion is that the suit, as a mortgage suit, must fail.

It is urged that nevertheless, the plaintiff is entitled to a charge upon the property mortgaged or, what is the same thing, upon the property conveyed to defendant 1 under the compromise of 29th November. It is agreed that the plaintiff may have a charge (1) in the form of a vendor's lien for the unpaid purchase money, if the conveyance was a sale; or, if not, (2) if it appears to have been the intention of the parties to create a charge for that money.

It appears to me impossible to sustain the latter alternative. Para. 7 of the compromise petition seems to show that when it was entered into, the intention was that a cash consideration should be paid for the Polavaram village and its appurtenances, and no question of a charge, if the money remained unpaid, seems to have arisen. It was found impossible to raise the money, so on 14th December, the plaintiff took the mortgage bond from defendant 1's guardian. Since that bond, had it been validly executed, would in itself have created a security superior to a charge, it is not to be supposed that any separate charge could have been in contemplation. Thus at no stage does any such intention appear to have existed. I think that in each of the cases cited to us where a charge has been deemed to have existed circumstances from which such an intention may be inferred have been found. They are cases in which allowance has been payable by the holder of an estate to some person such as a relative, with a claim to be maintained out of estate funds. An example is the Privy Council case *Narayana Ananga* v. *Madhava Dev* (7), followed by Seshagiri Iyer, J., (from whom Wallis, Offg. C. J., differed on the question of charge) in *Rajah of Ramnad* v. *Sundara Pandiaswami Thevar* (8). The latter case went up to the Privy

(7) [1893] 16 Mad. 268=20 I. A. 9=6 Sar. 270 (P.C.).
(8) [1914] 27 I. C. 283.

Council as *Rajah of Ramnad* v. *Sundara Pandiaswami Thevar* (9), and their Lordships agreed with the former learned Judge that upon a proper construction of the transaction a charge was established. Cases of this type bear no resemblance to the present one where nothing has been proved to suggest an implied intention to create a charge.

The plaintiff must then fall back to the position that the conveyance embodied in para. 7 of the compromise was a "sale" as defined in S. 54, T. P. Act; that is to say a transfer of property for a price. The expression "price" refers to money and money alone, as had been held by a Full Bench of this Court in *Madam Pillai* v. *Badrakali* (1); if any part of the consideration consists in something other than money it may be an exchange, as defined in S. 118 of the Act or it may be a transfer not within the terms of the Act, but it cannot be a sale.

Now it is clear that under the terms of para. 7 of the compromise, defendant 1 undertook to do something else besides paying money; the consequence was to be "in consideration of his not taking any proceedings to set aside the sale" of the whole property, i.e., the Polavaram Zamindari. If this formed part of the consideration for the transfer then the consideration was something not wholly money, and the transaction was not a sale. The learned Advocate General argues that it was a sale with a collateral contract, aud would compare it to a sale with an option to repurchase. The comparison, I think, is not very close because in the latter case the accompanying contract relates only to the subject matter of the sale whereas here the vendee's undertaking applies to the whole of the property included in the Court sale.

I think it is clear that the plaintiff must very substantially have reduced the price of the property in view of obtaining this undertaking; indeed it is said that for 1·40 lakh was conveyed property worth 3·25 lakhs. If so the money value to the plaintiff of the undertaking was not less than the sum in cash which he asked for. It seems impossible to hold accordingly that the undertaking itself was not part of the valuable consideration for the transfer, and if that be so it was not a sale, and the vendor has no statutory lien upon the property. This disposes of the claim to a charge.

There remains a further contention, that a decree may be given against defendant 1's assets. Although the mortgage bond may as such be invalid, it includes an agreement signed by the guardian of the then minor to pay the purchase money to the vendor and this will be enforceable, it is said, in the same way as, in the case of an adult, such an agreement may be enforced personally against him. The first objection raised to the grant of this remedy is that it was not asked for in the plaint. But the plaintiff, I think, can scarcely be expected to have contemplated the rejection of his mortgage bond as invalid and so to have made an alternative request of this nature. The suit was upon a mortgage and the plaint concluded with the prayer that, if the proceeds of the sale were insufficient to meet the debt, the plaintiff should be at liberty to apply for a decree for the balance against the other properties of defendant 1. It appears to me that if in other respects the claim is admissible, it should not be rejected merely because the liability of the assets for the debt was not asserted in the circumstances which have actually arisen. In so far at least as the property which defendant 1's guardian purported to mortgage is concerned, it is surely a case of the less being included in the greater. Can then a claim of this kind be enforced? The undertaking to pay being embodied in a registered bond admittedly the plaintiff's suit was within the six years allowed. The further question is whether the guardian's promise to pay binds the minor's estate. It has been decided by a Full Bench in *Kunhi Moidoo* v. *T. Madava Menon* (4) that a mortgage deed not duly attested may be used as evidence of a personal covenant to pay. How the matter stands when the person on whose behalf the covenant has been made is a minor has been considered by another Full Bench in *Ramajogayya* v. *Jagannadhan* (5). That too was a case of a mortgage which was found to be invalid for want of Government sanction. The debt was contracted by the mother as guardian to discharge minor debts incurred for maintenance and for the mar-

(9) A. I. R. 1918 P. C. 156=49 I. C. 704=46 I. A. 64=42 Mad. 581.

riage expenses of a sister of the minor. It had to be decided how far the Privy Council decision in *Waghela Ra'sanii* v. *Shekh Masluddin* (10) which was (to quote the head-note) that "a guardian cannot contract in the name of a ward, so as to impose on him a personal liability" must be construed as an absolute bar to the enforcement of such contracts. Sir John Wallis, C. J., while recognizing that the ruling does not affect the liability of a minor's estate under S. 68, Contract Act, which indeed does not require the intervention of a guardian, thought that a :

"decree cannot be passed against a minor or his estate on a covenant entered into on his behalf by a guardian for his benefit."

Of the other two learned Judges, Ayling, J., agreed with Seshagiri Ayyar, J., and the latter put his opinion into these words :

"No decree should be passed against a minor or his estate on a contract entered into on his behalf by his guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject."

The learned Judge goes on to say that the answer given by the learned Chief Justice "read with his opinion" would cover the above opinion also, an observation which does not make it very easy to understand what precisely he means. One thing seems clear that the mere test of a benefit secured for the minor by means of the debt will not suffice. If that were all that was meant the view of the two learned Judges who formed the majority would have been not in virtual agreement with but in direct opposition to the view of the learned Chief Justice. The opinion seems rather to have been that, while benefit is not the test, any liability to which the minor would be subject under the Hindu law is not the less a liability because it was incurred by his guardian on his behalf. This is an intelligible and indeed almost an indisputable proposition; and it probably sufficed to dispose of the particular case out of which it arose.

It seems to me that if the circumstances of the present case are considered, a solution of the question is almost self-evident. In his written statement defendant 1 pleads that he was a minor when the mortgage bond was executed and that it is not binding upon him. Issue 2 inquired whether the bond was not binding upon him, but the judgment shows that at the trial this issue was not disputed. If he waived this plea in the case of the mortgage, a fortiori he waived the plea that the debt, as an unsecured debt, was not binding upon him. The explanation of this attitude is clear enough. Defendant 1 cannot at once approbate the bargain by retaining the property, which he obviously desires to do and reprobate it by the plea that his guardian had no authority to acquire it on his behalf. I do not think that we can now allow him to say that the promise made by his guardian on his behalf to pay the cash consideration is not binding upon him. In other words, his property may be proceeded against by the plaintiff in satisfaction of the debt. I agree therefore that the main appeal (A. S. 409) must be allowed in part by substituting a decree of this kind for the mortgage decree, and in other respects dismissed with the order as to costs proposed by my Lord.

Appeal No. 452 *of* 1925.

In view of our judgment in Appeal No. 409 of 1925 no orders are necessary on this appeal. No order as to costs.

P.R.S./R.M. *Order accordingly.*

(10) [1867] 11 Bom. 551 (P.C.).

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* A. I. R. 1931 Madras 147

SUNDARAM CHETTY, J.

(*Nappalli Kandiyilthamasikkum Puthiyotil Kanhiratan*) *Govinda Kurup* — Plaintiff—Appellant.

v.

(*Chowakkaran Koloth*) *Beekku* and *others* —Defendants—Respondents.

Second Appeal No. 1947 of 1926, Decided on 2nd September 1930, from decree of Sub-Judge, Tellicherry, in Appeal Suit No. 382 of 1925.

(a) Transfer of Property Act (4 of 1882), Ss. 105 and 107—Lease by minor is void.

A lease is necessarily a transfer of an interest in immovable property by the lessor in favour of the lessee. A minor is not competent to contract and under S. 7 it is only a person competent to contract and entitled to transferable property that can transfer such property, either wholly or in part to another person. Any transfer of such an interest by a minor by the transaction of lease would be void: 30 *Cal.* 539 (*P. C.*), *Rel. on.* [P 148 C 2]

*** (b) Transfer of Property Act (4 of 1882), S. 105—Deed of lease may be executed by lessor or lessee—Lease involves transfer of interest—If lessor is minor, lease is void—**

Question as to who executed lease deed is immaterial.

The fundamental conception of a lease involves the transfer of an interest in immovable property by the lessor to the lessee, and if a valid lease can be created even by a registered instrument signed by the lessee and accepted by the lessor, it must be deemed to have effected a transfer of an interest in immovable property by the lessor to the lessee. If by reason of the lessor's minority, he is incompetent to make the transfer at all, the fact that the instrument is not signed or executed by him, but only to him cannot make any difference. By necessary implication, it amounts to a transfer by the lessor and if he is a minor the lease is void whether he or the lessee has executed it : 35 *Mad.* 95 (*F. B.*) *Rel. on* and 40 *Mad.* 308, *Ref.*

[P 149 C 1]

C. S. Venkatachariar and *V. P. Karunakaran Nambiar*—for Appellant.

K. Kutti Krishna Menon and *A. Atchutan Nambiar*—for Respondents.

Judgment.—Plaintiff is the appellant. On the strength of a lease of immovable property (lands) granted to him by defendants 1 and 2 by means of the registered marupat dated 28th December 1919 (the original of Ex. B) which was executed by the plaintiff to defendants 1 and 2, he filed the present suit to recover possession of those lands from defendants 3 and 4, who are in occupation thereof, as lessees under the tarwad of defendant 1, under a renewed lease granted by defendant 14 as karnavan on 13th January 1920 as per Ex. 1. Both the lower Courts have held, that the plaintiff has not acquired a valid right to the suit property under the lease set up by him and dismissed his suit.

Defendant 1 belongs to a rich Moplah tarwad. In 1918 and 1919, the then Karnavan, Makki Keyi, allotted some properties of the tarwad for the maintenance of defendant 1 (a minor) under the deeds Ex. 3 and 4. The suit lands are comprised in Ex. 4. There is no doubt that when the melcharth was given to the plaintiff as per Ex. B, dated 28th December 1919, defendant 1 who was a minor, was the sole owner thereof. Defendant 2 is her husband. The marupat or the lease deed (Ex. B) was executed by the plaintiff (lessee) to defendants 1 and 2, but defendant 2 had no right or interest in the suit property, and was not therefore competent to grant a lease of the same. The custom alleged by the plaintiff, whereby the husband of a moplah woman has the right to manage the properties given to her for maintenance, in order to make out the validity of the lease in question, treating it as one granted by the husband (defendant 2), has been found by the lower appellate Court to be unproved. I accept that finding as correct. The question therefore has to be decided on the footing that the lease in question was granted to the plaintiff by defendant 1 (the owner of the suit property) when she was a minor. Is such a lease valid and enforceable ?

A lease of immovable property, as defined in S. 105, T. P. Act, is a transfer of a right to enjoy such property, made for a certain time or in perpetuity, in consideration of payment of rent in cash or kind. A lease is necessarily a transfer of an interest in immovable property by the lessor in favour of the lessee. A minor is not competent to contract and under S. 7, T. P. Act, it is only a person competent to contract and entitled to transferable property, that can transfer such property, either wholly or in part to another person. Any transfer of such an interest by defendant 1 (a minor) by the transaction of lease relied on by the plaintiff, would therefore be void. A sale is a transfer of ownership in immovable property, in exchange for a price. A mortgage is the transfer of an interest in immovable property, in consideration of a loan, for securing the repayment of it. There is no doubt that a sale by a minor, and a mortgage by a minor, are invalid, and unenforceable. In *Mohori Bibee* v. *Dharmodas Ghose* (1), their Lordships of the Privy Council have held that not only is a mortgage made by a minor void, but even on a decree being given declaring the mortgage invalid, the lender was not entitled to the repayment of the money advanced to the minor under that invalid mortgage. It is not conceivable how a lease by a minor can be valid, while a sale or a mortgage by a minor, is void, if regard be had to the fact that just as in the case of sale or mortgage there is a transfer of an interest in immovable property, namely, the right to enjoy such property in a lease by the lessor to the lessee.

Mr. C. S. Venkatachariar for the appellant made a strenuous endeavour to differentiate a lease by a minor from a sale or a mortgage by a minor inasmuch as the marupat of the lease deed

(1) [1903] 30 Cal. 539=30 I. A. 114 (P. C.).

(Ex. B) was executed not by the minor (defendant 1) but by the plaintiff (lessee) to defendant 1 (lessor). It is true that in the case of a sale or a mortgage, the deed should be executed by the seller, or the mortgagor. But in the case of a lease S. 107, T. P. Act, does not expressly state, by whom the registered instrument should be executed, the lessor, or the lessee or both. It has been held by a Full Bench of this High Court in *Azam Sahib* v. *Ananthanarayana Ayyar* (2) that the registered instrument referred to in that section, need not necessarily be an instrument signed by the lessor, and such a lease may be created by a registered instrument signed by the lessee and accepted by the lessor. The fundamental conception of a lease involves the transfer of an interest in immovable property by the lessor to the lessee, and if a valid lease can be created even by a registered instrument signed by the lessee and accepted by the lessor, it must be deemed to have effected a transfer of an interest in immovable property by the lessor to the lessee. If by reason of the lessor's minority, he is incompetent to make the transfer at all, the fact that the instrument is not signed or executed by him, but only to him cannot make any difference. By necessary implication, it amounts to transfer by the lessor (in this case, a minor), and if it should be contended, that because Ex. B is not signed or executed by defendant 1, there was no transfer by the minor, it would follow, that there was no lease at all.

It seems to me clear that the invalidity of the lease in question by reason of the minority of the lessor cannot be got over, by the circumstance that the instrument Ex. B was executed to her, and not by her. A lease is essentially a bilateral contract. On the part of the lessor, there must be a transfer of an interest in immovable property by him and on the part of the lessee, there must be a promise to pay the rent. These are reciprocal considerations. In the present case, the lease deed Ex. C though executed by the lessee (plaintiff) expressly recites : " You have hereby demised to me the said two items of property." It means, that under his deed executed by me and accepted by you, you have transferred the right to enjoy the two items to me. Such a transfer by a minor, who is incompetent to make the transfer, is now sought to be enforced by the plaintiff, as the basis of his claim to recover possession of the properties from defendants 3 and 4. This case, has, in my opinion, no close analogy to a case of a sale in favour of a minor who has already paid the price, or a mortgage in favour of a minor who has already advanced the loan. The Full Bench decision in *Raghavachariar* v. *Srinivasaraghavachariar* (3), deals with such a mortgage in favour of a minor. The observations in the judgment of the learned Chief Justice in that case seem to be quite in consonance with the contention of the respondents in respect of the lease in question. There is a very elaborate discussion in the judgment of Srinivasa Iyengar, J., in that case, and reference was made to several passages in that judgment by the learned advocate for the appellant. After a careful consideration, I am unable to find any definite pronouncement in that judgment, for holding that the lease in the present case relied on by the plaintiff is valid and enforceable. I agree with the lower appellate Court's view on this point. The dismissal of the plaintiff's suit is therefore correct, and this second appeal is dismissed with costs.

P.R.S./M.N. *Appeal dismissed.*

(2) [1912] 35 Mad. 95=8 I. C. 668 (F. B.).

(3) [1917] 40 Mad. 308=36 I. C. 921 (F. B.).

A. I. R. 1931 Madras 149

WALLACE AND PANDALAI, JJ.

Peer Ammal and *another* — Defendants—Appellants.

v.

N. S. Nallusami Pillai and *others*—Plaintiffs—Respondents.

Stamp Register No. 711 of 1930 (as Appeal No. 532 of 1930), Decided on 19th November 1930, from decree of Sub-Judge, Madura, D/- 8th August 1928, in Original Suit No. 128 of 1926.

Limitation Act (1908), Art. 156—Ex parte preliminary mortgage-decree set aside on defendant's application—High Court restoring it on appeal—Limitation runs from date of restoration by High Court.

Where a preliminary decree on a mortgage is passed ex parte and on an application made by the defendant to set it aside, the Court sets it aside and the plaintiff thereupon appeals to the High Court as a result of which the decree is restored, the time of filing an appeal, which is governed by Art. 156, runs not from the date of the original decree but from the date of the order of restoration of that decree by the High

Court : 43 *Mad.* 185 *Rel. on.* ; 23 *Cal.* 775 and 11 *All.* 47, *Ref.* ; *A. I. R.* 1925 *Mad.* 334 and *A. I. R.* 1918 *P. C.* 180, *Expl.* and *Dist.*

[P 150 C 1, 2 ; P 152 C 2]

K. Bhashyam Iyengar and *T. R. Srinivasan*—for Appellants.

K. S. Jayarama Ayyar and *K. Swaminatha Ayyar*—for Respondents.

Pandalai, J.—The question is whether this appeal was presented in time. The material dates are as follows : The appeal is from a preliminary decree on a mortgage passed ex parte by the Subordinate Judge of Madura in O. S. No. 128 of 1926 first on 8th August 1928. The appellants (defendants 1 and 4) applied under O. 9, R. 13, on 9th August 1928, to set aside the ex parte decree, and the Court set it aside on 12th October 1928. Meanwhile the appellants had also on 9th August 1928 applied for copies of the judgment and decree, and they were ready for delivery on 27th September 1928 so that, had the appellants wanted to appeal, they had out of the ninety days available about 1½ months more after 12th October 1928. As the decree was set aside by the Sub-Judge himself, no appeal was preferred. But the plaintiff-respondent applied in C. R. P. 116 of 1929 to this Court to revise the order of the Subordinate Judge setting aside the ex parte decree, and this Court on 22nd November 1929 set aside that order thus restoring the preliminary decree to that effect. This appeal was presented on 6th January 1930.

The provision of the Limitation Act applicable is Art. 156 which prescribes a period of ninety days from the date of the decree or order appealed from. The appellants contend that the date of this decree for the purpose of appeal must be taken as 22nd November 1929, when this Court, by its order in C. R. P. 116 of 1929 restored force and effect, including appealability to the original decree which it had lost by its being set aside. The respondent contends that the date of the decree is 8th August 1928, the date when it was originally passed, and that its subsequent vicissitudes have no effect on the period of appealability, and that the only course open to the appellants is to induce this Court to excuse the delay under S. 5, Lim. Act. No application under S. 5 being now before us, we have to decide between the two above contentions as to the starting point of limitation.

No decision exactly in point has been brought to our notice. But we entertain little doubt that the appellants' contention must be accepted. It is not only in consonance with the principle underlying the law of limitation that suits, appeals and other legal proceedings are possible only when there is some cause of action, or ground of appeal or other grievance on which the plaintiff, appellant or applicant has a right to come to Court and ask for relief, but the opposite view would lead to the absurd result that an appellant's right to appeal and the decree-holder's right to execute the decree are both barred before the decree to be appealed from or to be executed came into legal being.

In *Muthu Korakkai Chetty* v. *Madar Ammal* (1) a Bench of five Judges dealt with the question whether for an application for delivery of properties sold in Court auction limitation ran from the date of an ex parte confirmation of the sale (26th April 1913), or from the determination of proceedings taken by the opposite party to set aside that confirmation (25th June 1915). It was held by four of the learned Judges that the latter date was the terminis a quo although the result of the proceedings in respect of the properties subsequently sought to be recovered was that the order of 26th April 1913 was confirmed by that of 25th June 1915. The other learned Judge contented himself with answering the question put in the negative as it was put in the form whether the cause of action for application was suspended during the pendency of the proceedings. The decisions of the Judicial Committee bearing on this question, an apparent conflict between which was the cause of the reference to a Full Bench, were so fully gone into in that case, that it is needless to refer at length to them again. To understand the ground of decision of the Court it is sufficient to refer to the citations from the Privy Council decisions in *Baijnath Sahai* v. *Ramgut Singh* (2) and *Bassu Kuar* v. *Dhum Singh* (3). In the former case which was one of a revenue sale by the Collector in 1882 confirmed by the Commissioner in 1884 and set aside by the Board of Revenue in

(1) [1920] 43 Mad. 185=54 I. C. 66 (F.B.).
(2) [1896] 23 Cal. 775=23 I. A. 45=7 Sar. 1 (P.C.).
(3) [1889] 11 All. 47=15 I. A. 211=5 Sar. 260 (P.C.).

1884 and confirmed by the Board in Review in 1886, their Lordships said that for the purpose of limitation there was no final or definitive confirmation of the sale till the final order on review by the Revenue Board in 1886. In *Bassu Kuar* v. *Dhum Singh* (3) it was held that money due on an account stated, which would as such have been barred in three years from the statement, became for purposes of limitation a debt of a new character when, it having been retained by the debtor as part of the consideration for a proposed sale of land, that arrangement failed, the sale not being specifically enforceable and so declared by decree between the parties. Their Lordships said as to the defence that the suit for the money should have been brought while the arrangement for setting it off against the purchase money was still in force that

"it would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years had been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time had relieved him from paying at all."

Reading the judgments pronounced in *Muthu Korakkai* v. *Madar Ammal* (1) it becomes clear that while on the one hand no "suspension" in the proper sense of a period of limitation which has begun to run is permissible except as provided in S. 14, etc., Lim. Act, the Courts will place a liberal, or in the language of Oldfield, J., an accurate construction on the somewhat loosely expressed words in Col. 3, Sch. 1, which prescribes the starting point of the period of limitation by not requiring parties to start legal proceedings in circumstances when it would be futile for them to do so. As Seshagiri Iyer, J., put it,

"subject to the exemptions, exclusions, mode of computation and excusing of delay etc., which are provided in the Limitation Act, the language of Col. 3, Sch. 1 should be so interpreted as to carry out the true intention of the legislature, that is to say by dating the cause of action from a date when the remedy is available to the party, p. 213."

The respondent's advocate relied on *Ammathayi Ammal* v. *Sivarama Pillai* (4) and the Privy Council decision referred to in it *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad* (5). In that case the plaintiff had obtained a preliminary decree on a hypothecation under which the time for payment of the mortgage money was fixed for 6th March 1917. Meanwhile the mortgagor's (defendant's) husband brought a suit in 1916 against the mortgagor and a mortgagee for a declaration that the mortgaged properties belonged to himself and that the mortgage was therefore not binding on the property. That suit was decreed in the first Court in favour of the husband on 26th April 1917, and by the first appellate Court, but was dismissed in second appeal by the High Court on 28th April 1920. The plaintiff applied for a final decree on 10th September 1920, more than three years after the date fixed for payment, but less than three years after the defendant's title to the mortgaged property was affirmed in the second appeal. The argument put forward for the plaintiff in this Court was that he had lost the right to apply for a final decree by the decisions of the first Court and the first appellate Court in the husband's suit, that the property belonged to him and that it revived on the decision of the second appeal, that it belonged to the mortgagor. The Court did not accept this on the ground that the Court, when it sells property in execution of a mortgage decree, does not guarantee the title of the judgment-debtor as against strangers, and that Art. 181 which prescribes the starting point of limitation for such an application as the time when the right to apply accrues, does not say (mean) that the right to apply accrues only when the mortgagor's title as against strangers is clear. Therefore it was held that the right to apply for a final decree accrued on the date fixed for payment and that as no ground of suspension of limitation could be urged under the Limitation Act and no other ground of suspension was available according to *Mani Singh* v. *Nawab Bahadur Murshidahad* (5) the application was barred.

This decision has in our opinion no application to this case. It merely decided that under Art. 181 the right to apply for a final decree in a mortgage suit accrues not when the disputes between the decree-holder and strangers to

(4) A. I. R. 1925 Mad. 334=85 I. C. 272.

(5) A. I. R. 1918 P. C. 180=50 I. C. 202=46 I. A. 60=46 Cal. 694 (P. C.).

the decree about the title to the mortgaged property terminate and the mortgagor's title as against such strangers is established, but from the date fixed in the decree for payment of the debt. In this case we have to deal with a different article, mamely 156 and the question is what is the meaning to be given to the words " date of the decree or order appealed from " when the decree has been set aside by the Court which passed it within the appealable period and therefore no appeal is thereafter competent to the defendant and the decree is afterwards restored by a higher tribunal.

In our opinion the case clearly falls within the class of cases when a fresh starting point of limitation for appealing has necessarily to be found. The opposite view would lead to the absurd result, that the defendant would be deprived of the right of appeal because he did not appeal against a decree which had ceased to exist and against which therefore he could not have appealed after it was set aside. But it was suggested that he ought to have appealed before the decree was set aside under O. 9, R, 13. Assuming he had done so as soon as the decree was set aside under O. 9, R. 13 the appeal would become infructuous and would necessarily have to be dropped and the position after the decree was restored in revision by the High Court would be the same as if he had not appealed at all. It is not to be supposed that the appeal should be kept pending in contemplation of the double uncertainty that the plaintiff might take the order setting aside the decree to the High Court in revision and that this Court might interfere in revision. If we look at the matter from the point of view of the decree-holder, it becomes still more absurd if we have to suppose that his right to execute the decree under Art. 182 is in the circumstances of the present case to begin from the date of the first decree which was subsequently set aside and later restored. If between the date of the original decree and the restoration in revision a period of more than three years has expired, it would follow that as there is no allowance for the intervening period according to the Act or any of the clauses of Art. 182, his application for execution would be barred before he succeeded in getting his decree restored. A construction which leads to such results could not have been contemplated by the legislature. We think therefore that the date of the decree appealed from must be taken as the date when the decree was restored in revision by this Court. On this footing we hold that the appeal was presented in time and it will be admitted.

P.R.S./K.N. *Appeal allowed.*

A. I. R. 1931 Madras 152

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Corporation of Madras—Appellant.

v.

Madras Electric Tramways Ltd.—Defendant—Respondent.

Letters Patent Appeals Nos. 265 and 264 of 1927, Decided on 4th September 1930, from judgment of Waller, J., D/- 10th December 1928, in C. C. C. Appeals Nos. 8 and 9 of 1925.

(a) Madras City Municipal Act, S. 287 —Powers of Commissioner are not for prohibition but for regulation.

The Commissioner has no doubt powers under S. 287 over persons who conduct a number of different trades, occupations and operations. The powers so entrusted to the Commissioner are however not intended for the prohibition of any of these trades, occupations or operations, but for their regulation in the interests of the people of Madras. If he refuses to grant a license under S. 287, he has to state his reasons for doing so; he cannot act arbitrarily. And any person who applies for a license which is refused by the Commissioner, or to which the Commissioner attaches conditions, can appeal to the Standing Committee of the Corporation, and if the Standing Committee use their powers unreasonably or perversely, the person concerned has his remedy in the Courts. [P 154 C 2 ; P 155 C 1]

(b) Tramways Act, S. 7 (2) (1)—Workshops are not provided for in the Act and " other works " do not include workshops.

The words " other works " used in Cl. (1), S. 7 (2), cannot be construed as including workshops. Workshops are not provided for in the Tramways Act. They are provided for in the City Municipal Act. There is nothing in the least inconsistent between the provisions of the Tramways Act and the provisions of the City Municipal Act whereby the Commissioner is empowered to require anyone to take out a license before he casts metal, or hammers or breaks iron or beats metal. The Tramways Company are not entitled to cast metal or to break or hammer iron or beat metal in their workshops without obtaining license from the Commissioner of the Corporation : *Farnworth* v. *Manchester Corporation* (1829), 1 *K. B* 533, *Ref.* [P 155 C 2]

(c) Interpretation of Statutes — General and Special Acts how to be construed enunciated.

If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless, unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act. If the special Act is made after the general Act, the position is even simpler. Having made the general Act, if the legislature afterwards makes a special Act in conflict with it, it is assumed that the legislature had in mind its own general Act when it made the special Act, which is in conflict with the general Act, as an exception to the general Act. A special statute containing no provisions inconsistent with a general statute is, however, controlled by the latter even if this is not expressly incorporated : (*English case law discussed.*)

[P 156 C 1]

(d) Electricity Act—Licensee under, is not in same position as person in whose favour special Act is made. (*Obiter.*)

A licensee under an Act of a general character like the Electricity Act, which extends to the whole of British India, is not in all respects in the same position as a person in whose favour a Special Act has been made.

[P 156 C 1]

(e) Madras City Municipal Act, S. 288—Municipal Committee consenting or raising no objection to issue of license for electric supply—Control in respect of generating station is not lost.

Because the Municipal Committee consents or raises no objection to the issue of a license for the supply of electricity, within the municipal boundaries, it does not follow that it gives up its control under S. 288 in respect of the generating station. [P 158 C 1]

(f) Electricity Act, S. 37 (2-f)—Power to make general rules does not make local control unnecessary.

The power to make general rules for the whole of British India or any considerable part of it cannot make local control and the consideration of immediate local conditions unnecessary. Because in their license the electric company are empowered to have a generating station somewhere within the limits of Madras, they are not free from the ordinary control of the local authority in respect of the steam boiler which they use to provide motive power for generation. [P 161 C 1, 2]

(g) Madras City Municipal Act, S. 288—Electric Company must obtain permission of Commissioner of Corporation to use steamboiler in governing station.

The Electricity Act is not a complete code. There is nothing inconsistent in the Electricity Act or the license issued under it to the Electric Company and the City Municipal Act in respect of the use of steamboiler and the Electric Company are not entitled to use the steamboiler in their generating station without obtaining the permission of the Commissioner of the Corporation. [P 162 C 1]

T. M. Krishnaswamy Iyer—for Appellant.

C. P. Ramaswami Iyer—for Respondent.

Reilly, J.—These two appeals relate to suits in which the Corporation of Madras claimed declarations that the Madras Electric Tramways Company and the Madras Electric Supply Corporation respectively were subject to the control of the Commissioner of the Corporation under Ss. 287 and 288 respectively of the Madras City Municipal Act. The suits were tried by the Judge of the City Civil Court, who dismissed both of them. They came on appeal before Waller, J., whose opinion was that both the companies carried on their operations under special Acts, or what were equivalent to special Acts, inconsistent with the general Act, the City Mnnicipal Act, and that the Corporation of Madras were not entitled to the declaration for which they sought. He upheld the decision of the City Civil Court; and it is against that decision that these two appeals have been preferred.

I think it will be convenient to deal with the two cases, separately, and, if I may say so with great respect, I doubt whether Waller, J., would have arrived at his decision in respect of the Tramways Company, if he had treated it separately from the case of the Electric Supply Corporation. The Tramways Company operates under what is called an order issued by the Government under the Tramways Act. In the course of their operations they maintain a workshop, we are told, in which they cast metals, break and hammer iron and beat metals. Under S. 287, City Municipal Act, no one is permitted in the City of Madras to use any place for those operations without obtaining a license from the Commissioner of the Corporation. The Tramways Company contend that by virtue of the order issued to them by the Government under the Tramways Act they are not subject to the provisions of S. 287, City Municipal Act. It was suggested at one stage of the argument by Sir Ramaswami Iyer, who appears for the Tramways Company that it would be an impossible position if the Tramways Company were required to take out a license from the Commissioner of the Corporation for every place in which they might want to repair

their lines of their tramways in the public streets by hammering or beating metal. But Mr. Krishnaswami Ayyar, who appears for the Corporation of Madras, has explained that this suit is confined to the workshops of the Tramways Company and I shall deal with it in that sense.

If we examine the Tramways Act, we find that workshops are nowhere mentioned in it, except in one place, to which I shall refer in a minute. In the order issued by the Local Government to the Tramways Company, which purports to be made under the Tramways Act, there is a mention of workshops. In Cl. (6) of the order the Company is empowered to establish workshops; but in that respect the order appears to go beyond the Act, and the mention of workshops in it is of no effect. Sir Ramaswami Ayyar drew our attenton to S. 7 (2) (i) of the Act, under which such an order may provide for

> "the provision of such crossings, passing places, sidings, junctions and other works. . . . . as may from time to time be necessary or convenient to the efficient working of the tramway,"

and he suggested that "other works" in that clause would include workshops. If I may say so, that argument appeared to be one of last resort, because, it is clear that in that connexion we cannot construe "other works" as including workshops without offending against a well-established canon of interpretation. I have mentioned that in one place in the Act there is a reference to workshops. In S. 44 it is provided that the Local Government may exempt yards and workshops of the Tramway undertaking from local taxation. But the power to exempt the Tramways Company from taxation under that section does not bring workshops within the scope of the Act otherwise.

It is clear I think that the Act is not concerned with workhops. It provides for the granting of the privilege of laying tramway lines along public streets, running tramcars along them and various other matters, but not for the construction of workshops. Still less could it be supposed to provide for the conduct and management of workshops or operations which might be carried on in them. There is nothing to suggest that in the Act. And it is clear that it is not really essential for a tramway undertaking that those who undertake it should have their own workshops. It is quite conceivable that they should arrange to get their tramcars and other apparatus repaired, when necessary, either in the workshops of another company or by outside engineering firms or contractors. But no doubt for such a tramway undertaking as that of the Tramways Company in Madras it is convenient and economical, and I should say prudent, to have their own workshops; but for that they require no authorization under the Tramways Act. They are quite as much at liberty as anybody else to establish workshops for that purpose. But, if they are as much at liberty as other inhabitants of Madras to establish workshops, why should they have greater liberty than other inhabitants in the matter? Why should they be at liberty to set up, as is suggested on their behalf, workshops wherever they like in the City of Madras and to carry on operations however offensive to their neighbours, when other people are restrained by the provisions of the City Municipal Act from doing so? If the Tramways Co. were free from all control in the matter, they might set up workshops and make the most intolerable din immediately next to a place of worship or a school or a law Court. Why should they have that extraordinary liberty? On the face of it, it is both unnecessary for their purposes and very undesirable in the public interest that they should have such liberty.

Sir Ramaswami Ayyar suggested that there was some indication in the Act that the Tramways Co. may be in a privileged position. He pointed out that under S. 35 of the Act disputes between the Company and the Corporation on certain matters are to be settled by a referee. But that does not affect the question of workshops, unless workshops come within the scope of the Act. It was also suggested that, if the Tramway Co.'s workshops are under the control of the commissioner, the commissioner might exercise that control so as to prohibit the Tramways Co. from using their workshops at all and so throw their whole undertaking out of order. That does not appear to me to be at all an effective argument. The commissioner has powers under S. 287, City Municipal Act, over persons who conduct a number

of different trades, occupations and operations. But, if we examine that section and Sch. 6, which has to be read with it, I think it is clear that the powers entrusted to the commissioner are not intended for the prohibition of any of these trades, occupations or operations, but for their regulation in the interests of the people of Madras. If we look at Sch. 6, we find that among operations which cannot be carried on without obtaining a license under the section from the commissioner of corporation are boiling paddy, washing clothes, baking bread and making sodawater. Can it be supposed that it was intended that the Commissioner of the corporation under the City Municipal Act should have power arbitrarily to prohibit any of those operations from being conducted in any part of the City of Madras? Such a suggestion on the face of it would be absurd. It is possible that, if the commissioner found that a very large number of persons were applying for licenses to carry on one of the more objectionable trades or occupations included in that schedule, he might reasonably say

"there are quite enough people in Madras doing that business already, and, if I allow any more to do so, there will be serious nuisance to the public."

In such a case he might perhaps use his powers of refusing licenses to prohibit any more people starting those particular operations. But, apart from that, I think it is quite clear that the commissioner's powers are intended for regulation, not for prohibition. And it has to be noticed that, if he refuses to grant a license under S. 287, he has to state his reasons for doing so; he cannot act arbitrarily. And any person who applies for a license which is refused by the commissioner, or to which the commissioner attaches conditions, can appeal to the standing committee of the corporation. It is suggested that possibly the standing committee might use its powers in conjunction with the commissioner unreasonably, perversely or for ulterior objects and so prohibit someone, the Tramways Co. for instance, from having a workshop anywhere in Madras. If the standing committee by any chance used their powers unreasonably, perversely or for ulterior objects in that way, the person concerned would not be without his remedy in the Courts. I think we need not pursue such speculation further in this matter.

Workshops, as I have said, are not provided for in the Tramways Act. They are provided for in the City Municipal Act. There is nothing in the least inconsistent between the provisions of the Tramways Act and the provisions of the City Municipal Act whereby the commissioner is empowered to require anyone to take out a license before he casts metal, or hammers or breaks iron, or beats metal, the processes with which we are concerned. In my opinion, the appeal in the Tramways Co.'s case should be allowed with costs throughout, and a declaration should be made that the Tramways Co. are not entitled to cast metal or to break or hammer iron or to beat metal in their workshops without obtaining licenses from the commissioner of the corporation under S. 287, City Municipal Act.

The case of the Electric Supply Corporation is not quite so simple. In that case the Corporation of Madras prayed for a declaration that the Electric Supply Corporation, which I shall refer to as the Electric Co. must obtain permission under S. 288, Madras City Municipal Act, for erecting a steamboiler in their generating station in Madras. The predecessors of the Electric Co. obtained in 1905 a license from the Local Government under the Electricity Act for the supply of electricity throughout the municipal limits of Madras subject to certain minor exceptions. The license was primarily for the supply of electrical energy to consumers. But in the license there is a statement: "The generating station is to be within the area of supply." The contention for the Electric Co. is that their license in respect of that generating station places them outside the scope of the City Municipal Act so far as their buildings, machinery and other apparatus are concerned and that commissioner has no right to assert that they must obtain permission from him before they can have a steamboiler in that station.

There was a good deal of argument before us on the question whether under the Electricity Act a license for the supply of electrical energy could include a license for establishing a generating station. The Act is not at all clear upon that point; but for the .purpose of this

case I am prepared to assume that the Local Government, when they issued a license to the Electric Co. for the supply of electrical energy within the City of Madras, also issued to them a license under the Act to establish a generating station. As I have said, the Electric Co. contend that over that generating station the Commissioner of the Corporation has no authority whatever. A large part of the case was argued before us on the assumption that a license issued to a person for the supply of electrical energy under the Electricity Act puts him in the same position as if a special private Act had been made in his favour. I think it would not be difficult to show that a licensee under an Act of a general character like the Electricity Act, which extends to the whole of British India, is not in all respects in the same position as a person in whose favour a special Act has been made. But for the purpose of this case I am prepared to assume that the Electric Co. by their license were put into the same position as if a special Act has been made in their favour.

A good deal of time was occupied in the arguments by a discussion of the question how special Acts and general Acts, if they came into conflict, are to be treated. A great deal of that discussion, if I may say so, appeared to me unnecessary. There is the old maxim, *Generalia Specialibus non derogant*; that is general provisions do not derogate from special provisions. If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms would include the subject of the special Act and is in conflict with the special Act, nevertheless unless it is clear that in making the general Act the legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act. If the special Act is made after the general Act, the position is even simpler. Having made the general Act if the legislature afterwards makes a special Act in conflict with it, we must assume that the legislature had in mind its own general Act when it made the special Act and made the special Act, which is in conflict with the general Act, as an exception to the general Act. These propositions appear to me to be beyond discussion at the present day. But several cases were quoted before us to show how those principles should be applied. The first was *City and South London Ry. Co.* v. *London County Council* (1). In that case a Railway Co. had by its special Act been empowered to construct buildings necessary for its purposes up to a certain distance from the side of a roadway. The bye-laws properly made under the general Act applicable to that neighbourhood required other members of the public if they were constructing buildings, to keep them at a greater distance than that away from the roadway. It was held that the railway's special Act overrode the bye-laws made under the general Act in that matter. *London and Blackwall Ry. Co.* v. *Lime House District Board of Works* (2), was a very similar case.

In the *London County Council* v. *London School Board* (3), land was acquired by the School Board under their special Act, and it was held that the Board was entitled to use the whole of that land for its own purposes, providing a school house and play-ground, without leaving a strip of land for the purpose of the adjoining roadway, though under the Metropolis Management and Building Act any other person, who had bought that land and raised a building on it, would have had to leave a strip for the purpose of the roadway. Then there is a case, which is not quite so simple, *Surrey Commercial Dock Co.* v. *Bermondsey Corporation* (4). There the Dock Co. within the enclosed area of their own undertaking, as defined by their original Act, erected a building necessary in consequence of works carried out by them under a subsequent Act, which gave them power to construct buildings and drains necessary in consequence of those works. It was held that the general control of the Bermondsey Corporation over buildings gave them no power to interfere with what was done by the Dock Co. under their special Act. There it will be observed that the Dock Co. were not only erecting a building which was allowed under their special Act but were

(1) [1891] 2 R.B. 513=60 L.J.M.C. 149=65 L.T. 362=40 W.R. 166=56 J.P. 6.
(2) 69 E.R. 1048.
(3) [1892] 2 R.B. 606=62 L.J.M.C. 30=40 W.R. 604=56 J.P. 791.
(4) [1904] 1 K.B. 474=73 L.J.K.B. 293=90 L.T. 123=52 W.R. 446=68 J.P. 155=20 T.L.R. 208.

doing so within the area which under their original Act was under their control and management. In each of those cases it was found that the special Act was inconsistent with, and in conflict with, the general Act, and it was held in each case that the special Act overrode the general Act. But can we find any inconsistency here between the terms of the license issued to the Electric Co. so far as the generating station is concerned, and the provisions of the City Municipal Act? All that is said in the license is that the generating station must be within the area of supply. There is nothing said about its being erected in any secluded place or any circumscribed area or in any specified place at all except that it must be somewhere .within the area of supply, that is somewhere, not specified, within an area which is I believe between 30 and 40 square miles in extent. And the license says nothing as to what the Electric Co. may do in respect of that generating station, nothing about what kind of buildings they are to erect or what kind of machinery or apparatus they are to work in them nothing apart from the one condition that the station has to be within the area of supply.

It may reasonably be suggested that the matter was left so vague because it was obvious to those concerned that in erecting the generating station and fitting it up with machinery and apparatus the Electric Co. would be subject to the same control as that to which other persons within the Municipal limits are subject. Can it be reasonably suggested that the Electric Co. were to be left free from all control in regard to the generating station? The original licensees were a firm in London and it may well be asked whether it is probable that they would have been intentionally given by their license an entirely free hand to construct any kind of building they liked for the generating station subject to no restrictions and fit it up with any machinery or apparatus however dangerous within the City of Madras. It will be observed that there was nothing in the license to tie them to putting the generating station in one part of Madras rather than in another. In that connexion the *Metropolitan Asylum District* v. *Hill* (5) is an interesting case. There the Metropolitan Asylum Board had a duty to build a small-pox hospital somewhere within their area. That they were bound to do under orders properly received from the Government department concerned. But it was held that when they erected a small-pox hospital, or proposed to erect one, in a neighbourhood where it would be a serious nuisance to the inhabitants, the fact that they erected it under their statutory powers would not exempt them from the control of the common law in the matter. Still less would it have exempted them from any general Act affecting that neighbourhood. There was no statutory obligation on them to erect the hospital in any particular place. But it has been suggested that *Municipal Commissioner of Bombay* v. *G. I. P. Railway Co.* (6) is a case which we should follow in this matter. There the Commissioner of the Bombay Corporation attempted to require a railway administration to take out a license for storing timber in their premises under the Municipal Act concerned and it was held by the Bombay High Court that he had no power to require that. But the reason of that decision is that the Railway Company were in a very special position under the Railways Act. They were empowered to do a number of things, which would include the storing of timber by the Railways Act, which contains the words "notwithstanding anything in any other enactment for the time being in force." And it has also to be observed that S. 7, Railways Act, puts the whole existence and working of railways in this country under the control of the Government of India. Those being the circumstances of the Railway Company, that particular case appears to me to be of no help to us in the present case.

But Sir Ramaswami Ayyar suggested that, although there is nothing in the license to control the actions of the Electric Company in respect of the generating station the Electricity Act provides that before a license is given, the local authority, which would be the Corporation of Madras in this case, has an opportunity of raising whatever objections it likes to the issue of the license and it may also be observed that if after obtaining a license for the supply of electricity, the licensee wishes to get it extended in any

(5) [1880-1881] 6 A. C. 193.

(6) [1910] 34 Bom. 252=10 Cr. L. J. 543=4 I. C. 281.

way so as to enable him to open up any roads which he has no power to open up under the original license again, the local authority has an opportunity of expressing its objections if any. No doubt the local authority has under an Act an opportunity, as have other people, of raising objection to the original issue of a license; and no doubt the local authority has to have an opportunity of expressing its objections before the license can be extended in the way I have mentioned. But in my opinion it would be quite unjustifiable to infer from that that the Corporation of Madras—I am here assuming that they raised no objections to the issue of this license consented to the abrogation of their control under S. 288, City Municipal Act, in respect of the generating station. There is no reason whatever to suppose that because they consented or raised no objection to the issue of a license for the supply of electricity within the municipal boundaries they gave up their control over any boiler which might be installed in the generating station. It has not been suggested to us that there is anything to show that they did so.

Then Sir Ramaswami Ayyar suggested that there are provisions about arbitration in the Electricty Act which make it imposible that the local authority should be put in a position of control over the company. There are provisions that if the Electric Company opens up roads for its purposes and fails to restore them within a certain time, the Corporation may do the work and recover the costs from the Company and if there is any dispute between the two bodies about the cost, the matter shall be decided by arbitration. From that and one or two similar provisions it is suggested that we should infer that the Electric Company and the Corporation are to be regarded as co-ordinate bodies. An examination of the Act will show that that argument cannot be maintained. There is a provision that the Government may in certain circumstances purchase the Electric Company's undertaking and that if there is any dispute between them about the amount to be paid for the purchase, the question shall be referred to arbitration. It cannot be suggested that because that provision appears in the Act, we must regard the Electric Company and the Government as co-ordinate authorities in all matters within the sphere of the Electricity Act or connected with the operation of the Electric Company's works so that the Government cannot exercise any control over them. A subsidiary argument about arbitration was urged namely that S. 19 of the Act provides that :

"a licensee shall, in exercise of any of the powers conferred by or under this Act, cause as little damage, detriment and inconvenience as may be and shall make full compensation for any damage, detriment or inconvenience caused by him or by anyone employed by him;"

and sub-S. (2) of that section goes on to provide that save in a particular case:

"where any difference or dispute arises as to the amount or the application of such compensation, the matter shall be determined by arbitration."

It is suggested that that indicates that any dispute between the Corporation and the Electric Company in respect of any matter shall be decided by arbitration and the Corporation can exercise no control under its own Act over the Electric Company. But if a private person suffers nuisance from anybody who conducts operations such as those which come within S. 287, City Municipal Act, he has his right of suit; but that does not prevent the Commissioner from exercising his powers of regulation under the City Municipal Act to prevent inconvenience from being caused. If the intention of the Electricity Act is that a person inconvenienced by the Electric Company, instead of having a right of suit, must refer his dispute to arbitration how can that in any way affect the power of the Commissioner to exercise his control under the City Municipal Act? The two things are not connected in the way suggested.

What at first sight might appear a more powerful argument for the Electric Company is that it is a public utility company operating under a statute with compulsory obligations to the public, which can be enforced by penalties. It has been suggested that such a company, performing cumpulsory duties must be regarded as exempt from the control of of the local authority. In that connexion several interesting cases were cited before us. In *Uckield Rural Council* v. *Crowborough District Water Co.* (7) the Water Company under its special Act had been empowered to build a water-tower

(7) [1899] 2 R. B. 664=68 L. J. R. B. 1009=81 L. T. 539=48 W. R. 63=16 T. L. R. 3.

in a particular place; nevertheless they were held to be subject to the control of the District Surveyor, to whom they had to submit the plans and sections of their proposed water-tower before its erection. There was a public utility company operating under its own private Act and proposing to build a tower in the very place where the Act empowered it to build it and yet it was held to be subject under the generel law affecting the neighbourhood to the District Surveyor who had his duties to protect the interests of the public by seeing that it was a safe and properly constructed building. *Moran & Son Ltd.* v *Marsland* (8), has also been quoted, another waterworks case, in which the company were empowered by their special Act to construct a reservoir in a particular place and yet were held to be subject to the general law in the matter of submitting their plans for the approval of the District Surveyor.

That case is interesting because Alverstone, L. C., who presided over the Bench also presided over the Bench which decided *Surrey Commercial Dock Co.* v. *Bermondsey Corporation* (4). *London County Council* v. *Wandsworth and Putney Gas Co.* (9), is a similar case. *London County Council* v. *District Surveyors Association and Willis* (10) is an interesting case. There a building was erected by the local authority itself in discharge of its own statutory duties for the purpose of a school house which was approved by the Board of Education, the department of Government concerned; and yet the Court held that the building required also under the general law the approval of the District Surveyor. In that case it was urged that if the local authority in the matter had to submit to the control of two other authorities the the Board of Education and the District Surveyor, there might be a conflict of authorities. But Lord Alverstone was not moved by the argument and said that there was no reason why the local authority should not satisfy the requirements of both the other authorities. *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (11) is perhaps an even more marked case. There the Electric Supply Corporation wished to build a street-box for the purpose of their supply lines and they proposed to do so, as required by their Act in accordance with the regulations of the Board of Trade. They obtained the approval of the Postmaster-General, as required by their Act. They also obtained the approval of the road authority. Nevertheless the Court held that under the general law they were bound also to obtain the approval of the District Surveyor who had public interests to guard different from those which the other authorities had to protect. There it will be seen that there were four authorities concerned, who might have been in conflict. But Wills, J., when that suggestion was put forward, replied that it might be supposed that the authorities were reasonable men, who would adjust their requirements in the interests of the public. Those cases are interesting because they concerned statutory bodies or public utility bodies working under private Acts of their own, all of which had compulsory duties to perform enforceable, except in the case of the School Board, by penalties, and in two of the cases there was a possibility of conflict between the various authorities which they had to satisfy. But in each of those cases it was found that there was no inconsistency between the special Act and the general Act, and therefore the bodies concerned were subject not only to the provisions of their special Acts, but also to the provisions of the general Acts.

We need not go so far as England to find cases where persons are required to take out licenses from two authorities in regard to the same matter. Under the Arms Act, if a shopkeeper in Madras wishes to sell arms and ammunition, he must get a license from the Commissioner of Police as representative of the Government; but he must also get a license from the Commissioner of the Corporation for storing ammunition. If a shop-keeper wishes to sell alcoholic spirits, he must get a license from the Abkari Department, but he must also get a license from the Commissioner of the Corporation for storing the spirits.

(8) [1909] 1 K. B. 744=78 L. J. K. B. 346=100 L. T. 374=73 J. P. 114=25 T. L. R. 235.
(9) [1900] 82 L. T. 562=64 J. P. 500.
(10) [1909] 2 K.B. 133=78 L. J. K. B. 729=100 L. T. 890=73 J. P. 291.
(11) [1903] 88 L. T. 772=67 J. P. 286=1 L. J. R. 551.

If one of the oil companies which supply this country wishes to have an oil-container for anything over 500 gallons of petroleum, it must get a license from the Government under the Petroleum Act. But if it wishes to have a container within the limits of the City of Madras it must also get a license from the Commissioner of the Corporation. That instance perhaps illustrates best the necessity for such double control. It is possible that one of the oil companies might acquire a strip of land along the Marina and propose to build there a number of huge oil containers. The authorities concerned under the Petroleum Act might issue a license for that, having first assured themselves that the containers and the installation would be safely constructed and would cause no danger to the public. But the Commissioner of the Corporation, if he was asked for a license for storing oil in those containers, would very properly refuse to grant it, refuse to allow a row of huge and hideous containers to be built upon the edge of the Marina and so spoil one of the great attractions for which this city is famous all over the world. He would then be acting under the powers given to him by the City Municipal Act for the general comfort and convenience of the inhabitants of Madras. There is nothing inconsistent in the sanction of two authorities being required in cases such as that.

But if Sir Ramaswami Ayyar is not able to satisfy us that in this case we have a special Act or anything equivalent to a special Act in conflict with a general Act, he is prepared to go almost to the other extreme and has urged in another part of his argument that, so far from being a special Act, the Electricity Act is a code containing the whole law on the subject of electricity in such a comprehensive way that those who get licenses under the Act are free from the control, of any other law or authority in respect of their oporations, buildings, machinery and apparatus. That, I think, is a contention very difficult successfully to maintain. To begin with, the Electricity Act does not purport to be a code. It does not even purport to be a consolidating Act like the Arms Act, the Abkari Act or the Petroleum Act. It is an Act to amend the law relating to the supply and use of electrical energy. So far from being obviously complete in itself, as I have mentioned, a great deal of time was spent before us in trying to ascertain whether a license issued under this Act can extend to generating station and whether, as I have assumed, a license under the Act can be held to include a license to generate electricity. It is quite clear that the Act is directed to the supply and use of electricity and not primarily to generation. If we examine the Act, I think it is clear that it is not intended to be a comprehensive Act and to include everything concerning the generation, supply and use of electric energy.

If a man wishes to establish a station to generate electricity for his own domestic or industrial purposes or for conducting scientific experiments, he does not require any license under the Act whatever. In my opinion the Act can in no sense be described as a "code," unless we use that word as meaning an Act including all the provisions which the legislature has thought it necessary to enact on any particular subject, whether those provisions are very restricted or very comprehensive. Speaking for myself, I see no purpose in using the word "code" in that sense. What is more interesting and noticeable about the Electricity Act is that there are no words in it such as those I have mentioned in the Railways Act—"notwithstanding any other enactment in force" or anything of that sort. There is nothing explicit in the Act to show that it was intended to exclude the operation of any other Act. It will be seen that there is nothing in the Act to show what kind of machinery may be used in the generation of electrical energy, what kind of apparatus may be used in connexion with the motive power selected, or what authority is to control the use of that machinery or the use of that apparatus except S. 37 (2) (f), which empowers the Governor-General in Council to make rules for the whole or any part of British India for the protection of persons and property from injury by reason of contact with, or the proximity of, or by reason of the defective or dangerous condition of, any appliance or apparatus used in generation. Sir Ramawsami Ayyar suggests that that rule-making power excludes the control of any local or other authority. I cannot agree with him.

The power to make general rules for the whole of British India or any considerable part of it cannot make local control and the consideration of immediate local conditions unnecessary. We are asked to suppose that, because in their license the Electric Company are empowered to have a generating station somewhere within the limits of Madras, they are free from the ordinary control of the local authority in respect of the steam-boiler which they use to provide motive power for generation. It is the steam-boiler with which we are concerned in this case. We have ascertained that, in spite of this suggestion that the Electricity Act is a code complete in itself, which excludes the operation of all other Acts and authorities, this very steam-boiler is regularly inspected by the Inspector of Boilers under the Boilers Act; and it has not been suggested to us after the discovery of that fact that the Boilers Act does not apply to this boiler. Under the Boilers Act no one is allowed to use a boiler of more than five gallons in capacity until it has been examined by the Inspector of Boilers and a certificate has been obtained from the Chief Inspector of Boilers fixing the pressure up to which it may be used. A license under the Electricity Act is subject to the control of the Boilers Act in that way just as every one else is. But it is impossible to fit in with the theory that the Electricity Act and the license issued under it have the effect that those who get the license are exempt from the control of any authority under any other Act. Nor can it be supposed that, if the Electricity Company now wished to extend their generating station by raising another building, they could ignore the building regulations, to which everyone else in Madras is subject, that they could raise the building to any height they liked, could make it overhang a public highway, could ignore all sanitary regulations, or so arrange that the drainage from the building went, not into the municipal system of drains, but into a public road.

I can see no reason whatever for supposing that, because the Electric Company have got a license under the Electricity Act, they are free from the building regulations in such matters. Nor can it be suggested reasonably that, if they chose to give up steam as their motive power for generation and to install petrol-engines for that purpose, they could store petrol to any amount for their engines without obtaining any license for doing so. Nor can we suppose that, because this boiler is often subject to the inspection of the Inspector of Boilers, the control of the Commissioner of the Corporation under S. 288, City Municipal Act, is excluded. The Inspector of Boilers looks to the safety of the boiler. He has to see that it is in proper working order and has to see that it is not used at an excessive pressure. But the Commissioner of the Corporation in the interests of the public, may have other matters to look to. Under the section he may refuse to give permission for the use of a boiler if in his opinion its position is objectionable. If, for instance, the boiler was put close to a public highway without any wall between it and the road, so that, when the furnance was open, sparks might fly out on to passing carts, the Commissioner might very reasonably say that that position was very objectionable, though the Inspector of Boilers thought it quite safe from his point of view, as the boiler was not likely to explode. Under S. 288 (3) the Commissioner is empowered to insist that any chimney in connexion with any steam boiler in the city shall be of such height and dimensions as he may fix. That may be a most important point as, if the chimney from the furnace of this boiler were too low, it might happen that in the prevailing winds smoke from the chimney would blow regularly every afternoon into a mosque or into a fruit market. The control of the Commissioner would be very necessary in the interests of the inhabitants of Madras, or those of that part of the town in such circumstances. There is therefore nothing unreasonable in this boiler being subject to the control of the Commissioner under S. 288, City Muncipal Act.

Finally it has been suggested, as in the other case, that the Commissioner might exercise his powers in connexion with this boiler in a perverse and unreasonable way and so bring the operations of the Electric Company to a standstill. In regard to that it may be noticed that, if the Electric Company had proceeded under the City Municipal Act in the first instance, they would have obtained the permission of the Commissioner before

the boiler was put up and so there would have been no likelihood of their operation being broken off by any order of the Commissioner. But apart from that the contention that the Commissioner might act in an arbitrary and perverse way so as to bring the operations of the Electric Company to a standstill is in my opinion of no weight whatever. Apart from the facts that his powers are given to him for regulation, not for prohibition, that he has to give reasons for his orders and that there is an appeal against his orders, the possibility that he might act perversely is no reason for questioning his powers. The dhobies of Madras perform services for the citizens of Madras at least as important as the service performed by the Electric Company. Most people, I suppose, would agree that it is more essential to have clean clothes than to have electric light. The dhobies of Madras might very well think that they carry on their occupation by a higher right than a license fro n the Government, that they do so by custom, tradition, birth and caste. But if they were to refuse to submit to the control of the Commissioner under S. 287, City Municipal Act, on the ground that they feared that the Commissioner might be so perverse as to prohibit them from washing clothes within the City of Madras at all, would anyone listen to them for a moment ? All of us are subject to various authorities. We cannot escape submission to those authorities by saying that we fear that the powers of the authorities will be abused. If that were allowed, all Government and administration would be at an end.

In my opinion there is nothing inconsistent between the Electricity Act or the license issued under it to the Electric Company and the City Municipal Act in respect of the boiler with which we are concerned, and there is no reason to suppose that the Electric Company are exempt from the control of the Commissioner of the Corporation under S. 288, City Municipal Act. In my opinion this appeal also should be allowed with costs throughout, and a declaration should be made that the Electric Company are not entitled to use the steam-boiler in their generating station without obtaining the permission of the Commissioner of the Corporation under S. 288, City Municipal Act.

In each of these appeals the Advocate's fee allowed will be Rs 250.

L. A. P. No. 265 *of* 1927.

Anantakrishna Ayyar, J.—I agree. It is enough for the disposal of this particular appeal to consider the provisions of the Tramways Act. The argument in the lower Court, as far as I could see, did not proceed after having due regard to the special provisions of the Tramways Act. The two cases seem to have been argued on a common basis, namely, whether when a special Act contains provision and confers special powers, they could be taken to be in any way affected by the general powers conferred upon another body by a later general Act. That is the question which will have to be discussed in detail in the connected appeal. For the purpose of disposing of this appeal, as was pointed out by my learned brother, it is unnecessary to discuss this question. However convenient it might be for the tramway authorities to own and possess workshops of their own, the Act, for reasons best known to the legislature, has not provided for workshops to be necessarily owned by tramway companies as part and parcel of their undertaking. That being so, the basis of the distinction which the learned advocate for the Tramways Company sought to rely upon fails. It is unnecessary for the purpose of disposing of this appeal to say more on this particular point. I may however say, as the question has been very fully discussed before us in the connected appeal, that even if I should be mistaken in my above view regarding the Tramways Act, there is nothing in that Act which, in my view, would preclude the application of S. 287, City Municipal Act. There is really nothing inconsistent in the provisions of the two Acts on the point now before us. As I propose to say something on the rules governing the applicability of a special law in relation to a later general enactment in the connected appeal, I do not think it necessary to say more at this stage. I agree that the appeal should be allowed : I also agree to the form which the decree is to take in this particular case.

L. P. Appeal No. 264 *of* 1927.

Anantakrishna Ayyar, J.—I agree that this appeal should be allowed. The question that arises in this case is whether the Madras Electric Supply

Corporation, hereinafter called, for purposes of this judgment, the Company, should take the permission of the Commissioner of the Corporation of Madras in connexion with a steam-boiler which the company has installed in its workshops and generating stations at Basin Bridge. The learned City Civil Judge, and on appeal the learned Judge of this Court, both held that the company was not bound to take the permission of the Commissioner under S. 288, City Municipal Act. It was argued by the learned advocate who appeared for the appellant, the Municipality, first, as a sort of a preliminary objection, as I understood him, that the Electricity Act deals only with the supply of electrical energy and not with the generation thereof and accordingly the boiler admitted to be installed for the purpose of generating electrical energy could not possibly come within the scope either of the Act or of the license which the company has got from the Government under the Electricity Act. If this objection is sustained, then straightaway the appeal has to be allowed. I may mention that this objection was not taken either in the lower Court or before the learned Judge on appeal.

The provisions of the Electricity Act have to be carefully examined for the purpose of deciding whether there is really anything in the objection. No doubt the preamble of the Act speaks of the supply and use of electrical energy, but I do not think that that should be taken to be conclusive of the matter. Though I cannot say the Act is very clear, yet, having regard to the various sections of the Act to which our attention was drawn by the learned advocate for the company (respondent), I do not think that this appeal should be allowed on such a narrow ground as the one suggested by the learned advocate for the appellant. Ss. 7, 32, 33, 34 and 37, among other sections of the Act, deal with generation of electrical energy; and there are provisions in the Act, in cases where the license is revoked, as to whether the generating station also passes to the purchaser to whom the property may be sold, the policy of the Act being that in the absence of a declaration that the generating station should not be taken to be part of the undertaking, it would pass. S. 37 which empowers the Governor-General to frame rules also refers to rules that might be made with reference to the generation of electrical energy. Further there is the definition of the word " works " in S. 2, Cl. (n). "Works" includes any building, machinery etc. and though it would have been more satisfactory if the Act had been more explicit regarding generating stations also, I think, having regard to the observations of Scrutton, L. J., in *Farnworth* v. *Manchester Corporation* (12) at p. 541, that the word "works" include buildings, and therefore in such cases, should be taken to include generating stations also in the absence of anything contrary. The following are the observations at p. 541:

" The company could construct such works (which include buildings and generating stations) as were necessary and incidental to such supply."

The heading of the English statute which was the subject of discussion in the English case was also similar to the heading and preamble of the Indian Act, namely for the supply of electrical energy etc. On the whole, I have come to the conclusion that I should not uphold the preliminary objection and dispose of the appeal on that basis only. I therefore propose to proceed to consider the appeal on its merits.

Another point was raised by the learned advocate for the appellant, namely that as the Electricity Act on which the company relies is an Act of 1910 whereas the City Municipal Act is one of 1919, the later Act should be taken to overrule the provisions of the earlier Act, and that without considering anything else for the purpose of disposing of this appeal, the earlier Act should, if I understand him properly, be ignored. I do not think that this is a proposition to which I can accede. Various decisions were brought to our notice by the learned advocate for the respondent where the Courts had to consider the effect of two Acts, one special but earlier Act and a second, a general but later Act; and the mere circumstance that the general Act was one of later date has not been held in any of the cases to conclude such a question. I therefore think that the second point on which the learned advocate for the appellant relied is also not sustainable.

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(12) [1929] 1 K. B. 533.

A third point was raised by him, and it turned on the provisions of the City Municipal Act. The learned advocate drew our attention to various sections of the Municipal Act which contains exemptions either in the case of certain persons or in the case of particular kinds of property from taxation. He drew our special attention to Ss. 101 and 102 and observed that under S. 102 the Madras Port Trust, which under a prior Act enjoyed exemption from taxation, has been brought in, though made liable only to pay a lower rate of tax. But I think that such considerations, though relevant, are not in any way conclusive of the real question before us which has to be decided on a reference to the particular provisions relevant to the case. Again it cannot be said that, because the Electricity Act contains certain provisions authorizing the company to break open highways for particular purposes, their powers are confined only to the same and that they enjoy no other rights under the Act. As I said, all this would be of use in construing the particular provisions of the Acts which are alleged to be consistent or inconsistent with each other, but by themselves these considerations would not be conclusive on the question before us.

On the other hand, on the side of the respondent company the learned advocate argued that, because certain obligations were imposed upon them by statute therefore it must be taken that all incidental and subsidiary rights which they should have for the purpose of properly exercising their operations with a view to discharge their obligations should be taken to have been preserved to them and not in any way affected by any other enactment. He drew our attention particularly to S. 3, sub-Cl. (1), S. 4, sub-Cl. (11), S. 22 and S. 42 among others, of the Electricity Act. It is true that obligations are imposed on the company by the Act and by the license, but the mere fact that certain obligations are imposed and even penalties attached for the non-fulfilment of these obligations does not in my opinion, free them from obligations imposed by other enactments, if on a proper construction of such other enactments the Court comes to the conclusion that they are liable to those other obligations also. The existence of such obligations does not necessarily give them a free exemption from provisions of other Acts which have operation over a particular locality or over the people inhabiting or carrying on operations in a particular place. No doubt in construing any particular provision on which the decision of a case might turn, it would be legitimate to have this consideration also in view, but it should not be taken to be in any way conclusive of the question Similarly, another argument was advanced by the learned advocate for the respondent that the Electricity Act should be taken to be a code in itself and that the rights and liabilities of the parties should be adjudicated upon only on the basis of the provisions contained within the four corners of the Code and the rules framed thereunder. I am unable to agree. It is not necessary for me to go through the ground covered by the judgment of my learned brother on this point. The admitted existence of control under the Boilers Act appealed to me in this connexion. On going through the Electricity Act, I find that the Act does not make provision for many things for which one would expect provision to be made in the Act if it was intended to be a code; for the essence of a code is to be exhaustive. As I said, this was a new argument suggested by the learned advocate for the respondent before us, and for the other reasons given by my learned brother, I do not think that we must proceed on the footing that the rights and liabilities of the parties are governed only by the provisions of the Electricity Act and the rules framed thereunder and by no other enactments outside the same.

Having now noticed the preliminary argument so to speak, urged by the learned advocates who appeared in the case for either side, I proceed to discuss the real question that arises for decision. Before doing so I may state that the general rule of construction of statutes contended for by the learned advocate for the respondent is not open to question. The learned advocate for the appellant does not question the rule and a reference to legal authorities makes it absolutely clear that the rule contended for by the respondent has been taken to be the rule in existence from very early times. The learned advocate for the respondent referred us to a case in *Barker* v. *Edgar* (13), the particular passage he

[13] [1898] A. C. 748.

referred to being at p. 754. It is a judgment of the Privy Council; Lord Hobhouse remarked as follows:

"The general maxim is *generalia specialibus non derogant*. When the legislature has given its attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms."

Speaking with reference to this principle, Turner, L. J., observed as follows in *Trustees of the Birkenhead Docks* v. *Birkenhead Dock Co.* (14):

"The rule seems to be a very ancient and settled principle of law. That appears to be the rule as laid down by the learned Jenkyns, J., in Sir Foulke Grevil's case (reported in his work called Eight Centuries of Reports — the Third Century, Case 41, p. 120). Although the principle of law is not open to any doubt, difficulty often arises in its application to particular cases."

In this case no reference is made to any steam-boiler in the Act, or in the license granted to the company. Reliance is placed by the company on clause 7 (f) of its license which is to the following effect: "The generating station is to be within the area of supply." If I understood correctly the argument of the learned advocate for the respondent on this point, his argument seems to be this: the Electricity Act is a special Act; the license is given under that Act; the license must be taken to incorporate all the relevant protions of the Act into it; the license states that the generating station is to be within the area of supply. Under R. 4 the area of supply is practically the whole of the City of Madras; therefore it was argued that this gives the company an unrestricted right to erect a generating station anywhere within the twenty or thirty square miles of Madras, and for that purpose to install steam-boilers anywhere it liked within that area. In support of this position certain English and Indian decisions were referred to.

On behalf of the respondents great reliance was placed on three English decisions reported in *City and South London Railway Co.* v. *London Country Council* (1), *London Country Council* v. *School Board for London* (3), and *Surrey Commercial Lock Co.* v. *Bermondsey Corporation* (4). In the first of the above cases a railway company had obtained statutory powers to make an underground railway with all necessary works connected therewith and to take and use such of the lands delineated on the deposited plans as might be required for that purpose. The company built a station which was found necessary for the purposes of the railway within the limits of deviation, a part of which projected beyond the general line of buildings in the street. It was held that S. 75, Metroplis Management Act of 1862 did not apply. Lindley, L. J., observed at page 521 as follows:

"Upon the true construction of the special Act, it is impossible to read the special and the general Acts together in such a way as to make them harmonize. The limit set by the Act of Parliament is set geographically by the lines delineated on the deposited plans, and is set also by the conditions that every structure shall be necessary for the purposes of the undertaking."

Fry, L. J., observed at p. 525:

"It is obvious therefore to my mind that that clause (in the special Act) is inconsistent with the general statute."

Similarly, Lopes, L. J., remarked at p. 526.

"I think that the construction which I put upon this section makes it inconsistent with the general statute."

Holding therefore that the provisions of the special Act were inconsistent with the provisions of the general Act, the Court held that the special Act prevailed.

In *London County Council* v. *London School Board* (3) it was held that the statutory powers to erect a school on a particular site was inconsistent with the application to that building of the provisions of the Metropolis Management and Buildings Act (Amendment Act) 1876 forbidding the erection, without the consent of the Metropolitan Board of Works, of any building, wall or fence, within twenty feet of the centre of a highway. There, too, the Court held that where there was an inconsistency between a special Act and a general Act, the special Act should prevail.

In the third case, *Surrey Commercial Dock Co.* v. *Bermondsey Corporation* (4) it was held that where a dock company obtained statutory authority to make certain alterations in their dock premises, and it became necessary as ancillary to those alterations to demolish a certain workshop and erect another in its place, it was not necessary to give notice to the local authority of their

(14) (1851) 23 L. J. N. S C 457=4 De. Gex. Mac. & Gor. 732 18 Jur. 883.

intention to erect the new workshop: the Court held that the interference and control involved in S. 76, Metropolis Management Act was inconsistent with the powers conferred upon the dock company under their special Act.

These cases were considered in a later case reported in *Moran & Son Ltd.* v. *Marsland* (8). A water company was empowered by a special Act to make and maintain in the lines and situation and according to the levels shown on the deposited plans and sections, the reservoirs. . . . and other works for collecting and distributing water. The company built two big reservoirs under powers given to them by the Act. Under the London Building Act the builder or other person causing or directing the work to be executed shall serve on the District Surveyor a building notice respecting the building or structure or work. The District Surveyor was bound to supervise any building or work affected by the provisions of the Act for securing the due observances of the provisions of the Act and bye-laws. Some particular buildings were exempted from the operations of the Act. The question arose whether it was the duty of the District Surveyor to supervise the construction of these reservoirs and whether he was entitled to the fees specified by the London Building Act for such supervision. The Magistrate observed as follows at p. 748:

"I do not see anything inconsistent between the powers of the water works company and the powers of the surveyor under the Building Act, and I accordingly make an order for payment of the sums claimed by the District Surveyor. I have arrived at this conclusion in consequence of the decisions of the Judge of the High Court in the cases reported in *London County Council* v. *Wandsworth and Putney Gas Company* (9), *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (11) and *Whitechapel Board of Works* v. *Crow* (15)."

On a case stated by the Magistrate, the Court upheld his view. Lord Alverstone, C. J., after noticing *City South London Ry. Co.* v. *London County Council* (1) and *London County Council* v. *London School Board* (3), and distinguishing them, proceeded to observe as follows, with reference to *Surrey Commercial Dock Co.* v. *Bermondsey* (4):

"There the dock company had special statutory powers to construct certain works, and I will assume that the deposited plans did not specify in detail the mode in which those works were to be constructed. In carrying out those works it became necessary, as ancilliary thereto, to demolish a workshop and to erect a new workshop in its place. The question arose under S. 76, Metropolis Management Act, which provides for notice to be given to the local authority before beginning to lay down or dig out the foundations of any new house or building or to rebuild any house or building. I was a party to that decision, and we held that the interference and control involved in S. 76, General Act, were inconsistent with the powers conferred upon the dock company by the speicial Act and that therefore the dock company need not give notice to the local authority of their intention to erect the new workshop. We did not rely solely upon the section of the special Act which gave the company power to construct the works, but, taking that section with other sections in the Act, we thought that the provisions of S. 76, General Act were inconsistent with the powers conferred upon the company by their special Act. The question therefore before us is whether S. 5, Special Act of 1894, which gives power to water company to make and maintain the reservoirs is inconsistent with the supervision of the District Surveyor under the London Buildings Act of 1894. In my opinion it is not."

The learned Chief Justice made the following further observations with reference to the other English cases quoted before him:

"It cannot be put higher than the provisional order authorizing the construction of the street box under the foot pavement in the street in the three cases I have mentioned in the earlier part of this judgment (Law Times cases), where the requirements of the Board of Trade and of the Postmaster-General had to be complied with. In those cases this Court was of opinion that there was nothing in the control given to the Board of Trade and to the Postmaster-General which ousted the right of supervision given to District Surveyor. We are bound by those cases and they seem to me to be indistinguishable from the present case."

Bigham, J., remarked at p. 758 as follows:

"Under S. 138, London Building Act, every building or structure shall be subject to the supervision of the District Surveyor. I do not feel disposed to place any limitation upon those words, unless the provisions of the special Act are inconsistent with the supervision of the District Surveyor over the particular work. I cannot find anything in the special Act which is inconsistent with the application of that section to the construction of these reservoirs. As therefore there is nothing inconsistent therewith in the Special Act, and as the London Building Act applies to all buildings and structures, it is the duty of the District Surveyor under the Act to supervise the construction of the reservoirs, and he is entitled to fees for the work of supervision."

Walton, J., agreed and made the following observations at p. 759:

(15) (1901) 84 L. T. 595=65 J. P. 549=19 Cox. C.C. 700=17 T. L. R. 469.

"It is then said that even if there are certain requirements of the London Building Act, 1894, which will prima facie apply to these reservoirs, still the provisions of the special Act, under which the reservoirs were constructed, are inconsistent with the supervision of the District Surveyor, and that therefore the sections of the general Act relating to the supervision of the District Surveyor do not apply. I have not myself seen anything in the special Act which is inconsistent with the requirements I have referred to. There seems to me to be nothing in the special Act which prevents the sections of the general Act relating to supervision from applying to the construction of these reservoirs. It is not our province to consider whether the supervision of the District Surveyor in a case like the present is useful or necessary for the protection of the public. We have only to consider whether the case comes within the Act, and, in my opinion, it does."

On behalf of the appellant we were referred to *Uckfield Rural Council* v. *Crowborough District Water Co.* (7) *Galbraith Brothers* v. *Dicksee* (16), *Moran & Son Ltd.* v. *Marsland* (8) and *London County Council* v. *District Surveyors' Association and Wallis* (10).

In *Uckfield Rural Council* v. *Crowborough District Water Co.* (7) a water works company by a special Act was empowered to erect and maintain a water tower in a specific place. Under S. 157, General Public Health Act, by-laws were made by which any persons intending to erect a building should give the local authority notice of his intention and of the date on which the building was to be commenced, and also deliver to them plans and sections of it, and a description of the materials with which it was to be constructed. The Court held that the Water Works Co. were bound to comply with the by-laws made by the local sanitary authority. Ridley, J., was one of the members of the Court which decided this case and some of the other cases relied on by the appellant. A few sentences from the judgment of the learned Ridley, J. show the reasoning of the learned Judge for his decision:

"The Crowborough Water Co. under S. 25, Special Act, had authority to put up a water tower in a particular field. The question for our determination is whether they were entitled to do it without submitting plans and sections to the District Council, and giving the Council notice before beginning the works, in accordance with By-laws 93 and 94 made by the District Council under the Public Health Act, 1875. I am of opinion that the Water Company were not so entitled. It was contended on their behalf that when once they had authority under the special Act, to put up the tower they might put it up as they chose. I cannot accept that view. The precise effect of the special Act is to give them power to put up in another person's field a water tower, that is they had power to put up the tower in that field as though the land was their own. They required a statutory power in order to enable them to take and use the land. When they had got as far as that, they were, in my opinion, in no better position than the private owner who, along with them and all others, must, unless specially exempted by some statutory provision, comply with the provisions of the Public Health Act, under which Act the local authority may make by-laws with respect to the commencement and construction of new buildings. It was contended for the respondents that they were not bound by the by-laws, and that the Public Health Act, 1875, did not apply to them because it was not incorporated with their special Act. . . . . But it does not follow that, because the Public Health Act, 1875, is not incorporated with the special Act, the water company are not bound, like everybody else, by the provisions of the earlier Act. If the directors of the Water Company were, in putting up their water tower, to commit a breach of the criminal law, it could not be contended that the criminal law did not apply to them; yet the argument put forward on their behalf must mean that no Act of Parliament bears upon them at all unless specially mentioned in their special Act. The real question is whether, under S. 93, Water Works Clauses Act, 1847, the Water Company are protected against the provisions of the Public Health Act, 1875, or are subject to those provisions. I am of opinion that the Water Company are not exempted from the provisions."

Again, at p. 671 the learned Judge proceeded to observe as follows:

"The principle laid down in the cases cited comes to this, that if there is an inconsistency between a special Act and a general Act the provisions of the special Act are not overridden by those of the general Act."

His Lordship quoted *City & South London Ry. Co.* v. *London County Council* (1) (the railway case), and observed with reference to that case as follows at p. 672:

"The Court of appeal held that the powers given by the special Act were inconsistent with those given by the general Act, and on that ground they held that the County Council could not interfere with the building. I think it is clear that but for that inconsistency the decision would have been otherwise. There is no such inconsistency in the present case. The power given to the Water Company is to put up a water tower in a particular field—nothing more. If the District Council had required that it should be put up in another field they would have required something inconsistent with the power given to the Water Company by their special Act. What the County Council did in fact require did not affect the powers of the Water Company under their special Act."

It must be noted in connexion with this case that the Water Company in

(16) [1910] 102 L. T. 890 = 74 J. P. 348 = 8 L. J. R. 800.

question was bound to supply a certain quantity of water to the area concerned, and yet it was held that the water company was subject to the provisions of the Public Health Act, and bound to give notice as required by the by-laws and supply plans, etc., to the local authority in connexion with any building which the Water Company might put up in carrying out its work, and discharging its obligations.

In my opinion this last case is very similar to the case we have to decide, and adopting the reasoning of Ridley, J., we have to hold that the respondent is subject to the provisions of S. 288, City of Madras Municipal Act. The decision in *Uckfield Rural Council* v. *Crowborough District Water Co.* (7) has been followed in the two cases reported in the English Law Times mentioned already.

Having examined the provisions of the Electricity Act, the license given to the respondent, and the provisions of the City of Madras Municipal Act, it seems to me that there is no inconsistency in applying S. 288, City of Madras Municipal Act, to the respondent. I do not understand that the plans deposited by the respondents mentioned anything about any steam-boiler, or about the position in which it was to be installed. The reasoning adopted by the English Courts in the cases cited on behalf of the respondent does not, in my opinion, apply to the present case. The position of a railway company, authorized by its special Act to put up any buildings necessary for their purposes in the place covered by the lines marked in the plan deposited, is different from the position of the respondent who is only bound to have the generating station within the City of Madras (a rather wide area), and not on any specified plot. The respondent's case is also different from the case of an authority entitled to put up a school building on a particular plot. The present case would seem to be similar to the class of cases decided by Ridley, J., referred to above. I may also observe that the circumstance that the plan deposited might show the necessity for a building and even its position would not necessarily lead to the inference that all outside supervision under general Act is necessarily excluded. I may in this connexion quote the following passages from the judgment of Lord Alverstone, C. J., in *Moran & Son Ltd.* v. *Marsland* (8). At p. 755 it was observed :

" It was suggested that the deposited plans gave such a description of the reservoir as to render the supervision of the District Surveyor unnecessary, inasmuch as they indicated how the work was to be carried out. We have seen the deposited plans, and they seem to us to contain nothing more than what ordinarily appears upon such plans, such as the site, levels and size of the reservoir. They do not prescribe, for instance, how the reservoirs are to be constructed, the quality of the bricks, stone or other materials, or how these materials are to be bonded or put together, nor do they contain any provisions for the safety of the public. Therefore the case raises the simple question whether the mere statutory power to construct a work such as a reservoir is of itself sufficient to oust the application of those provisions of the London Building Act, 1891, which relate to the supervision of the District Surveyor. Speaking for myself I have no doubt that some of the things which have been mentioned to us—such, for instance as the thickness of the concrete, the quality of the mortar, and the mode of binding the materials together—require careful supervision. and I have no doubt that proper supervision is given by competent engineers. But I can see nothing in the special Act to show that the supervision which must be exercised by the engineers is to supersede the supervision of the District Surveyor. "

In *Verrall In re*; *National Trust for Places of Historic Interest or Natural Beauty* v. *Attorney-General* (17) at p. 108, Astbury, J., observed that

"A private Act cannot exclude application of public Acts unless and to the extent that the powers are expressly excluded or rendered impossible of application by necessary implication."

In Halsbury's Laws of England, Vol, 27, the law on the point is stated as follows in para. 322, at p. 169:

"Where in the same or a subsequent statute a particular enactment is followed by a general enactment and the latter taken in its most comprehensive sense would overrule the former, the particular enactment is operative and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply."

In para. 362 at p 186, it is stated that:

"A special statute containing no provisions inconsistent with a general statute is however controlled by the latter even if this is not expressly incorporated."

It is clear that similar cases have arisen in England with reference to disputes arising between companies which are in the position of the Electrical Company here and local authorities, and Courts have come to the conclusion that

(17) [1916] 1 Ch. 100=85 L. J. Ch. 115=113 L. T. 1203=80 J. P. 89=14 L. J. R. 171 L. O. S. J. 141.

unless there be real inconsistency between the two Acts, such companies come under the supervision imposed by the local Acts also. Now in the present case all that we have got in the license granted to the respondent is that the generating station should be within the City of Madras. Further, as I have already remarked there is nothing in the Act or the license about erecting any steam-boiler. Electricity can be generated either by the aid of steam-boilers or otherwise. If the company's present contention be upheld it would necessarily follow that if tomorrow they should make up their minds to generate energy by other means then they should have the same privileges attached to them with reference to the new machinery and apparatus which they might like to bring into existence for the purpose. Again how is the existence of a power in the Commissioner under S. 288, City Municipal Act, in any way inconsistent with the exercise of such rights by the company? It was argued that the Commissioner might in his discretion refuse permission and that such an order might be upheld by the Standing Committee on appeal. If there were proper grounds for such refusal the Commissioner would be right in his view as also the appellate authority. But if the suggestion is that the power is likely to be misused by the Commissioner then the answer should be that the Court has no business to assume misuse of power by any officer in whom it is vested by law. If in any particular case a person invested with such authority be found to have exercised it on irrelevant grounds or to have brought to bear upon his decision considerations which should not have been brought to bear upon the same, then Courts are available to persons who feel themselves aggrieved thereby. I do not think that such an argument should be allowed to have undue weight in the matter of construction of these two Acts.

Then something was mentioned with reference to the admission said to have been made in the lower Court on the side of the Municipal Corporation. All that I understood that the admission was really meant to amount to was this: Having regard to the way in which the Electric Company is at present carrying on its operations, a steam-boiler is necessary for the purpose of generating electrical energy. As I said, nothing really turns upon the admission. We have to construe the provisions of the two Acts; and having regard to the way in which Acts similar in scope have been construed by Courts in England, I do not feel any difficulty in coming to the conclusion that the provisions of the two Acts are not in any way inconsistent and that the two can stand together and have operation so far as the point before us is concerned.

Then, two Bombay decisions were quoted before us, and it was argued that the same construction should be placed on the Electricity Act. The decisions are reported in *Municipal Commissioner of Bombay* v. *G. I. P. Railway Company* (6) and *G. I. P. Railway Company* v. *Municipal Corporation of the City of Bombay* (18). S. 7, Railways Act, contains the following provision; "Notwithstanding anything in any other Act for the time being in force etc." With these words occurring in a particularenactment it is impossible to say that any other general enactment should be allowed to have operation against the positive wordings and specific provisions of that particular enactment.

Section 288, Madras City Municipal Act, enacts as follows :

"(1 No person shall without the permission of the Commissioner erect anywhere any steam-boiler or machinery by the use of which smoke, smell, noise, vibration, dust or floating particles of combustible or other matter are produced or danger is likely to arise to the inhabitants of the neighbourhood.

(2) The Commissioner may refuse to give such permission if he is of opinion that such boiler or machinery in the proposed position is objectionable by reason of the density of the population in the neighbourhood or will be a nuisance to the inhabitants of the neighbourhood or may grant such permission under such restrictions and regulations as he thinks fit.

(3) All chimneys in connexion with any steam-boiler or machinery erected within the City shall be of such height and dimensions as the Commissioner may determine."

Under that section it will be noticed that the Commissioner may refuse permission if any steam-boiler in the proposed position is objectionable. He may determine the height of the chimney of any steam-boiler. He may grant permission under such restrictions and regulations as he thinks fit. As I have already mentioned this power on the

(18) [1914] 38 Bom. 565=23 I. C. 765.

part of the Commissioner is not inconsistent with the powers conferred on the company under the license granted to the company under the Electricity Act.

In this connexion, I think it is also relevant to consider that if we allow the contention raised by the Electric Company it would follow that several other provisions of the City Municipal Act would not be applicable to them at all. There are provisions relating to buildings contained in Ss. 232, 235, 243 and 245 of the Act and with reference to some of them similar questions have arisen in England and Courts have there held that such companies are bound by similar provisions relating to buildings. In the absence of more definite provisions in the Electricity Act, I do not see any reason for adopting a construction of the Act which will make many of the salutary provisions designed for public safety and benefit practically a dead letter with reference to such companies, if the company's contention be upheld.

Finally, it was argued that the existence of two authorities on a particular matter is always irksome and would lead to friction and that such a position should not be accepted unless the Act compels us to do so. Here again certain English authorities have been cited to us where not merely two but even three authorities were held entitled to enforce their respective supervision with reference to works carried on by companies like the Electric Company before us. It is not necessary for me to refer at length to those cases here. All that I am now concerned to say is that the existence of two or even more authorities is not by itself conclusive in favour of the contention raised by the learned advocate for the respondent. In my view various powers conferred upon public authorities are conferred for the purpose of enabling them to see that certain aspects of public health, safety, convenience, etc., are not interfered with or ignored by persons proceeding under special Acts. I think therefore that the mere existence of supervision on the part of a plurality of authorities does not by itself necessitate the view suggested by the learned advocate for the respondent.

For these reasons, I think that the provisions of S. 288, City Municipal Act, are not inconsistent with either the Electricity Act, or with the provisions of the license granted to the respondent to which our attention was drawn; and it follows that the Electric Company is bound by the provisions of that section. I agree with the form of decree proposed by my learned brother.

Appellant's advocate's fee will be fixed at Rs. 250 in each appeal, having regard to the nature of the questions involved in these cases.

P.R.S./R.N. *Order accordingly.*

A. I. R. 1931 Madras 170

MADHAVAN NAIR AND CORNISH, JJ.

Kunthi Ammal and *another*—Defendants—Appellants.

v.

Sarangapani Chetti —Plaintiff—Respondent.

Appeal No. 139 of 1928, and Civil Revn. Petn. No. 1048 of 1928, Decided on 22nd April 1930, from order of City Civil Court, Madras, D/- 14th November 1927, in Original Suit No. 580 of 1926.

Arbitration Act (1899), Ss. 2, 3, 4, 8 and 9 —Agreement to refer dispute to five panchayatdars – One refusing to act—Dispute exclusively triable by High Court—As High Court had jurisdiction to try suit, so case could not be governed by provisions of Civil Procedure Code—High Court also could not appoint another panch in place of one refusing under Ss. 8 and 9 and hence could not give any relief as matter was referred to five panchayatdars.

Where there was an agreement to refer the matter in dispute to five panchayatdars in arbitration and one of them refused to act and where the suit in respect of the dispute could be filed in the High Court at Madras:

Held : that under the circumstances of the case, as the High Court at Madras had the exclusive jurisdiction to try the suit, the case could not come under the provisions of the Civil Procedure Code. As the matter was referred to five panchayatdars, one of whom refused to act, the High Court could not according to Ss. 8 and 9 do anything or give any relief in the case because the High Court could not appoint a fresh arbitrator in place of the panch refusing to act as these sections would apply only to the cases where there was a single arbitrator or but two arbitrators. This disability was certainly "a great blot in the Act" which ought to be removed : 43 *Bom.* 809 *Foll.*; *In re Smith Service* and *Nelson & Sons Ltd.*, (1890) 25 *Q. B D.* 545, *Rel. on.* ; *A. I. R.* 1921 *Bom.* 185; *Manchester Ship Canal Company* v. *S. Pearson & Sons Ltd.*, (1900) 2 *Q. B. D.* 606 ; *A. I. R.* 1922 *Bom.* 444 and *A. I. R.* 1929 *Cal.* 177, *Ref.* [P 173 C 1,2]

K. V. Sesha Ayyangar — for Appellants.

P. V. Venugopala Ayyar—for Respondent.

Madhavan Nair, J.—This civil miscellaneous appeal arises out of an order passed by the City Civil Judge in a suit to have an agreement submitting a case for arbitration filed in Court and to provide for the arbitration in accordance with law. The agreement sought to be enforced was entered into between the plaintiff and the defendants referring disputes about their joint family property to five panchayatdars asking them to divide it among the signatories to the document. One of the panchayatdars refused to act as an arbitrator. For this and other reasons the defendants contended that the agreement could not be enforced. They also contended that the City Civil Court has no jurisdiction to entertain the suit as it fell within the scope of the Indian Arbitration Act 9 of 1899 which vests the High Court with exclusive jurisdiction to try suits of this nature. The learned City Civil Judge overruled these contentions and passed the following order :

" I therefore direct that Bhagirathi Pillai be appointed arbitrator in place of the person who has resigned and this additional person newly appointed to dispose of the case according to law and submit a finding within one month."

This appeal has been filed by the defendants against this order.

It is urged on behalf of the appellant that the Indian Arbitration Act gives exclusive jurisdiction to the original side of the High Court to determine this matter, as, if it were the subject-matter of a suit, the suit could be instituted only in a Presidency Town, and that Sch. 2, Civil P. C., provides that Sch. 2 of that Code shall not apply to any case falling within the purview of the Indian Arbitration Act. On behalf of the respondents, it is contended that the Indian Arbitration Act will not apply to submissions or arbitrations where there are five arbitrators as in the present case, i. e., more arbitrators than one contemplated by Ss. 8 and 9 of the Act and that even if the Act applies,

the City Civil Court has jurisdiction as it is directed under the City Civil Courts Act, Madras Act 7 of 1892, to take cognizance of all suits triable on the original side of the High Court provided the value of the suit does not exceed Rs. 2,500 and provided further that the suit does not relate to probate, matrimonial and insolvency proceedings."

It is admitted that the present case falls within these provisions of the City Civil Courts Act.

On the above arguments, two questions arise for consideration : ( ) Whether the jurisdiction to determine the subject-matter submitted to arbitration in the present case lies exclusively with the High Court; (2) if, so, is the City Civil Court vested with that jurisdiction under the City Civil Court Act ? As we shall presently show in the view that we take of this case, it is not necessary to express any definite opinion on the second question.

Under the Indian law, references to arbitration are governed by the provisions of the Code of Civil Procedure and the Indian Arbitration Act (Act 9 of 1899). Under S. 89, Cl. (1), Civil P. C.,

" Save in so far as is otherwise provided by the Arbitration Act 1899, or by any other law for the time being in force, all reference to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2."

Section 3, Act 9 of 1899, says that Ss. 523 to 526 (paras. 17, 19 and 20 of Sch. 2) shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply. This section excludes those references to arbitration to which the provisions of the Act apply from the operation of paras. 17 to 20, Sch. 2, Civil P. C., S. 2 of the Act states :

" This act shall apply only in cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency Town."

According to this section, the Act would apply to an agreement forming the subject-matter of a reference to arbitration only if a suit between the parties with respect to that subject-matter could be instituted in a Presidency town. S. 4 of the Act states that " the Court " referred to in the Act in the Presidency towns is the High Court. In the present case it is clear that if a suit is instituted by the parties with reference to the subject of arbitration, i. e. the division of their family property, that suit will have to be instituted at Madras, and therefore under Ss. 2 and 4 of the Act, the High Court will be the Court having jurisdiction to determine the reference to arbitration. This is the argument of the appellant. The respondents meet this argument by saying that the plaintiff in order to succeed in his contention should, besides showing that his case

falls within S. 2 of the Act should also show that the provisions of the Act would apply to the submission or arbitration in question. This argument has special reference to S. 3 of the Act and is put in this way: Having regard to that section only those submissions, i. e., written agreements to submit present or future differences to arbitration whether an arbitrator is named therein or not, (see S. 4 (b) to which the provisions of the Arbitration Act will apply, will be exempt from the operation of the Civil Procedure Code, in other words, if any of the provisions embodied in any section of Arbitration Act will not apply to a "submission" then that "submission" will be governed by the rules of the Code of Civil Procedure. In this case as one of the panchayatdars has refused to act, it is conceded that without resorting to S. 8 or S. 9, if these sections will apply his vacancy cannot be filled up and that relief cannot be given to the plaintiff. The respondent proceeds to show that Ss. 8 and 9, Arbitration Act, will not apply to a submission like the present one wherein the dispute is referred to the arbitration of five panchayatdars as those sections will apply only to cases where there is "a single arbitrator or but two arbitrators." In support of his interpretation of Ss. 8 and 9 of the Act *Gopalji Kuverji* v. *Morarji Jeran* (1) is relied on. If this argument is accepted it will follow that the question of the application of the Act should be considered with reference to both Ss. 2 and 3 and that if any of the sections of the Act will not apply in the matter of any submission, then despite the fact that a suit in respect of its subject-matter if instituted will undoubtedly lie in the High Court, the provisions of the Code of Civil Procedure will become applicable and the City Civil Court will have exclusive jurisdiction to deal with the matter.

We will now proceed to see how far this argument of the respondent can be accepted. S. 8, Arbitration Act, deals with the power of the Court in certain cases to appoint an arbitrator, umpire or a third arbitrator. S. 9 of the Act deals with the power which the parties have in certain cases to supply the vacancy. I do not think it is necessary for deciding this case to deal at length with the scope of the provisions of these two sections as I am prepared to accept the reasoning of the learned Judges in *Gopalji Kuverji* v. *Morarji Jeram* (1) in which the question is discussed elaborately. In that case strongly relied on by the respondent it was held by Scott, C. J., and Hayward, J., reversing the judgment of Marten, J., that in a case of submission to three named arbitrators—all of them after acting have declined to proceed any further the Court has no jurisdiction to appoint fresh arbitrators in their place under the Arbitration Act. Generally stated, following the decisions in *In re, Smith Service & Nelson & Sons, Ltd.* (2) *Manchester Ship Canal Co. Ltd.* v *Pearson Son Ltd.* (3) under the English Arbitration Act, the learned Judges adopted the view that Ss. 8 and 9 would apply only to cases where there is a single arbitrator or but two arbitrators. According to this decision these sections will not apply to the present case as the agreement in question refers the matter in dispute to five panchayatdars, and therefore if the respondent's argument is correct it would follow that the provisions of the Code of Civil Procedure are not excluded under S. 3 of the Act and the City Civil Court must be held to have exclusive jurisdiction to deal with the matter.

The appellants argue that this decision is wrong and rely on *General Electric Trading Co.* v. *Siemens (India) Ltd.* (4). Ss. 8 and 9, of the Indian Act correspond to Ss. 4 and 5, of the English Arbitration Act which correspond to Cls. 12 and 13 of the Common Law Procedure Act of 1854. So far as I can see, though there is some variation in the wording of Ss. 5 and 6, of the English Arbitration Act from the wording of the corresponding section of the Common Law Procedure Act, the purport of the sections remains exactly the same. In my view there is no support for the view of Ghose, J., that the wording of Ss. 5 and 6, English Arbitration Act would make them applicable to cases of three arbitrators, cases to

(1) [1919] 43 Bom. 809=50 I. C. 411..

(2) [1890] 25 Q. B. D. 545=59 L. J. Q. B. 533=63 L. T. 475=39 W. R. 117.

(3) [1900] 2 Q. B. 606=69 L. J. Q. B. 852=83 L T. 45=48 W. R. 669.

(4) A. I. R. 1929 Cal. 177=116 I. C. 625=56 Cal. 848.

which admittedly Ss. 12 and 13, Common Law Procedure Act, would not apply. In this connexion it may be observed that *In re Smith Service* and *Nelson & Sons Ltd.* (2) relied on by the learned Judges of the Bombay High Court was decided after the passing of the English Act of 1899 and under it, it was held that

"where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties and the third by the two so appointed and one of the parties refuses to appoint an arbitrator the Court has no power under or apart from the Arbitration Act, 1889, to order him to do."

In that case Lindley, L. J. made the following observations:

"It certainly looks like a blot in the Act, that by reason of there being there no provision as to three arbitrators as distinguished from two arbitrators and an umpire, Ss. 4, 5 and 6 do not apply but we cannot help that."

This so called blot in the English Act was cured in England by the enactment of the Administration of Justice Act of 1925, 10 and 11 Geo. 5, Chap. 81. This would show that the legislature thought that the interpretation of Ss. 5 and 6, English Act, adopted by the learned Judges in *In re Smith Service* and *Nelson & Son Ltd.* (2) was correct. The blot in the Indian enactment has not been cured by the Indian legislature as was done by the English legislature with reference to the English Act. Having regard to these considerations it seems to me that the interpretation of the learned Judges in *Gopalji Kuverji* v *Morarji Jairam* (1) of Ss. 8 and 9, Arbitration Act is amply supported by the English authorities. The subsequent decision of the Bombay High Court, in *In re Babaldas Khemchand* (5) in no way conflicts with the prior decision in *Gopalji Kuverji* v. *Morarji Jairam* (1). *Mackintosh & Co.* v. *Scindia Steam Navigation Co. Ltd.* (6) shows that:

"where the parties agree to refer their disputes to arbitration without the intervention of the Court, no suit having been brought in respect of those disputes, the Court has no power to order the issue of a commission for the examination of witnesses in the arbitration."

Though I agree thus far with the respondent's contention that the provisions of Ss. 8 and 9, Indian Arbitration Act do not apply to a case of five panchayatdars like the present one, it does not necessarily follow from this conclusion that the Indian Arbitration Act will not apply to the present case. The very case so strongly relied on by the respondent, *Gopalji Kuverji* v. *Morarji Jairam* (1), supports this position. As observed by Scott, C. J., see p. 831 (of 43 *Bom*): "The Act does not attempt to provide for every case" and Hayward, J., points out that though reference to three named arbitrators is not included within the particular provisions of Ss. 8 and 9 they might fall within the provisions of the other sections including S. 19, Indian Arbitration Act. In this connexion attention may also be drawn to the observations of Vaughan Williams, L. J., in *Manchester Ship Canal Co.* v. *S. Pearson & Son, Ltd.* (3), which show that the English Arbitration Act would govern a submission to arbitration even though the reference is to three arbitrators. The conclusion is therefore clear that though Ss. 8 and 9, Indian Arbitration Act, will not apply to the present case, sfill the case will fall under the purview of the Act though the parties are left without any remedy under the Act. This blot in the Act will not, in my opinion, make the Act inapplicable to a case though reference is made in it to five panchayatdars. Two inferences follow from this conclusion:

(1) That S. 3 cannot be used in the manner suggested by the appellant to limit the scope of S. 2, that S. 3 simply means that in cases governed by the Indian Arbitration Act, the operation of the provisions of the Civil Procedure Code mentioned in it is excluded, that the reference to arbitration in the present case is not governed by the provisions of the Civil Procedure Code and is not therefore within the exclusive jurisdiction of the City Civil Court; and

(2) that S. 2 read with S. 4 vests the jurisdiction to deal with the present reference exclusively in the High Court, but that the High Court, in the light of the foregoing observations must be held to be unable to give the relief asked for by the plaintiff under S. 8 or 9 of the Act as according to our interpretation these sections cannot be applied to cases wherein the reference is made to five panchayatdars. This disability is certainly "a blot in the Act" ; but it must remain so till it is cured by the legislature.

(5) A. I. R. 1921 Bom. 185=57 I. C. 997=45 Bom. 1.

(6) A. I. R. 1922 Bom. 444=75 I. C. 221=47 Bom. 250.

It is conceded that if the High Court cannot interfere in the present case, then the City Civil Court which, according to the respondent, is directed to deal with the matter is also helpless, and therefore the second question raised in this appeal as regards the jurisdiction of the City Civil Court under the Civil Procedure Code need not be decided. Having regard to my view that the relief asked for cannot be given to the plaintiff under S. 8 or S. 9 of the Act, we must set aside the order of the lower Court. In the result the plaintiff's suit will be dismissed. In the circumstances we make no order as to costs. No special order is necessary in the civil revision Petition.

Cornish, J.—I agree. In my opinion the Arbitration Act governs the submission to arbitration in the case before us. If that be so, S. 17, Sch. 2, Civil P. C., has no operation ; and it follows that the order of the City Civil Court Judge purporting to be made under that section was without jurisdiction and should be set aside. S. 2, Arbitration Act, states that subject to the provisions of S. 23 (which are not material here) the Act shall apply only in cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could be instituted in the Presidency Town. Admittedly, a suit in respect of the subject-matter of the submission in this case could have been instituted in the Presidency town. Then, S. 3, Arbitration Act, provides that Ss. 523 to 526, Civil P. C., corresponding to Ss. 17, 19, 20 and 21, Sch. 2, Civil P. C., 1908,

"shall not apply to any submission or arbitration to which the provisions of this Act for the time being apply."

The meaning of this is clearly that, when the Arbitration Act governs a submission, the operation of the specified sections of the Civil Procedure Code is excluded. This exclusion is recognized by S. 85, Civil P. C., which says :

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder shall be governed by the provisions in Sch. 2,"

and this must mean that the provisions of Sch. 2 shall apply to an arbitration except when the Arbitration Act says that they shall not. But the contention is that the Arbitration Act has no application when, as in the case before us, the submission is to more arbitrators than are contemplated by Ss. 8 and 9 of the Act. It is established by *In re, Smith Service and Nelson & Sons Ltd.* (2), *Manchester Ship Canal Co.* v. *S. Pearson & Son Ltd.* (3) and *Gopalji Kuverji* v. *Morarji Jairam* (1), that the power given to the Court by Ss. 5 and 6 of the English Act, and by the identical Ss. 8 and 9 of the Indian Act, is confined to cases where there is a single arbitrator or but two arbitrators : see the judgment of A. L. Smith, L. J., in *In re. Smith Service & Nelson & Sons Ltd.* (5). But these authorities do not, nor do the later authorities *In re, Babaldas Khemchand* (5) and *Mackintosh & Co.* v. *Scindia Steam Navigation Co. Ltd.* (6), in my opinion support the argument that a submission ceases to be governed by the Arbitration Act by reason of the submission being to three or more arbitrators. On the contrary that proposition appears to be negatived by the judgment of Vaughan Williams, L. J., in *Manchester Ship Canal Co.* v *S. Pearson & Son Ltd.* (3) where he said :

"In the report of *In re, Smith and Service* (2) the judgments in which it is said that Ss. 4, 5 and 6 (these sections corresponding to Ss. 19, 8 and 9 of the Indian Act) did not apply, must be read in the light of the argument for the appellants. It is there said that S. 4 had no application to the case because no legal proceedings had been taken. It is plain from this that when the learned Lords Justices said that S. 4 did not apply it was not meant that this was because it was a case of reference to three arbitrators, but only because no legal proceedings had been commenced."

In short it was pointed out that the Arbitration Act was not rendered inapplicable to a submission because in a particular instance the powers given to the Court by the Act were unavailing.

On the question which was raised by Mr. Sesha Ayyangar, whether the definition of "Court" in S. 4, Arbitration Act, is to be taken as indicating another exception to the jurisdiction conferred on the City Civil Court by S. 3, Madras City Civil Court Act 7 of 1892. I do not think it is necessary to give a decision, for it is obvious that if the High Court has no power under S. 8 or S. 9, Arbitration Act, to make an appointment of an arbitrator, when the reference is to five arbitrators, the City Civil Court has no such power. For these reasons I agree that the appeal should succeed and be allowed.

P.R.S./B.V. *Appeal allowed.*

* A. I. R. 1931 Madras 175

SUNDARAM CHETTY, J.

(*Sree Rajah*) *Venkata Rangiah Appa Rao Bahadur* and *another*—Plaintiffs—Appellants.

v.

Secretary of State and *others*—Defendants—Respondents.

Second Appeals Nos. 317 to 319 of 1927, Decided on 1st September 1930, from decrees of Sub-Judge, Ellore, in Appeal Suits Nos. 38 to 40 of 1925.

*** (a) Civil P. C. (1908), S. 80—S. 80 is mandatory — Consideration of hardship or absence of prejudice is immaterial.**

The Courts cannot make exceptions or qualifications to the explicit terms of S. 80, on account of considerations of hardship and absence of prejudice or detriment to the interests of the Government: *A. I. R.* 1927 *P. C.* 176, *Rel. on.* [P 176 C 1]

*** (b) Civil P. C. (1908), S. 80—Person or persons giving notice should be same who bring suit.**

The giving of notice about the suit-claim by one plaintiff would not be a strict compliance with the mandatory provisions of S. 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person that gave the notice. There should be identity of the person who issued the notice with the person that brings the suit: 25 *All.* 187 and *A.I.R.* 1930 *Bom.* 367, *Ref.* [P 176 C 1]

(c) Civil P. C. (1908), O. 7, R. 11—Plaint cannot be rejected in part—Non-compliance with S. 80—Suit should be wholly dismissed—Civil P. C. (1908), S. 80.

The plain meaning of R. 11 is that if any of the defects mentioned therein is found to exist in any case, the plaint shall be rejected as a whole. It does not imply any reservation in the matter of the rejection of the plaint. Non-compliance with the requisites of S. 80 may be a ground covered by Cl. (d), R. 11. Even if it should be taken that that clause does not strictly apply to non-compliance with S. 80, still a suit against all the defendants is liable to dismissal on account of non-compliance with S. 80: 29 *All.* 325 and *A. I. R.* 1927 *P. C.* 176, *Ref.* [P 176 C 2]

A. Venkatarayaliah and *M. Appa Rao*—for Appellants.

Government Pleader—for the Crown.

K. Kameswara Rao—for Respondents.

Judgment.—These three are connected appeals arising out of three suits brought by the plaintiffs (appellants) against the Secretary of State for India in Council as defendant 1 and some other defendants in possession of the suit lands in order to establish the plaintiffs' right to resume the suit inams and for a declaration that defendant 1 had no right to enfranchise these inams and also for the recovery of possession of these lands ejecting the other defendants therefrom. Both the Courts below have rejected the plaints in these cases under O. 7, R. 11, Civil P. C., on the ground that the notice under S. 80, Civil P. C., was not given to defendant 1 in the manner required by that section. The only question now arising for consideration is, whether the view taken by the Courts below is correct.

The village in which the suit inams are situate belonged to plaintiff 1. It is admitted in the plaint that plaintiff 1 has sold the suit village to plaintiff 2 and under the contract of the sale plaintiff 2 has been put in possession of the village also. The plaint seeks for a declaration of the right set forth therein in favour of both the plaintiffs and the suit is clearly framed in such a manner as to make it one in which the reliefs mentioned therein are sought for on behalf of both the plaintiffs. Ex. 1, which is dated 22nd July 1921, is the notice sent by plaintiff 1 alone to the Government under S. 80, Civil P. C. The question is, whether the present suit brought by two plaintiffs in the manner above set forth, is maintainable when the notice required by S. 80, Civil P.C., was given by plaintiff 1 alone; in other words, whether such a notice can be deemed to be a sufficient compliance with the requisites of S. 80. That section lays down that no suit shall be instituted against the Secretary of State for India in Council, unless two months before the institution of that suit a notice in writing was given stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. There should also be an averment in the plaint that such a notice was delivered or left as stated in the aforesaid section. As regards the provisions in S. 80 being strict and mandatory or not, it would appear there was some difference of opinion expressed in some of the rulings relating to this section. In some decisions, a strict view was taken, but, in other cases, a liberal construction was placed upon this section and any defect or irregularity was condoned if it was found to be immaterial or unsubstantial. My attention was drawn to those decisions, but in view of the latest pronouncement by their Lordships of the Privy Council in the case *Bhagchand Dagadusa* v. *Secy. of State* (1) it

(1) A. I. R. 1927 P. C. 176=104 I. C. 257=54 I. A. 338=51 Bom. 725 (P.C.).

seems to me that the dictum so clearly laid down by the Privy Council will have to be followed in deciding a question of this kind. At p. 747 (*of* 51 *Bom.*), their Lordships have observed thus:

> "The Act albeit a procedure must be read in accordance with the natural meaning of its words. S. 80 is express, explicit and mandatory, and it admits of no implications or exceptions."

Later on, their Lordships further state thus:

> "To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while S. 80 is mere procedure, is fallacious, for S. 80 imposes a statutory and unqualified obligation upon the Court."

In view of such a clear pronouncement, it is no longer open to argue that the Courts can make exceptions or qualifications to the explicit terms of S. 80, on account of considerations of hardship and absence of prejudice or detriment to the interests of the Government. If the requisites of S. 80 should be literally complied with, I must say that the giving of notice about the suit claim by one plaintiff would not be a strict compliance with the mandatory provisions of S. 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person that gave the notice. There should be identity of the person who issued the notice with the person that brings the suit. In this view, it has been held that a suit brought by a legal representative of a deceased man and a suit brought by a transferee would offend against S. 80, Civil P. C., if the notice required by that section was given by the deceased man or by the transferor: vide *Bachchu Singh* v. *Secy. of State* (2), *Mahadev Dattatraya* v. *Secy. of State* (3). As the dictum of the Privy Council indicates that it is no longer left to the discretion of the Court to hold in favour of the maintainability of a suit in spite of non-compliance with some of the requisites of the section, I have to find against the maintainability of the present suits on the ground that the notice as required by S. 80, Civil P. C., was not given.

It is argued by the learned advocate for the appellants that even if a strict interpretation of S. 80 is made, the plaint, as a whole, should not be rejected, but only so far as plaintiff 2 is concerned. If it is a case of rejection of plaint owing to non-compliance with S. 80 it is not clear how there can be a partial rejection of the plaint in respect of a portion of the claim or as regards some of the parties. A similar question was considered by the Allahabad High Court in the case reported in *Raghubans Puri* v. *Jyotis Swarupu* (4). Referring to S. 54 of the old Civil Procedure Code, the learned Judge states that that section only provides for the rejection of a plaint in the event of any matters specified in that section not being complied with and it does not justify the rejection of any particular portion of a plaint. S. 54 now corresponds to O. 7, R 11, Civil P.C. The plain meaning of that rule seems to be that if any of the defects mentioned therein is found to exist in any case, the plaint shall be rejected as a whole. It does not imply any reservation in the matter of the rejection of the plaint Non-compliance with the requisites of S. 80, Civil P C., was taken to be a ground covered by Cl. (d), R. 11, above referred to. Even if it should be taken that that clause does not strictly apply to the present case, I must hold that the suits are liable to dismissal on account of non-compliance with S. 80, Civil P. C.

It is urged on behalf of the appellants that if it should be taken that the suits have to be dismissed, then, so far as the defendants other than defendant 1 are concerned, the suits may be allowed to be proceeded with. There is real difficulty in acceding to this argument, advanced on the appellants' side. If these suits should stand dismissed as against defendant 1, it means that the Government's right to resume these inam lands stands unaffected and the plaintiffs have no right as against the Government to resume the same. That being so, their claim to recover possession of these lands from the other defendants, should fall to the ground, for the simple reason that they have no right to resume these inams. In this connexion I may also refer to an observation made by the Privy Conncil in the said *Bhagchand Dagdusa* v. *Secy. of State* (1) at p. 748 (*of* 51 *Bom.*) It was contended in that case, that even if the non-compliance with S. 80 defeated the action as against the Secretary of State, it could be proceeded with as against the other

(2) [1903] 25 All. 187.
(3) A. I. R. 1930 Bom. 367=124 I. C. 814.
(4) [1907] 29 All. 325=(1907) A.W.N. 68.

defendant. To meet this argument, their Lordships have observed thus:

"Not only has the suit been thoughout a joint proceeding against the officials concerned, for the purposes of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but without ths presence of the Secretary of State before the Court, the Notification could not be assailed, and if it stands as valid, the Collector's own action could not be successfully impugned."

Similarly, in the present case, if the claim put forward by the plaintiffs against defendant 1 fails, it cannot succeed against the other defendants. However the above observation in that ruling was sought to be distinguished on the ground that in that case there was a necessity of giving notice under S. 80 even in respect of defendant 2; and in the present case there was no necessity to issue any such notice to the other defendants. But I do not think the observation of their Lordships as to the non-maintainability of the action against defendant 2 depends on this circumstance, namely, the necessity of a notice even to defendant 2.

The defect pointed out above being fatal to the maintainability of the suits, either the suits are liable to dismissal or the plaints are liable to rejection. In either view the order of the lower appellate Court seems to be correct. I therefore dismiss these second appeals with costs.

P.R.S./R.K. *Appeals dismissed.*

A. I. R. 1931 Madras 177

WALLER AND REILLY, JJ.

Periyaswami Mooppan and *another*—Accused.

v.

Emperor—Opposite Party.

Criminal Appeal No. 232 of 1930. Decided on 14th July 1930.

(a) Evidence Act (1872), S. 30 — Confession cannot take place of evidence against co-accused.

The confession of an accused cannot take the place of evidence against the co-accused; nor can it be added to supplement evidence otherwise insufficient. Where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence.

"Confession" in S. 30, Evidence Act, means confession of the offence for which the accused persons are being jointly tried: 2 *All.* 444, *Appr.*; *A. I. R.* 1926 *Bom.* 513, *not Foll.*

[P 178 C 1, 2]

(b) Interpretation of Statutes — Two constructions possible — Stricter construction must be adopted in accused's interest— Evidence Act (1872), S. 30.

Where two interpretations of a section e. g., S. 30, Evidence Act, are grammatically possible, the stricter and narrower construction must be adopted in the interest of accused persons.

[P 179 C 1]

E. Antony Lobo and *K. W. Rama Rao*—for Accused.

Acting Public Prosecutor—for the Crown.

Waller, J.—I agree that Ex. G is a statement that should not have been taken into consideration against accused 1. He and the maker of the statement were being jointly tried for murder and Ex. G was not a confession of murder jointly affecting them both. The law on the point was correctly laid down by Straight, J., many years ago in the Allahabad case *Empress* v. *Ganraj* (1), cited by my learned brother. As regards the case *Shivabhai* v. *Emperor* (2), a statement by one of the accused that he by himself had burnt the clothes of a murdered man and would show the place was treated as a confession of participation in the murder and admissible under S. 27, Evidence Act, against him. To that extent the decision seems to be correct, but when it goes on to put forward some circumstantial grounds on which the Judges held that the confession "indirectly affected" another accused not named in it and could therefore be used against him under S. 30, Evidence Act, I find myself wholly unable to follow it.

Apart from the so-called confession, there is, I think, a strong circumstantial case against appellant 1. Against the second, there is that and more, that is to say, his statements Exs. G and H. They show that he was present when the murder was committed. That they give a true account of what happened is incredible. The murder and disposal of the body could not have been the work of one man. Nor is it believable that appellant would have suddenly murdered Ramasamy in the presence of appellant 2 without the previous knowledge and consent of the latter. The scene of the murder was probably deliberately chosen. It was a place where the Periyar channel which was then certain to be in flood, runs close to the road. Doubtless the

(1) [1878] 2 All. 444.
(2) A.I.R. 1926 Bom. 513=97 I.C. 660=27 Cr. L.J. 1140=50 Bom. 683.

intention was, as stated in Ex. H, to throw the body into the channel. Apparently, in the darkness the murderers mistook the water in the burrow pit for the channel. I agree in the order proposed by my learned brother.

Reilly, J. — In this case the appellants, accused 1 and 2, have been convicted by the Sessions Judge of Madura of murdering one Ramswami Moopan, with whom, it has been found, they were dealing in sheep as partners. The learned Sessions Judge has taken into consideration against accused 1 a statement, Ex. G, made by accused 2 before the Sub-Magistrate of Dindigul. In that statement accused 2 does not admit that he took any part in the murder of Ramaswami ; he says that accused 1 killed Ramaswami and then compelled accused 2 by a threat to assist in disposing of the body. The learned Public Prosecutor has contended that Ex. G is a statement which the Sessions Judge was at liberty to take into consideration against accused 1 under S. 30, Evidence Act, because it was a confession, not indeed of murder, but of causing the evidence of murder to disappear, which is an offence punishable under S. 201, I. P. C. In my opinion that contention is mistaken. S. 30, Evidence Act, is a very exceptional, indeed an extraordinary, provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that we do not stretch it one line beyond its necessary intention. It is true that the section provides only that the confession of one accused person may be "taken into consideration" against his fellow accused. As I understand the section, the confession cannot take the place of evidence against the co-accused ; nor can it be added to supplement evidence otherwise insufficient. As I understand the matter, the provision goes no further than this: where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in S. 30 may be thrown into the scale as an additional reason for believing that evidence. But even for that limited purpose the confession must be of the kind intended by the legislature when enacting S. 30. What kind of confession is intended ? The words of the section are :

> "when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved."

In my opinion, "confession," in that collocation of words cannot reasonably be interpreted to mean a confession of any offence in the world, nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of the very offence for which they are being tried, "offence" always including under the explanation to the section abetments and attempts. That appears to me to be the plain meaning of the words. To interpret the word "confession" in the section in any wider sense is to accuse the legislature of using loose language in a matter of great importance. In my opinion we must read the word "confession" as if it were followed immediately by the words "of that offence ;" and that appears to me to be the plain meaning of the section as read by a reasonable man. And indeed, if that were not the meaning, why should the use of the confession be confined to cases where the accused persons are being tried for the same offence ? But, keeping our attention for the moment on the words themselves, if we speak of persons being tried for the same offence and in the same sentence speak of one of them making a confession, how can we mean by "confession" a confession of any other offence unless we are most careless in the use of language ? To my mind the words of S. 30, Evidence Act, leaves no doubt that the confession mentioned is a confession of the offence for which the accused persons are being tried. If the words left us in any doubt, the nature and effect of the provision might be called in to help us. The provision allows a statement of an accused person, not made on oath, not tested by cross-examination, to be used against a person tried with him. What can be the justification of a provision at first sight so startling ?

If, while confessing some minor offence, a man could implicate his fellow accused in a far more serious offence for which they were being tried and the confession could then be used against his fellow accused, would not that be offering to the confessing accused a plain

temptation to make himself useful by throwing the serious blame on his fellow accused while saving his own skin or exposing himself only to a minor penalty? To my mind it is inconceivable that the legislature had any idea of offering to any accused person a temptation to such mean and immoral conduct. But, if the confession which may be used is confined to a confession of the very offence for which the accused persons are being tried, the position is different. Then at least the confessing accused has nothing to gain by his confession; on the contrary he exposes himself to the very penalty which he helps to bring down on his fellow accused. To such a confession it is not entirely unreasonable to allow some weight, and the danger that it may be untrue is at least very greatly reduced. If we examine the effect and nature of the provision, we arrive again at the same result, that it is only such a confession which the legislature can have allowed by S. 30 to be taken into consideration. Lastly, if in this respect two interpretations of the section were grammatically possible, the ordinary canons of interpretation would compel us to adopt in the interest of accused persons the stricter and narrower construction, the construction which gives the less scope to this very exceptional extension of what may be used against an accused person at his trial. Examining the section in any or all these ways in my opinion we must arrive at the same conclusion, namely that "confession" in S. 30, Evidence Act, means confession of the offence for which the accused persons are being tried.

It appears to me surprising that any other interpretation of the section should now be put forward. The interpretation I have indicated as proper was adopted by Straight, J., in *Empress of India* v, *Ganraj* (1), and his view has been followed in a great many later cases. The learned Public Prosecutor quoted in his favour *Shivabhai* v. *Emperor* (2). So far as that case deals with this point, I must say with very great respect that I neither agree with it nor understand it.

In Ex. G, as I have mentioned, accused 2 does not admit that he took any part in the murder of Ramaswami Mooppan; he admits only that he helped to dispose of the corpse. That is not a confession of the offence of murder for which accused 1 and 2 were tried, and therefore in my opinion the learned Sessions Judge in dealing with accused 1 should have excluded Ex. G entirely from consideration. If that is done, what is the evidence against accused 1? There is evidence, which I see no reason to doubt, that for a few weeks accused 1 and 2 had been trading in sheep in partnership with Ramaswami Moopan and that they had taken some sheep bought in the Trichinopoly District south through Dindigul to Madura. There is evidence that on Thursday, 28th November 1929, they arrived at Madura with 12 sheep and stayed that night with P. W. 27, who knew accused 2, as accused 2 had married and divorced a daughter of P. W. 27's neighbour; on Thursday they sold two of the sheep, and on Friday they sold the rest with the help of P. W. 27, who himself bought the last one for Rs. 11-8-0; the money for the sheep sold on Friday was given to Ramaswami Mooppan, who was carrying a money bag; about 4 p. m. on Friday, 29th November, accused 1 and 2 and Ramaswami left P. W. 27's shop at Madura saying that they were going to walk home. This evidence of what happened at Madura is given by P. W. 27. (The judgment then discussed the evidence and observed): Though he (accused 2) has withdrawn his statement Ex. G there is no doubt that his admission in it that he was present when Ramaswami was murdered is true. That is what he admits in Ex. G. But taken with the other evidence that cannot be accepted as the limit of his guilt.

In the circumstances it is very highly improbable that, as accused 2 represents, accused 1 fell upon Ramaswami without a word to accused 2 of his intention. Of the nine wounds found on Ramaswami's body one, on the right of the neck, cutting the carotid artery, was necessarily fatal. From the fact that so many wounds were inflicted it may be inferred that Ramaswami was not killed without a struggle. Accused 2 according to his own account stood by and was not responsible for what was done. To my mind in the circumstances the only reasonable inference is that accused 2 took part in the murder, whether he actually had a hand in the struggle, as is probable, or merely stood by on guard. In my opinion, the convictions and sentences of both the accused should

be confirmed and their appeals should be dismissed.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 180

JACKSON, J.

Arumuga Tevan and *others*— Accused Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 365 of 1929, Decided on 11th November 1929, from order of Sess. Judge, Madura, in Criminal Case No. 31 of 1929.

Evidence Act (1872), S. 32— Statement of person who is dead throwing light upon cause of his death is relevant evidence—Man in bed in hospital four days after occurrence and month before his death making statement — That statement carries no more weight than if he had made it in witness-box.

When a man, who is dead has left a statement throwing light upon the cause of his death that statement is relevant evidence under S. 32 but it is not entitled to any peculiar credit. No doubt if a man gasps out his story soon after the occurrence it may be said that there was no time for him to fabricate or for his friends to suggest falsehood. But if the man is in bed in hospital four days after the occurrence, and a month before he dies, and makes a statement, that statement carries no more weight than if he made it in the witness-box and rather less, because he has never been cross-examined. It is therefore incumbent upon the Court before it accepts the statement as true to see how far it is corroborated.

[P 180 C 2]

V. Rathnam—for Appellants.

Public Prosecutor—for the Crown.

Judgment.—The six appellants have been convicted on the charge that they rioted with the common object of hurting one Rani Sundarajan and also Mookan Servai and Kalimuthu Servai. Appellants 1 and 4 have also been convicted under S. 148, and the first under S. 326 and all the others under Ss. 326 and 149.

The learned Judge finds that the statement taken from Rani Sundarajan before he died, Ex. F, is a substantially true account of what occurred. He says that he came to Madura from Tirupparankundram and found Mookan and Kalimuthu setting in front of the house of Nagayan, who joined them, and told them that his son's wife had left him, and when his son went to get her back from her parents they called in accused 1, who protested against the son trying to get his wife from a house of which accused 1 was the landlord. The son said there was no need to ask his leave, and was beaten. Nagayan protested and was also beaten. Next morning he was beaten again and went home.

Nagayan was telling this story to the others at about 3-30 p. m. when accused 1 and 4 to 7 came and asked why they were sitting there. Mookan and Sundarajan tried to preserve peace but accused 1 and Sundarajan began to abuse each other, whereupon accused 5 beat him on the head, and accused 1 stabbed him with a spear, and accused 4 cut him with a chopper. Kalimuthu and Mookan picked up sticks to rescue him, and they turned upon them.

From this account it would seem that the common object was to drive Nagayan out of the town because he supported his son in trying to get back his wife. It is not at all clear why accused 1 should be so violently interested in the quarrel merely because the girl's parents were his tenants but in any case neither he nor the other accused seems to have any object to beat Sundarajan, Kalimuthu or Mookan until they quarrelled that afternoon. The learned Judge has never addressed his mind to this difficulty. In his 15th paragraph. he reiterates his belief in Ex. F, and in his 17th he finds the accused guilty of rioting, but he nowhere explains what riot he deduces from the evidence of Ex. F. It is certainly not the riot set forth in the charge, for if the accused were after Nagayan and suddenly came upon Sundarajan, Mookan and Kalimuthu it cannot be said that their common object was ever to hurt these three.

When a man who is dead has left a statement throwing light upon the cause of his death that statement is relevant evidence under S. 32, Evidence Act, but it is not entitled to any peculiar credit. No doubt if a man gasps out his story soon after the occurrence it may be said that there was no time for him to fabricate or for his friends to suggest falsehood.

"The tongues of dying man enforce attention like deep harmony; where words are scarce, they are seldom spent in vain; for they breathe truth that breathe their words in plain."

But if as in this case, the man is in bed in hospital four days after the event and a month before he dies and makes a statement that statement carries no more weight than if he made it in the witness-box and rather less, because he has never been cross-examined.

It is therefore incumbent upon the Court before it accepts the statement as true to see how far it is corroborated. Mookan, so far from corroborating it, says it was made by Sundarajan when he was off his head owing to fever. He says that he was sitting in front of his own house that afternoon, and heard an uproar coming from inside the house of Nagayan. He stepped into the road, saw all the accused there and asked them why they had come after beating Nagayan and his son in the morning. Then accused 1 gave him seven slaps and the others beat him. Kalimuthu ran to his rescue and he too was beaten. Then Sundarajan came up and he was stabbed.

Nagayan says that he was standing outside a shop when the accused attacked him, and he ran inside the house and bolted the door. He looked out later and saw Sundarajan on the ground. He had not seen him before that day. Kalimuthu says that he ran up and saw Mookan being beaten, he tried to rescue him. got beaten himself, and then Sundarajan came and protested and was stabbed.

The learned Judge rather understates the divergency between the story in Ex. F and the story in the depositions, when he says that they differ to some extent. They are quite different, probably it is a correct inference that Sundarajan and Mookan when they lay in hospital never arranged to tell the same story; but that hardly proves that one story out of the two discrepant stories must be true. It merely proves that one of them at least is lying and they never troubled to conceal the fact, and if it is an understatement to say that there is some difference, it is an overstatement, as it is said in para 15, that the evidence of Mookan and Kalimuthu largely corroborates Ex. F. The truth is that Ex. F is not corroborated at all, and since it is contradicted by the oral evidence no conviction can be founded upon it. Nor can the judgment be supported by relying upon the oral evidence, because the trial Court has not believed it to be true. It finds that P. W's. 8 and 9 changed the facts in order to safeguard themselves, and the other alleged eyewitnesses carry little weight.

Some attempt seems to have been made to convict the accused out of their own mouths. The interrogatories came perilously near to cross-examination and accused 5 was made to admit a complaint of his to the Magistrate which was marked as a prosecution Ex. (L) and used against him as showing that he had never attempted to explain how the prosecution witnesses came by their injuries. The learned Public Prosecutor very properly abstained from any reference to this exhibit.

To sum up, even the lower Court finds that there is no evidence for the common object stated in the charge. The only evidence of the common object upon which the conviction for rioting is founded is Ex. F, and that statement is both uncorroborated and contradicted. Therefore the findings under Ss. 148 and 149 cannot possibly stand.

As for that under S. 326 no doubt the witnesses agree that accused 1 stabbed Sundarajan, but their stories are too discrepant and improbable. An outstanding difficulty which has never been cleared up is how accused 1 took a prominent part in the quarrel merely because one side happened to have rented his house. The findings and sentences are cancelled and appellants are acquitted.

P.R.S./P.N. *Accused acquitted.*

A. I. R. 1931 Madras 181

PANDALAI, J.

K. V. Subramania Iyer—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 24 and 25 of 1930, and Criminal Revn. Petns Nos. 23 and 24 of 1930, Decided on 20th August 1930, from orders of First Class Bench Magistrates, Palghat, in Summary Trials Nos. 1481 and 1485 of 1929.

Madras District Municipalities Act, S. 300—Rr. 2 and 11—Punishment for two offences arising from same facts is illegal—Person convicted for neglecting to vaccinate child—Persistence in neglect is punishable under R. 11 (2) and not under R. 11 (1) (a).

Where a defaulter had already been convicted and sentenced for disobeying a previous notice to produce a child for vaccination and the subsequent notices served on him were in fact nothing more than a repetition of the same demand though served in two forms, one as a notice to produce the child for vaccination, the other as one to discontinue his breach of the previous notice.

Held: that the defaulter could not be punished for two offences on the same facts and also because, according to the rules, once a

person has been convicted for neglecting to take his child to be vaccinated under R. 11 (1) (a) his persistence in such neglect is punishable not as " neglect " under that rule, but as "continuing breach " under R. 11 (2): *Filcher* v. *Stafford*, 122 *E. R.* 651, *Ref.* [P 182 C 2]

S. V. Venkata Subramaniam — for Petitioner.

K. Venkataraghavachari — for Ag. Public Prosecutor.

Order.—The petitioner, a resident of Palghat Municipality, was convicted and fined by the 1st Class Bench of Magistrates in both the above cases. In Case 24 he was convicted for failure to produce his 3½ year old child for vaccination as required by a notice served on him on 23rd September 1929, an offence falling under S. 300, District Municipalities Act read with Rr. 2 (1) and 11 (1) (a) of the rules framed by Government under that section and he was sentenced to pay a fine of Rs. 3 or to suffer three days' simple imprisonment in default. In Case No. 25 he was convicted for failure to comply with another notice served on him on the same day, 23rd September 1929, calling on him to discontinue his previous breach of the vaccination rules, viz., failure to get the same child vaccinated in pursuance of a previous notice, an offence falling under S. 300, District Municipalities Act, read with R. 11 (2) of the rules framed by Government under the section and he was sentenced to pay a fine of Rs. 8 at 4 as. per day for 32 days, or to suffer three days' simple imprisonment in default. The petitioner says he has bona fide and conscientious objections to getting his child vaccinated as it will be injurious to its health, and that so far as his conviction in Case 24 is concerned, the Magistrates have erred in declining to consider it at all, as according to him it is a reasonable excuse within the meaning of R. 11 (1) (a) of the rules. This raises an interesting question which is now dealt with by S. 2, 61 and 62 Vic. Ch. 49 exempting conscientious objectors from the operation of compulsory vaccination statutes. But there is no corresponding exemption in the District Municipalities Act. The decision in *Rutter* v. *Norton* (1), shows that even under the previous Act, 30 and 31 Vic. Ch. 84, S. 29, objection to vaccinating a child on the ground that it was or was bona fide believed to be injurious to its health may be reasonable excuse under that Act. It is not however necessary to decide the point in this case because the conviction in Criminal R. C. 24 must fail for another reason. It is now admitted that the petitioner had already in S. C. 281 of 1929 before the Magistrate been convicted and sentenced for disobeying a previous notice to produce the same child for vaccination and that this Court refused to interfere with that conviction (Criminal R. C. 836 of 1929). The present notices served on him on 23rd September 1929 were in fact nothing more than a repetition of the same demand though served in two forms, one as a notice to produce the child for vaccination, the other as one to discontinue his breach of the previous notice. It is clear to me that the petitioner cannot be punished, as he has been, for two offences on the same facts : (cf. S. 26, General Clauses Act). Apart from that, there is the further objection in respect of the conviction in Case 24, that according to the rules, once a person has been convicted for neglecting to take his child to be vaccinated under R. 11 (1) (a) his persistence in such neglect is punishable not as " neglect " under that rule, but as ' continuing breach " under R. 11 (1): *Pilcher* v. *Stafford* (2). The offence constituted by such persistence is really not merely neglect as such for which the offender has already suffered punishment, but a continuing breach which is separately punishable under R. 11 (2) with a penalty calculated according to the period during which the offender persists in his neglect. For both reasons the conviction in Case 24 is unsustainable and is set aside. The fine of Rs. 3, if paid, will be refunded.

In Criminal R. C. 25, in which the petitioner has been found to have neglected to produce his child for 32 days, his advocate's argument, lucid and to the point, was that continuing to neglect to produce a child for vaccination is no offence at all. For this *Pilcher* v. *Stafford* (2), a decision passed under 16 and 17 Vic. Ch. 100 and 24 and 25 Vic. Ch. 59 was cited. It was there decided that where a parent or a person having the care, nurture, or custody of a child has incurred and paid the penalty for neglecting to have it vaccinated within the time specified by statutes, a continuous neg-

(1) 57 J. P. 8.

(2) 122 E. R. 651.

lect to have it vaccinated is not a further breach of the statutes. But the judgment of Cockburn, C. J., shows that that was because nothing corresponding to R. 11 (2) penalizing continous neglect existed in the then statutes, and as he said "nothing will meet it (the mischief) but fresh legislation." In view of the clear language of R. 11 (2) the above decision is not applicable. The petition in Criminal R. C. 25 is dismissed.

P.R.S./M.N. *Order accordingly.*

A. I. R. 1931 Madras 183

VENKATASUBBA RAO, J.

Ghulam Moideen Sahib—Applicant.

v.

Md. Oomer Sahib and *another*—Respondents.

Application No. 2173 of 1930, Decided on 2nd October 1930.

Legal Practitioner — Solicitor has a lien for his costs on fruits of judgment recovered by his exertion and cannot be defeated by the third partys' attachment—Lien—Contract Act (1872), S. 171.

A solicitor has a lien on the fruits of a judgment recovered by his exertions, for it would be inequitable to give the client the benefit of the solicitor's labour without paying for it. The solicitor's lien is not liable to be defeated on the ground that the assignee of a decree, or the attaching creditor of the solicitor's client had no express notice of the lien. The fact of there being a fund in Court amounts to notice of the existence of a solicitor's lien : *A.I.R.* 1927 *Bom.* 542; *In re Born*, (1900) 2 *Ch.* 433 ; *Metre Cabs Ltd. In re*, (1911) 2 *Ch.* 557 ; *Guy* v. *Churchill*, (1887) 35 *Ch. D.* 489 and 10 *Bom.* 248, *Ref.* [P 184 C 2]

N. Rajagopalan for *P. V. Sudarsana Raju*—for Applicant.

W. V. Rangaswami Iyengar—for Attaching creditor.

Judgment.—This summons raises a question relating to a solicitor's lien. In O. P. No. 44 of 1923 costs were awarded to Ghulam Mohideen against Govindarajulu by an order dated 17th December 1924. Mr. Sudarsana Raju, as attorney, appeared then for Ghulam Mohideen. Nothing seems to have been done for about six years. Then in April 1930, at his client's request, the attorney filed his bill of costs which was taxed by the Registrar on 28th April 1930. In doing so, the Registrar overruled the objection of Rajabahadur, the legal representative of Govindaraju who in the meantime had died. In execution of the order for costs against Rajabahadur certain jewels were seized and brought into Court. This happened on 7th August 1930.

I must now turn to a suit filed by Dawood Saheb against Ghulam Mohideen, C. S. No. 76 of 1925. In that suit, on 26th July 1925, Dawood obtained a decree against Ghulam Mohideen. In execution of that decree he applied, on 2nd August 1930, for attachment of the order for costs in O. P. No. 44 of 1923, which had been obtained by his judgment-debtor, namely Ghulam Mohideen. I am satisfied that it was with the active help of Rajabahadur that Dawood Saheb took this step. But this is really immaterial, for in my judgment nothing turns upon it. Mr. Sudarsana Raju intervened and objected that costs were due to himself from his client and that the attachment asked for by Dawood Saheb should not be made as it would defeat his own right. The master must be taken to have overruled the objection of the attorney, for on 15th August 1930, he made an order for attachment in favour of Dawood Saheb. Mr. Sudarsana Raju urges that he has a solicitor's lien for his costs and on that ground attacks the master's order.

The first ground taken by the counsel for Dawood Saheb is that the attorney has no subsisting claim for costs against his own client. The facts bearing on this point are these: The attorney's account books show that in 1924 he received from his client Rs. 10 and spent on his behalf Rs. 6. From 1924 to 1930 as I have said, nothing seems to have been done, but, in April 1930, Ghulam Mohideen requested Mr. Sudarsana Raju to tax his bill of costs. The latter seems to have incurred expenses by way of out-fees amounting to Rs. 40. The total amount thus spent by him comes to Rs. 46; and deducting from it Rs. 10 to which I have already referred, he was out of pocket by Rs. 36. The costs allowed to him on taxation amounted to Rs. 500 odd. What is urged by Dawood's counsel is that the business for which the attorney was employed terminated on 17th December 1924, and that the attorney's claim for costs against his client was therefore barred under Art. 84, Lim. Act. Art. 84 is restricted to suits, but I shall assume that even applications are governed by it by way of analogy.

That article provides a period of three years for a suit by an attorney "for his costs of a suit or a particular business," the time running from "the termination of the suit or business." It cannot be said that the business terminated in 1924. There is no question in this case between the attorney and his client. When his own client treats the engagement as subsisting and instructs him to tax his bill of costs, how can it be said that the business has terminated? Would it be open for instance to Ghulam Mohideen, if a suit had been brought against him by Sudarsana Raju, to plead that the latter's claim for costs was barred, notwithstanding what had happened between him and his attorney in April 1930? The answer must plainly be in the negative. I therefore hold that on the date when Sudarsana Raju intervened and objected, he had a subsisting claim for costs which he could have enforced against his client in a regular suit. This brings me to the second point raised, namely, has the attorney a lien for his costs which cannot be defeated by a third party's attachment? This point is fully considered by Sir Amberson Marten, C. J., and Blackwell, J., in *Tyabji Dayabhai & Co.* v. *Jetha Devji & Co.* (1). The learned Chief Justice reviews the English cases at length and points out that a solicitor has under the common law what is known as particular lien which does not depend on actual possession of the property as distinguished from possesory lien by reason of certain property like title-deeds being in his hands. The English cases also show very clearly that this common law lien has not been abrogated by statute. This is pointed out by Farwell, J., in *In re. Born* (2), where he observes that a solicitor has a common law lien on the fruits of a judgment recovered by his exertions, for it would be inequitable to give the client the benefit of the solicitor's labour without paying for it. To the same effect are the observations of Swinfen Eddy, J., in *In re Metre Cabs Ltd.* (3) and of Cotton, L. J., and Lindley, L.J., in *Guy* v. *Churchill* (4). In the judgment of the Bombay High Court, these and several other cases have been fully referred to and I shall not therefore discuss the point at any further length. That the law in India on this point is in conformity with the common law of England is also established by the same decision. In a case quoted by the learned Sir Charles Sargent, C. J., says:

"It is to be borne in mind that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic., Ch. 127 (the Solicitors Act, 1860) by which that lien was very much extended. By that law the solicitor had a lien for his costs of any funds or sum of money recovered for, or which became payable to his client in the suit: *Devakibai* v. *Jefferson* (5)."

It is also clear from the decided cases, that the attorney's lien is not liable to be defeated on the ground that the assignee of a decree or the attaching creditor of the solicitor's client had no express notice of the lien. The fact of there being a fund in Court amounts to notice of the existence of a solicitor's lien. The same rule is stated differently thus. If the assignee has notice that what is assigned is the subject-matter of a suit, he must be deemed to have notice of the existence of the solicitor's lien: see the cases cited in the Bombay High Court judgment. In the present case the attorney pointed out that he had a lien before the attachment was made. But, as I have said the question whether the attaching creditor has express notice is immaterial.

Then remains the question, what is the order I am to make? Dawood Saheb after obtaining the attachment, has realized the sum from Rajabahadur; at any rate he says so, and what is material is that on 22nd August 1930, he entered up satisfaction of the order for costs. I must therefore direct Dawood Saheb to bring back by way of restitution Rs. 464-8-0 to be paid over to Mr. Sudarsana Raju. When the amount is brought back the part satisfaction which Dawood entered of his own decree in C. S. No 76 of 1925 will stand revoked. It follows from this that the jewels in Court must be returned to Rajabahadur and I make an order accordingly. In review of the fact that Mr. Sudarsana Raju slept over his rights for about six years, I make no order as to costs.

P.R.S./B.V. *Order accordingly.*

(1) A. I. R. 1927 Bom. 542=105 I. C. 383=51 Bom. 855.
(2) [1900] 2 Ch. 433=69 L. J. Ch. 669=49 W. R. 23=83 L. T. 51.
(3) [1911] 2 Ch. 557.
(4) [1887] 35 Ch. D. 489=56 L. J. Ch. 670=35 W. R. 706=57 L. T. 510.
(5) [1886] 10 Bom. 248.

A. I. R. 1931 Madras 185 (1)

JACKSON, J.

(*Chukkala*) *Mangayyamma*—Petitioner.

v.

(*Chukkala*) *Appalaswami*—Respondent.

Criminal Revn. No. 533 of 1930 and Criminal Revn. Petn. No. 495 of 1930, Decided on 4th November 1930, from order of Sub-Divl. Magistrate, Vizagapatam, D/- 16th May 1930, in Misc. Case No. 13 of 1927.

Criminal P. C. (1898), S. 488—Compromise after reference to Court of which essential part is passing order under S. 488 can be enforced.

Although Magistrate is under no necessity to pass an order under S. 488, where the compromise is entirely independent of the Court, but if a compromise of which the essential part is the passing of an order under S. 488, such order can be enforced under S. 488: *A. I. R.* 1926 *Lah.* 469 and *A. I. R.* 1930 *Lah.* 524, *Doubted*; 2 *Weir* 629, *Foll.* [P 185 C 1, 2]

Kasturi Seshagiri Rao—for Petitioner.

K. S. Jayarama Ayyar—for Respondent.

Order.—The petitioner seeks to revise the order of the Sub-divisional Magistrate of Vizagapatam in an application under S. 488, Criminal P. C., by a wife for enforcement of the order of maintenance which she had received from that Court. The learned Magistrate has refused to pass any such order for reasons which it is not easy to follow. He says that the original order is based on a compromise, that therefore S. 488, Criminal P. C. has no longer any application and that the proper remedy for the petitioner is by way of civil Courts. Of course if the parties had settled the dispute by themselves without any reference to the Court, there would have been no order under S. 488, Criminal P. C. at all; but such settlement is evidently not what they contemplated. The husband was prepared to consent to judgment without giving the petitioner any further trouble so long as her claim for maintenance was reasonable and therefore the Magistrate passed orders in the terms of this agreement, or compromise, a very sensible arrangement which did not in any way detract from the force of the order. In two cases from Lahore, *A. I. R.* 1926 *Lah.* 469 and *A. I. R.* 1930 *Lah.* 524, it is held that a compromise cannot be enforced under S. 488, Criminal P. C. and if these cases refer to a compromise of which an essential part is the passing of an order under S. 488, Criminal P. C., I must respectfully differ from them. If the compromise is entirely independent of the Court, I agree that the Court would be under no necessity to pass an order under S. 488, Criminal P. C. The view of the matter which I have endeavoured to set forth is I think succinctly put in *Lingadu* v. *Labbakka* (1), Case No. 41 which is a ruling of a Bench of this Court and which finally settles the matter for this Presidency. The petition is accordingly allowed and the application is remanded to the Sub-divisional Magistrate for disposal according to law after hearing the parties, if necessary.

P.R.S./V.B. *Petition allowed.*

(1) 2 Weir 629.

* A. I. R. 1931 Madras 185 (2)

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Annu Avathanigal—Appellant.

v.

Somasundara Avathanigal—Respondent.

Letters Patent Appeal No. 129 of 1929, Decided on 8th October 1930, from judgment of Wallace, J., D/- 22nd October 1929, in Second Appeals Nos. 469 and 470 of 1928.

*** (a) Limitation Act (1908), Arts. 89 and 116—Though money recovered by suit on registered bond is money recovered as compensation for breach of contract, yet where by registered agreement one tenant-in-common manages the property as agent of other tenants-in-common, Art. 89 applies as it is suit for account between principal and agent and not Limitation Act, Art. 116.**

No doubt it is true that money recovered by suit as due on a registered bond, or due as rent under a registered counterpart of a lease, should be treated as money recovered as compensation for breach of contract under Art. 116, but as a decree for the taking of an account implies that if a balance is due from the defendant he must pay it, and as a suit for compensation for breach of contract may possibly come within some other articles of the Act than Art. 115 or Art. 116, but not within Art. 89, therefore when by a registered agreement, one tenant-in-common is left in possession as the agent of the other tenants-in-common and the agent agrees to submit yearly accounts to his principals, Art. 89 is the article which applies to a suit for an account brought by the principals and not Art 116, 24 *All.* 27 (*P. C.*) and *A. I. R.* 1916 *P. C.* 148, *Foll*; *A. I. R.* 1922; *Mad.* 150 (*F. B.*); 40 *Cal.* 108; *A. I. R.* 1923 *P. C.* 31; 43 *Cal.* 248; 32 *Cal.* 719; 53 *I. C.* 675; 35 *Cal.* 298; *A. I. R.* 1925 *Bom.* 148; *A. I. R.* 1922 *Mad.* 150 (*F. B.*); *A. I. R.* 1921 *Bom.* 384 14 *Cal.* 147 (*P. C.*) and *A. I. R.* 1929 *Mad.* 53, *Ref.* 15 *Bom.* 155 (*P. C.*) and *A. I. R.* 1916 *P. C.* 182, *Rel. on.* [P 186 C 2; P 187 C 1, 2]

(b) Limitation Act (1908), Arts. 89 and 116—Suit for account is for ordering defendant to account to plaintiff for moneys received by him and is different from suit for compensation for breach of contract.—In suit for accounts defendant can get decree for balance of account if anything is found due to him.

A suit for an account is not a suit for a definite sum of money, but for ordering the defendant to account to the plaintiff for moneys received by him and the first result is that the plaintiff gets a decree for discovery. An agent when sued as defendant for an account can get a decree for the balance of the account, if anything is found due to him, even though he has not claimed it in his pleadings; and that could never happen in a suit merely for compensation for breach of contract. 23 *Cal.* 884 (*F. B.*); 32 *All.* 525; 14 *Cal.* 147 (*P. C.*) and 50 *I. C.* 675, *Rel. on*: 20 *Mad.* 418; *A. I. R.* 1924 *All.* 854; 35 *Cal.* 298; 32 *Cal.* 719; *A. I. R.* 1926 *Mad.* 615 (*F. B.*); *Collyer* v. *Dudley*, 2 *L. J. Ch.* 15; 15 *Bom.* 155 (*P. C.*); 27 *All.* 374; *A. I. R.* 1916 *P. C.* 182; 39 *Mad.* 376; 20 *Mad.* 418 and *A. I. R.* 1916 *P. C.* 182, *Ref.*; 42 *Mad.* 873, *Expl.* and *not Foll.*; 1 *C. L. J.* 211; 5 *I. C.* 59; 5 *I. C.* 186 and 16 *I. C.* 852, *Diss form.* [P 188 C 1]

(c) Limitation Act (1908), Art. 89—Moveable property.

Money received by the agent for the principal is moveable property: 24 *All* 27, *Foll.* [P 188 C 2]

(d) Limitation Act (1908), Art. 116—Breach of contract is condition precedent.

Per *Anantakrishna Ayyar, J.*—Before Art. 116 should apply the Court must be satisfied that the suit is one for compensation for the breach of a contract. [P 192 C 1]

(e) Limitation Act (1908), Arts. 116 and 88—Suit for account by principal against his agent for property received and not accounted for cannot be a suit for compensation for breach of contract, but is suit for account.

A suit by a principal against his agent for moveable property received by the latter and not accounted for cannot be said to be suit for compensation for the breach of a contract, but is a suit for account: *A. I. R.* 1926 *Mad.* 615; *A. I. R.* 1916 *P. C.* 182; 5 *I. C.* 59; 1 *C. L. J.* 211; 39 *Mad.* 376; 32 *Cal.* 719; 35 *Cal.* 298 and *A. I. R.* 1923 *Cal.* 507, *Ref.* [P 191 C 1]

K. Rajah Ayyar—for Appellant.

K. Bhashyam Ayyangar—for Respondent.

Reilly, J.—In this suit the plaintiff and the defendant, who are brothers, and another brother as members of a joint family owned a village. In 1896 they executed a registered deed of partition, Ex A, by which they agreed that each brother should be in management of the village for two years in turn and should settle the accounts for his management in July of each year and pay the amounts due to the other brothers. The defendant was in management under that arrangement for faslis 1326 and 1327. The plaintiff sued for what was due to him for those faslis. The defendant in his written statement claimed to set off what was due to him from the plaintiff for the plaintiff's period of management, faslis 1324 and 1325. The District Judge found that the defendant's claim for those two earlier faslis was barred, as it should be taken to be governed by Art. 89, Lim. Act. On second appeal Wallace J., found that the defendant's claim in respect of those two faslis was in time as it could be brought under Art. 116, Lim. Act, as well as Art. 89. The present appeal is against that decision of Wallace. J.

As the document, Ex. A, was a registered document and there was this contract that each brother in turn should be in charge and render accounts in July of each year, and pay over what was due to the other brothers, if those terms of Ex. A were broken, as it is admitted they were broken, then either the plaintiff or the defendant could have sued for damages for breach of contract and the suit would have come under Art. 116. Wallace, J., is of opinion that the suit and the defendant's claim were of that nature. But if we examine the plaint in this case, we find that the plaintiff was clearly not suing for compensation for breach of contract. He sued for an account and put in an approximate account, stating approximately what he thought was due, as it was necessary under the Code of Civil Procedure that he should put in some such statement. The defendant in his written statement said:

> "The plaintiff is bound to render accounts to this defendant relative to his (plaintiff's) management for faslis 1324 and 1325 when he had the management, and pay to this defendant the proportionate amount found due under the same,"

and he put in an account. I think it is perfectly clear that, whatever kind of suit the plaintiff and the defendant might have brought, the suit which the plaintiff brought and the reply which the defendant gave were both claims for an account and nothing else. With great respect, it appears to me that Wallace, J., has not noticed exactly what the prayers of the parties were.

It has been decided that, when by an oral agreement one tenant-in-common is left in possession as the agent of the other tenants-in-common, if one of them sues him for an account, the article ap-

plicable is Art. 89, Lim. Act. A Full Bench of this Court expressed that opinion in *Yerukola* v. *Yerukola* (1) and the Privy Council decided that that was the right article in *Asghar Alikhan* v. *Khurshed Ali Khan* (2). Again when the High Court of Calcutta applied that article to such a case in *Chandra Madhab* v. *Nobin Chandra* (3), that was approved by their Lordships of the Privy Council in *Nobin Chandra* v. *Chandra Madhab* (4). There is also another statement of the Privy Council, obiter dictum, to the same effect in *M. Venkanna* v. *M. Agasthiah* (5). It has also been decided that when an agent agrees to submit yearly accounts to his principal, Art. 89 is the article which applies to a suit for an account brought by the principal. *Madhusudan Sen* v. *Rakhal Chandra Das* (6) and *Bhabatarini* v. *Sheikh Bahadur* (7) are to that effect. Even if the agent's agreement to submit yearly accounts is a registered agreement, there is the opinion of Maclean, C. J., obiter in *Hafezuddin Mandal* v. *Jadu Nath Saha* (8) that the article applicable is Art. 89.

But for the defendant it has been contended before us that, when a principal sues his agent for an account, he sues for money which he hopes to obtain as the result of the accounting. As a matter of human nature no doubt that proposition is true. Very few people, one may imagine, bring suits for accounts before the Courts and hope to get nothing out of them. The Privy Council in *Rahimbhoy Habib Bhoy* v. *C. A. Turner* (9) has stated that a decree for the taking of an account implies that, if a balance is due from the defendant he must pay it. So far the contention of the defendant is no doubt sound. Then it is further contended by Mr. Viswanatha Ayyar for the defendant that in such cases, if money is found due on the agent's account being taken, it is really due because the agent has broken his contract to account, and, if anything is recovered in such a suit from the agent, it must be regarded as compensation for breach of contract, and, if the agent's agreement is registered, then Art. 116, Lim. Act, applies. He has pointed out that money recovered by suit as due on a registered bond or due as rent under a registered counterpart of a lease must now be treated by us as money recovered as compensation for breach of contract under Art. 116, Lim. Act, in accordance with the opinion of the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (10). That is so. But is a suit for an account, a suit for compensation in that sense? It has been decided in some cases that it is a suit for compensation in that sense. That is the effect of *Matilal Bose* v. *Amin Chand* (11), *Easin Sarkar* v. *Baroda Kishore* (12), *Jogesh Chandra* v. *Benode Lal* (13) and *Bhagirath* v. *Pramchand* (14) On the other side there is the decision in *Bhabatarini* v. *Sheikh Bahadur* (7) that a suit for an account and for money due on taking the account is not a suit for compensation for breach of contract. But, in my opinion, Mr. Rajah Ayyar for the plaintiff in this case is right in his contention that we are not at liberty to say that a suit for an account is a suit for compensation for breach of contract even in the sense in which "compensation for breach of contract" has been used in the cases recognized as correct by the Privy Council in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (10). In *Hurrinath Rai* v. *Krishna Kumar Bakshi* (15), their Lordships of the Privy Council themselves made a statement, which shows that a suit by a principal against his agent for an account is something different altogether from a suit for compensation for breach of contract, because in a suit for an account the defendant can claim a decree, if the accounting turns out to be in his favour, and that could never happen in a suit merely for compensation for breach of contract. The words actually used in that case by their Lordships of the Privy Council are:

(1) A. I. R. 1922 Mad. 150=71 I. C. 177=45 Mad. 648 (F. B.).
(2) [1902] 24 All. 27=28 I. A. 227=8 Sar. 142 (P. C.).
(3) [1913] 40 Cal. 108=18 I. C. 735.
(4) A. I. R. 1916 P. C. 148=36 I. C. 1=44 Cal. 1 (P. C.).
(5) A. I. R. 1923 P. C. 31.
(6) [1916] 43 Cal. 248=30 I. C. 697.
(7) [1919] 53 I. C. 675.
(8) [1908] 35 Cal. 298=7 C. L. J. 279=12 C. W. N. 820.
(9) [1891] 15 Bom. 155=18 I. A. 6 (P. C.).
(10) A. I. R. 1916 P. C. 182=39 I. C. 156=44 I. A. 65=44 Cal. 759 (P. C.).
(11) [1905] 1 C. L. J. 211.
(12) [1910] 5 I. C. 186.
(13) [1910] 5 I. C. 59.
(14) [1913] 16 I. C. 852.
(15) [1887] 14 Cal. 147=13 I. A. 123=4 Sar. 751 (P. C.).

"Nothing could prevent the defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the plaintiff claims it if a larger sum than he specifies should be found due to him."

There we have an essential difference between a suit for an account and a suit for compensation for breach of contract. As was pointed by Trevelyan, J., in *Kunjo Behary Singh* v. *Madhub Chandra Ghose* (16), a suit for an account is not a suit for a definite sum of money but for ordering the defendant to account to the plaintiff for money received by him and the first result is that the plaintiff gets a decree for discovery. That an agent when sued as defendant for an account can get a decree for the balance of the account if anything is found due to him, even though he has not claimed it in his pleadings, was decided in *Parmanand* v. *Jagat Narain* (17), which was approved in a later decision of the same Court, *Ram Charan* v. *Bulaqui* (18). It is true as Mr. Viswanatha Ayyar has pointed out, that in *Narasimha Rao* v. *Zamindar of Tiruvur* (19), Phillips, J., dissented from that view and was of the opinion that a defendant agent in such a suit could not get the balance by decree if a balance was found due to him. But it appears that *Hurrinath Rai* v. *Krishna Kumar* (15) was not quoted to the learned Judge in that case, and, as has just been pointed out by Mr. Rajah Ayyar, in *Ramalinga Chetti* v. *Raghunatha Rao* (20) it is recognized as the law and practice in England—and there is no reason to suppose that the practice in this country should be different—that defendant agent in a suit for an account can recover the balance, if on the accounting a balance is found to be due to him. I must accede to Mr. Rajah Ayyar's contention that a suit for an account is not a suit for compensation for breach of contract. It appears to me to be a suit of an entirely different nature and may have results impossible in a suit for compensation for breach of contract. I may remark that, if such a suit were really a suit for compensation for breach of contract, then all the decisions which I have mentioned, that a suit for an account against an agent falls within Art. 89, Lim. Act, would be unjustifiable, and it should be remembered that those decisions included two of the Privy Council. A suit for compensation for breach of contract may possibly come within some other article of the Limitation Act than Art. 115 or Art. 116. But how could it ever come within Art. 89? The very wording of Art. 89, precludes that. Art. 89 runs:

"by a principal against his agent for moveable property received by the latter and not accounted for."

Is it possible, using English language with any approach to accuracy or even sense, to speak of compensation for breach of contract as moveable property received by the agent for his principal? Money received by the agent for the principal is moveable property, as was declared in *Asghar Ali Khan* v. *Khurshed Ali Khan* (2). There is no difficulty about that. But to my mind it is beyond all reason to suggest that a suit for compensation for breach of contract comes within Art. 89, Lim. Act, As the Privy Council has definitely decided that a suit against an agent for an account comes within Art. 89, Lim. Act, that is alone sufficient to show that when the plaintiff sued for an account in this case and when the defendant asked for an account it was Art. 89 which was applicable and not Art. 116. Both parties might have sued, if they had chosen, for compensation for breach of contract and have brought themselves under Art. 116; but it happens that they have chosen to sue for accounts, and we must apply the article applicable to the relief for which they have prayed. That being so, in my opinion this appeal must be allowed and the decree of the District Judge restored with costs.

Anantakrishna Ayyar, J.—I agree. The only question that arises for decision in this appeal is one of limitation. As I construe the pleadings in the case, the claim (put forward by the plaintiff as well as the defendant) is one for account by the principal against his agent. That is the view which both the lower Courts also took of the pleadings in the case. If so, prima facie, Art. 89, Lim. Act, would apply to this case and the only question then is whether Art. 116 would apply because Ex. A under which the liability arises is a registered document. Both the lower Courts held

(16) [1896] 23 Cal. 884 (F. B.).
(17) [1910] 32 All. 525=6 I. C. 163.
(18) A. I. R. 1924 All. 854=83 I. C. 889=46 All 858.
(19) [1919] 42 Mad. 873=53 I. C. 234.
(20) [1897] 20 Mad. 418.

that Art. 116 would not apply to such a case; but the learned Judge (Wallace, J.) held that

"there was no obstacle in law to the suit coming under Art. 116 as well as under Art. 89, Lim. Act."

The question is whether that view is correct.

The learned advocate for the respondent argued that Art. 116 applies to the case, for there is a contract in writing registered in the present case (Ex. A), one party has committed breach of that contract, and the other party claims compensation for the said breach and that the claim is therefore really for compensation for breach of a contract in writing registered. He drew our attention to the decision of the Privy Council in *Tricomdas Cooverii Bhoja* v. *Gopi Nath Jin Thakur* (10) and also to the decision of a Full Bench of this High Court reported in *Ratnasabhapathi Chettiar* v. *Devasigamony Pillai* (21). The Privy Council held that Art. 116 applied to a suit for royalties due under a registered lease of certain lands. Reading pp. 767 and 768 (of 44 *Cal.*) it is clear that their Lordships

"thought that they should accept the interpretation so aften and so long put upon the statute (as to the meaning of the word "compensation" occurring in Art. 116) by the Courts in India that the decisions cannot now be disturbed."

The Full Bench held that :

"where a mortgage deed containing a personal covenant to pay the mortgagee money is registered, Art. 116 applies to a suit to recover the balance due to the mortgagee after the sale of the mortgaged property."

In delivering the opinion of the Full Bench, Kumaraswami Sastriar, J., refers to various decisions of this and other High Courts where it was held that suits to recover money due on registered bonds, suits to recover rent due on registered lease-deeds and suits to recover amounts dne in respect of covenants in registered deeds of partnership, were governed by Art. 116, Lim. Act. No reference was however made to decisions dealing with Art. 89 in cases where the documents creating agency are registered. We have therefore to consider the nature of the suit contemplated by Art. 89 and to see whether the same could be considered to be "a suit for compensation for breach of a contract" within the meaning of Art. 116. No doubt we should keep in view the fact that the word compensation has been used in a wider sense in the Contract Act .and in the Limitation Act. We should also remember that there is generally a distinction established by the Limitation Act in favour of registered instruments, a longer period of limitation being (generally speaking) prescribed in .the case of registered instruments. We have therefore to be fully alive to the above features in construing Art. 89, Lim. Act.

Article 89 speaks of "a suit by principal against his agent for moveable property received by the latter and not accounted for" period of limitation is three years, and time runs from the time when the account is, during the continuance of the agency, demanded and refused or, where no such demand is made when the agency terminates. The Privy Council decided in *Asghar Ali Khan* v. *Khurshed Ali Khan* (2) that the expression "moveable property" in Art. 89 includes "money." In *Shib Chandra Roy* v. *Chandra Narain Mukerjee* (22) it was held by Harrington and Mookerji, JJ., that a suit by a principal against his agent for an account and also for recovery of money that may be found due from him is a suit for moveable property received by the agent on behalf of the principal and not accounted for, and is governed by Art. 89. It was argued that because the plaintiff prays that an account may be taken first, the sum due ascertained, and the amount so due be also decreed to him, that the suit is therefore not one for account but for money. At p. 725, Mookerjee, J., answered the objection in the following terms :

"As pointed out by Sir Barnes Peacock in *Kulee Kishen Paul Chowdhry* v. *Mt. Juggut Tara* (23), when it is said that law imposes an obligation on the agent to render an account of his agency and to account for the money of his principal, the word "account" is used in its legal sense and is not confined merely to rendering an account by the agent of what he has done with the money, but also includes the payment of any balance which might be found due from him upon taking the account. This is substantially in accordance with the observations of Lord Esher in *Harsant* v. *Blaine* (24) that the duty of the accounting

(21) A. I. R. 1929 Mad. 53=116 I. C. 817=52 Mad. 105 (F. B.).

(22) [1905] 32 Cal. 719=1 C. L. J. 232.
(23) 11 W. R. 76=2 B. L. R. A. C. 139.
(24) [1887] 56 L. J. Q. B. 511.

party is not merely to be constantly ready with his accounts, but also, if the accounts show that he has money to pay over, to be constantly ready to pay. In this view of the matter, Art. 89 covers a case of the present description, the object of which is to obtain an account of the money in the hands of the agent as also to recover the sum due."

What is technically known as "a suit for account" by principal against his agent has been described in several cases. The agent has to be ready with his accounts: he has to explain the entries in the accounts which require explanation; he has to support the entries by vouchers in proper cases; and he has also to hand over the balance, if any, that might be found due, to the principal. It has also been mentioned in the cases that if it should turn out that, as a result of the taking of the accounts, some money is due to the defendant agent, then there should be a decree in favour of the defendant agent for that amount: see *Collyer* v. *Dudley* (25); *Harinath Rai* v. *Krishna Kumar* (15); *Rahimbhoy Habib Bhoy* v. *C. A. Turner* (9); *Ramalinga Chetty* v. *Raghunath Rao* (20): see also the following regarding the nature of a suit for account: *Kunjo Behary Singh* v. *Madhule Chandra* (16), per Trevelyan, J., *Raghunath* v. *Ganpatji* (26); *Parmanand* v. *Jagat Narain* (17) and *Ramcharan* v. *Bulaqui* (18): see also Ss. 213 and 218, Contract Act. In *Harinath Rai* v. *Krishna Kumar* (15) the plaint concluded as follows:

"There is a balance against the defendant of Rs. 19,925-14-0, for the recovery of which I instituted this suit. If by the decision of the Court a larger sum should be proved to be payable to me by the defendant under proofs and papers, the prayer is also for the recovery of the same."

The High Court was of opinion that the suit was virtually one for an account, and the Privy Council agreed with that view. At p. 153, their Lordships observed as follows:

"Nothing could prevent the defendant in a suit framed like this from claiming the benefit of an account if in his favour, just as the plaintiff claims it if a larger sum than he specifies should be found due to him. Such a suit is essentially one for account."

In *Rahimbhoy Habib Bhoy* v. *C. A. Turner* (9) at p. 159, the Privy Council remarked, as to the effect of a preliminary decree for an account passed in a suit for account, as follows:

"It is true that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held the decree contains within itself an assertion that if a balance is found against the defendant on these accounts, the defendant is bound to pay it."

The question was also considered in this Court by Sir Arthur Collins, C. J., and Shephard, J., in *Ramalinga Chetty* v. *Raghunatha Rao* (20), whether a defendant could obtain a decree for the amount that might be found due in his favour. At p. 420 the Court observed:

"If it were true that the suit was a suit for an account in the proper sense of that term, then it would follow, according to the decision in *Harinath Rai* v. *Krishna Kumar* (15) which decision illustrates the English practice, that defendant 1 would be entitled to have an account taken with a view to obtain a decree for the sum that might be found due to him."

It is therefore clear that in a "suit for account"—properly so called—the defendant has to render account in the technical sense, and pay the plaintiff the amount that might be found due to him; it is also clear that, in such a suit, the defendant would be entitled to a decree in his favour for any amount that might be found due to him, as the result of the taking of the accounts. The opinion expressed by Phillips, J., in *Narasimha Rao* v. *Zamindar of Tiruvur* (19) at p. 879-80 that no decree could be passed in such a suit in favour of the defendant is thus unsustainable having regard to the authorities noticed above, which authorities were evidently not cited before the learned Judge.

Could such a suit be called "a suit for compensation for breach of a contract" within the meaning of Art. 116? No doubt no plaintiff ordinarily files a suit for an account unless he also hopes to get a decree for some amount of money in his favour; but it is possible that a plaintiff in a particular case might file such a suit with a view mainly to get possession of the accounts and other papers from the agent and to have the entries explained as is done in suits for accounts: see p. 260 of *Madhusudan Sen* v. *Rakhal Chandra* (6). Does the circumstance, then, that ordinarily, and in a large majority of cases, a decree for money is also prayed for in such a case by the plaintiff, who has also to pay court-fee on the amount at which he approximately values the relief,

(25) 2 L. J. Ch. 15.
(26) [1905] 27 All. 374.

bring the case under Art. 116? The learned advocate for the respondent strongly relied on this aspect of the case; but after having given my best consideration to the arguments, I feel unable to agree with him. In my opinion, a suit by a principal against his agent for moveable property received by the latter and not accounted for, could not be said to be "a suit for compensation for the breach of a contract." After the decision of the Privy Council in *Tricomdas Cooverji Bhoja* v, *Gopinath Jiu Thakur* (10) a Full Bench of this High Court consisting of Sir Murray Coutts-Trotter, C. J., and Krishnan and Beasley, JJ., had to consider the question whether a suit by a shareholder against a company for recovery of dividend is governed by Art. 116, Lim. Act. After noticing the Privy Council case in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (10) the learned Chief Justice observed at p 482 of 49 *Mad.* as follows:

"It is difficult enough to regard that form of words as applicable to a claim for rent. It seems to me clumsy beyond anything that is legitimate to allow the claim of a shareholder for his dividend to be regarded as aptly described by 'compensation for breach of contract, express or implied": see *Ramaseshayya* v. *Sri Tripurasundari Cotton Press, Bezwada* (27), at p. 482 (of 49 *Mad*).

No direct decision of this Court, on the question we have to decide, has been brought to our notice. In *Venkatachalam* v. *Narayanan* (28), Sir John Wallis, C. J., and Sehagiri Ayyar, J., made certain observations relevant to the present question. At p. 379, the learned Chief Justice observed as follows:

"The plaintiffs rely on a decision reported in *Jogeshchandra* v. *Benode Lal* (13) that where there was a definite contract to render an account yearly, Art. 115 and not Art. 89 would be the article applicable in the case of unregistered contracts. This case proceeded to some extent on the authority of a decision in *Batilal Bose* v. *Amin Chand* (11), that in the case of a contract in writing registered, Art. 89 does not apply, but Art. 116. The authority of the latter decision has been doubted in *Shib Chandra* v. *Chandra Narain* (22) and *Hafezuddin Mandal* v. *Jadu Nath* (8), and it is not in my view conclusive of the present case."

Seshagiri Ayyar, J., would seem to go a little further. At p. 382 the learned Judge observed as follows:

"The respondent's vakil relied on *Jogesh Chandra* v. *Benode Lal* (13) for the position that when there is a special contract fixing a date for the rendering of the accounts, the article applicable to suits by principals against agents is 115 and not Art. 89. The fixing of a date for rendering accounts cannot stop the termination of the agency. The authority relied upon in *Jogesh Chandra* v. *Benode Lal* (13) has been dissented from by Maclean, C. J, in *Hafezuddin Mandal* v. *Jadu Nath* (8). Mookerji, J. in *Shib Chandra* v. *Chandra Narain* (22,) held that Art. 89 would apply to a case like the present."

The decisions of the Calcutta High Court are not uniform. They are all collected in the case reported in *Mahomed Mazaharal Ahmad* v. *Mahamad Azimuddin* (29), where there is also an interesting discussion abut the meaning of the word "compensation" at p. 216, though the case itself related to recovery of dower-debt under the registered dower-deed, the Court holding that Art. 116 applied to such a case. Though the decision in *Venkatachalam* v. *Narayanan* (28) was passed before the ruling of the Privy Council in the case reported in *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (10) the learned Judges who took part in the decision in *Venkatachalam* v. *Narayan* (28) would seem to be inclined to agree with the view of Maclean, C. J., in the case reported in *Hafezuddin Mandal* v. *Jada Nath* (8).

Suits for accounts by principals against agents have been held to come under Art. 89: see *Asghar Ali Khan* v. *Khudshed Ali Khan* (2); *Hurrinath Rai* v. *Krishna Kumar* (15); *Gabu* v. *Zipru* (30) and *Girija Bai Shivdeo Ray* v. *Narayan Rao Ganpat Rao* (31): see also *Yerukola* v. *Yerukola* (1), *Venkanna* v. *Agasthiah* (5) and *Madhasudan Sen* v. *Rakhal Chandra* (6) where at p. 256 the Court (Mookorjee and Roe, JJ.,) declined to refer the question to the decision of a Full Bench, and decided where there is an agreement to submit accounts annually, a suit against the agent for account is governed by Art. 89 and not by Art. 115, Lim. Act.

The wording of the corresponding Art. 117. Act, 9 of 1871 was "on a promise or contract in writing registered." The words "for compensation, &c.," were introduced by Act 15 of 1877. Any argument derived from the change of language goes, if at all, against the respondents' contention.

(27) A. I. R. 1926 Mad. 615=94 I. C. 515=49 Mad. 468 (F. B.).
(28) [1916] 39 Mad. 376=26 I. C. 740.
(29) A. I. R. 1923 Cal. 507=73 I. C. 17.
(30) A. I. R. 1921 Bom. 384=59 I. C. 357=45 Bom. 313.
(31) A. I. R. 1925 Bom. 148=88 I. C. 975.

No doubt there is a saving clause in Art. 115 which does not find a place in Art. 116, namely the words "not otherwise provided for"; but before Art. 116 should apply the Court must be satisfied that the suit is one "for compensation for breach of a contract; and for the reasons I have mentioned, a suit for an account by principal against his agent is a suit well known to law and could not properly be described as a suit for compensation for breach of a contract as ordinarily understood. Having regard to the apparent policy of the Registration Act to provide generally a longer period of limitation to suits based on registered documents though it was more apparent under Act 9 of 1871 than in the later Acts, I should be glad if I had been able to come to the conclusion that Art. 116 applies to the present case seeing that Ex. A is a registered document; but for the reasons already given, I feel myself unable to accept the contention that Art. 116 is applicable to the present case. Holding that Art. 89 is the article applicable, the appeal has to be allowed with costs. This appeal having been posted to be spoken to this day, the Court made the following

Order.—Costs will be allowed both in second appeals and Letter Patent Appeal—in both cases.

P.R.S./B.V. *Appeal allowed.*

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* A. I. R. 1931 Madras 192

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

P. Abdul Samad Saheb—Appellant.

v.

Sowcar Kamaruddin Saheb and *others*—Respondents.

Original Side Appeal No. 7 of 1930, Decided on 21st August 1930, from order of Chief. Justice, D/- 15th November 1929, in Appln. No. 3210 of 1929.

*** Civil P. C. (1908), O. 21, R. 16—Non-compliance with proviso regarding notice renders all subsequent proceedings void as against unnoticed defendant and his representatives—Failure to take this objection by representatives does not make question res judicata unless they might and ought to have taken it—Civil P. C. (1908), S. 11.**

It is an indispensable condition of jurisdiction under O. 21, R. 16, that proviso 1, to that rule, relating to notice, should be complied with. The failure to comply with it with respect to one defendant not only renders void as against him and his representatives the proceedings in which the failure occurred, but all, subsequent proceedings dependent upon them. The failure to take objection on the part of such representatives in a subsequent proceeding will not make the question res judicata when it cannot be said that they might and ought to have raised the objections: 6 *I.C.* 262, *Ref.*

[P 193 C 1, 2]

K. Narasimha Aiyar and *P. K. Janakiram*—for Appellant.

A. Viswanatha Aiyar and *A. Ramaswami Ayyar*—for Respondents.

Curgenven, J.—This appeal arises out of execution proceedings under a consent decree awarding the decree-holder the sum of Rs. 5,845-10-8 to be realized out of the assets of one Nur Muhamad Usman Saheb, deceased, in the hands of the defendants and out of the assets in their hands of the business in which he was a partner. Of the defendants, the first and second were surviving partners, while the third was the widow of the aforesaid Nur Muhamad Usman Saheb. The earliest execution application to which we have been referred was to transfer the decree to the Sub-Court of Shimoga, and this was ordered on 7th December 1927. Then while execution was pending there, on 24th February 1928, the decree-holder assigned the decree to the present appellant. In E. P. 146 of 1928 this transferee decree-holder applied under O. 21, R. 16, Civil P. C., for leave to execute the decree and to continue the proceedings at Shimoga. This was ordered on 19th April 1928, the order reciting that the defendants did not appear in person or by pleader, though served with a copy of the notice of the application. Subsequently, on 1st September 1928, defendant 3 died and in E. P. No. 21 of 1929 the appallant applied to execute the decree against her legal representatives, consisting of a mother, four brothers and a sister. A month later, on 25th April 1929, one of these legal representatives, S. Kamaruddin Saheb, moved the Master, who had passed the order in E. P. 21 of 1929, to call on the appellant to show cause why the earlier order recognizing the transfer should not be set aside, the proceedings in E. P. 21 stayed and such other orders as might be appropriate passed. The principal ground alleged was that the appellant had secured recognition of his transfer without taking out or serving any notice on defendant 3. It was further asserted that only two out of the six legal representatives re-

ceived notice of the later application, E. P. 21. The learned Master found it to be a fact that defendant 3 had no notice of the application under O. 21, R. 16, and accordingly gave the legal representatives a further opportunity to show cause why the appellant should not execute the decree against the assets of defendant 3 in their hands. This order has been confirmed by the learned Chief Justice against whose decision this appeal is preferred.

It is admitted that defendant 3 was not served in E.P. 146, and this omission, it is not contested, renders the order void as against her and her legal representatives. It is an indispensable condition of jurisdiction under O. 21, R. 16, that the first proviso to that rule, relating to notice, should be complied with: see *Kassum Goolam Hosein* v. *Dyabhai Amarsi* and *Sreenath Das* v. *Achutananda Mahanti* (2). There can be no doubt therefore that, considered by itself, this order was rightly revoked. An attempt has however been made to found an argument upon the existence of the subsequent order to execute passed against the legal representatives in E.P. 21. It is said that these latter proceedings gave those representatives an opportunity to contest the right of the transferee decree-holder to execute, that they omitted to do so and that accordingly the matter is now res judicata. This position cannot however be sustained, we think, in the circumstances of this case. The contesting legal representative asserts that he only heard after the order in E.P. 21 had been passed, that defendant 3 had not been served in E.P. 146, and we must take it, in the absence of evidence to the contrary, that, when the latter order was passed, it was believed that defendant 3 had had an opportunity of contesting the order under O. 21, R. 16. If that had been so, it would not have been open to the legal representatives to contest the transferee's right in E.P. 21, and accordingly that question was not one which, in the language of Expln. 4, S. 11, Civil P. C., "might and ought to have been made ground of defence or attack". It seems clear therefore that what happened in the later proceedings cannot operate as a bar of this kind, nor do we think that it makes any difference whether or not all the legal representatives were in fact served in the later application. The failure to serve defendant 3 not only renders void as against her and her representatives the proceedings in which the failure occurred, but all subsequent proceedings dependent upon them. As against the persons specified, the appellant has failed to establish his competence to execute the decree and this disability debars him in all further proceedings. This is made clear in *Sri Nath Das* v. *Achutanand Mahanti* (2), a case in which service was effected indeed upon the judgment-debtors, but no notice was served upon the transferor. Even in such a case it was held, and we think rightly held, that the whole of the proceedings subsequent were bad in law. We do not wish to go into the merits, but it has only to be observed that the contention is that the appellant is a benamidar for defendants 1 and 2 to realize how defendant 3 may have been prejudiced by the order being passed behind her back.

The order under appeal modifies the order in E. P. No. 146 by noting that the legal representatives of the deceased defendant 3 had no notice of the application under O. 21, R. 16, and by adding a further clause adjourning the application so that the legal representatives might have an opportunity of showing cause. We think that the better course would be to set aside the order in E. P. 146 of 1928 as against defendant 3. Her legal representatives may then be brought on and the application disposed of in due course. We must also for the reasons given set aside the order in E.P. 21 of 1929, and disposal of this application must await the decision in E. P. 146. It is hardly necessary to add so far as this latter application is concerned, that if the legal representatives are brought on in E. P. 146 no further question with regard to this relationship can arise in E. P. 21. It has been objected that the revocation of E.P. 21 was not in terms asked for, but we think that the notice of motion, which seeks such further or other order appropriate in the circumstances of the case, is wide enough to cover this relief, and O. 41, R. 33, gives the appellate Court ample powers

(1) [1912] 36 Bom. 58=12 I.C. 547.
(2) [1910] 6 I.C. 262.

in this respect. The appeal is dismissed with taxed costs.

P.R.S./M.N. *Appeal dismisssd.*

A. I. R. 1931 Madras 194

WALLACE AND ANANTAKRISHNA AIYAR, JJ.

Sree Venugopala Rice Mill—Appellants.

v.

Raja of Pithapuram—Respondents.

Second Appeal No. 594 of 1926, and Civil Revn. Petn. No. 878 of 1926, Decided on 13th December 1929.

(a) Madras Estates Land Act (1 of 1908), Ss.3 and 56—Consideration for agreeing that land should not be used for agricultural but for building purposes is not rent and suit for specific performance of such contract being not to enforce acceptance of patta is maintainable in ordinary Courts.

There is nothing in the Act to prevent the landlord and the tenant from entering into a contract with each other that the land should in future be held or used not for agricultural purposes but for building purposes. The consideration for the landlord agreeing to the same may be either a lump payment made to him or annual payments. Such annual payments are not "rent" within the meaning of the Act, and a suit for specific performance of such a contract between the parties is not a "suit to enforce acceptance of patta" within the meaning of S. 56. Such a suit is maintainable in the ordinary civil Courts: 37 *Mad.* 432 ; 31 *I. C.* 852 ; 27 *Cal.* 205 and 19 *Cal.* 489, *Ref.* [P 197 C 1]

(b) Madras Estates Land Act (1 of 1908), S. 3 (15)—Ryots.

Persons who buy ryoti land not for agricultural purposes but for constructing a mill which they do construct on an agreement with the zamindar are not ryots within S. 3 (15).

[P 194 C 2]

P. Somasundaram—for Appellants.

A. Krishnaswami Aiyar—for Respdts.

Wallace, J.—The facts necessary for the disposal of this appeal are : The defendants are the proprietors of a rice mill. They purchased for the purpose of erecting and working a mill 3·26 acres out of Survey No. 179 in the suit village which lies within the estate of the zamindar of Pithapuram, who is the plaintiff. The defendants' vendor was the ryot who held Survey No. 179 on patta from the zamindar. When the zamindar's thanedar informed the defendants that buildings should not be erected on ryoti land, the defendants petitioned the zamindar and came to an agreement with him that they should be left undisturbed promising to pay him three times the ordinary cist. The zamindar accordingly ordered his officials to sub-divide the 3·26 acres from the main holding and have that registered as a separate holding in the names of the defendants, and directed that a draft patta and a muchilika should be prepared. When the muchilika was offered to the defendants, they refused to accept it on the ground that the zamindar could not charge them more than the ordinary cist. The plaintiff has accordingly filed this suit for specific performance of the agreement. Both the lower Courts have decreed the suit and the defendants appeal.

Clearly on the equities they have no case, but they stand on the technical ground that this suit is, in effect, one to enforce a patta and therefore cannot be brought in a civil Court. The answer to this contention seems to me to be that the defendants are not "ryots" within the definition of that term in the Madras Estates Land Act. They are not persons who ever held or are now holding this ryoti land under the plaintiff for the purpose of agriculture. They never wanted so to hold it. They did not buy the land for that purpose. Their avowed purpose in purchasing the land was for erecting the mill upon it, and their arrangement with the plaintiff was that they should be allowed to retain it for building purposes and they have in fact built upon it. In these circumstances it seems to me impossible to hold that the defendants are ryots within the definition in the Act. Since they are not ryots, whatever recognition the zamindar has made in the matter of consenting to the sub-division of the land and to its being held under him for rent is not a recognition by him of the defendants as his ryots. It does not advance the case of the defendants that they purchased the land from a ryot. Whether the zamindar chooses to eject that ryot under S. 151 because he has impaired the value of his holding for agricultural purposes by sale of 3·26 acres of it to the defendants is a matter entirely between the plaintiff and that ryot and is no concern of the defendants. For a similar reason there is no question here of any enhancement of a ryot's rent. The rent of that ryot who holds patta for the land has not been enhanced, and the rent claimed from the defendants is therefore not an enhancement of the ryot's rent.

The rent payable by the defendants is the matter of a separate contract between them and the zamindar, and it is not "rent" under the provisions of the Estates

Land Act : see *Ramachandra Madaraja Deo* v. *Dukko Padhano* (1). The defendants, then, not being ryots, S. 55, Estates Land Act, which is the section enabling a suit to be brought to enforce a patta on a ryot, has no application. There is no reason therefore for holding that the civil Court has no jurisdiction to enforce the specific performance of the plaint agreement, which is in essence merely a contract between the landlord and those who have bought out the original occupancy holders. I therefore see no reason to interfere with the decree of the lower appellate Court and dismiss this appeal with costs.

C. R. P. No. 878 of 1926 follows and is dismissed with costs.

Anantakrishna Aiyar, J.—I agree. The defendants (Sree Venugopala Rice Mill, Pandalapaka, and the shareholders thereof) are the appellants in this second appeal. Survey No. 179 was jeroyati land under wet cultivation, of the extent of 56 acres, paying rent at a particular rate per acre to the plaintiff the Rajah of Pithapuram. The defendants purchased three acres from the ryot who owned Survey No. 179 and wanted to use the same for non-agricultural purposes by constructing buildings thereon for use as a rice mill. When the defendants proceeded to erect buildings on the three acres, purchased by them in 1916, the plaintiff's officials obstructed the defendants from proceeding with the building on the ground that the defendants were not entitled to use the three acres of land, which were actually under wet cultivation, for building purposes unconnected with the agricultural use of the land. The defendants thereupon, petitioned the plaintiff for permission to use the land for non-agricultural purposes, and for using the same for building purposes, offering to pay three times the rent that was being paid in respect of the land. The plaintiff agreed to the said offer and directed proper house site patta and muchilika to be executed by both parties. The buildings having been evidently completed in the meantime, the defendants wanted to back out of the agreement ; they denied to do anything further in the matter. The plaintiff filed the original suit in the Court of the District Munsif of Rajahmundry for specific performance of the agreement between the parties. The defendants pleaded coercion, misrepresentation, etc.; and both the lower Courts found against the said contentions of the defendants. The defendants also pleaded that the suit was for enhancement of rent and that the civil Courts had no jurisdiction to entertain the suit. Both the lower Courts disallowed these contentions also and decreed the suit in plaintiff's favour. The defendants have preferred the present second appeal.

Mr. P. Somasundaram, the learned advocate who appeared for the appellants, argued that the civil Courts had no jurisdiction to entertain the suit, that the plaintiff's remedy, if any, was only to take ejectment proceedings under S. 151, Estates Land Act, if the use of 3 acres out of 56 acres for building purposes be considered to be " materially impairing the value of the holding for agricultural purposes " and further that the suit was really for enhancement of rent. He referred to S. 189, Estates Land Act, and also to S. 11 as regards the right of the ryot to use the land:

" in any manner which does not materially impair the value of the holding or render it unfit for agricultural purposes; "

he relied also on S. 27 as regards the rate of rent payable by the ryot. He also referred to S. 56, under which the landholder should proceed in the revenue Courts to compel the ryot to accept patta and to execute muchilika. He also argued that in spite of buildings being raised on the land, the land remained " cultivable " land, and that the landholder was only entitled to recover the mamool rent payable in respect of the lands, and that, if the landholder wanted " enhancement of rent, " he was bound to proceed under the provisions of Ch. 3, Estates Land Act.

On behalf of the respondent the learned Advocate-General argued that the three acres in question were purchased by the defendants under Exs. 2 and 2 (a) from the original ryots who owned 56 acres in Survey No. 179, and under S. 145 it was open to the landholder to subdivide the original holding and recognize the 3 acres as a separate holding ; that the effect of Exs. A and B (the application by the defendants and the order by the plaintiff) was to recognize the transfer and to treat the three acres as a separate holding ; that no question of the applicability of S. 151, Estates Land Act,

(1) [1915] 31 I.C. 852.

arose since the three acres in question should be deemed to be a separate holding after Exs. A and B, and that the questions whether the use of 3 out of 56 acres of wet land for building purposes was reasonable or not, and whether the same materially impaired the value of the holding for agricultural purposes or rendered it substantially unfit for such purposes, did not arise for consideration in this case. He contended that this was a case of the whole of the three acres of wet land included in a holding being built upon, in which case it could not be doubted that such user was not permissible on the part of the ryot, and the landholder could have sued to eject the defendants under S. 151 of the Act. The landholder had valuable rights in the land to prevent the use of wet land for building purposes by the defendants; while the defendants also were greatly benefited by being allowed to use these lands for building purposes. In the circumstances both parties agreed that the land should not in future be held for agricultural purposes, and they agreed to convert the same into building sites and to have buildings erected thereon. He contended that there was nothing in the Estates Land Act which prevented the parties from agreeing to do so. The amount to be paid in future in respect of such land would not be "rent" within the definition of S. 3 (11) of the Act, which defines "rent" as

> "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture;"

so that if the land is not held for purposes of agriculture, the payments could not be said to be "rent" within the meaning of the Estates Land Act. He similarly contended that the defendants could not be said to be "ryots" within the definition of S. 3 (15), since they did not hold the land "for the purpose of agriculture" on condition of paying to the landholder the rent which is legally due upon it. The amount to be paid by the defendants is not "rent" and the defendants themselves are not "ryots," after the plaintiff and the defendants agreed that the land should not be used for agricultural purposes but, should be used for putting up buildings. He also argued that no provisions of the Estates Land Act prevented the parties from entering into such a contract or from fixing the amount payable by the one party to the other.

We think that the contentions raised by the appellants are not sustainable. We take the result of Exs. A and B to be that the plaintiff recognized the defendants' purchase, and also agreed to treat the 3 acres in question as a separate holding. When both the parties agreed to utilize the land for building purposes, and not for agricultural purposes, the amount payable by the tenant under the contract could not be called "rent" within the meaning of the Estates Land Act; nor could the defendants be said to be "ryots" within the meaning of the Act. It is only a suit to enforce acceptance of patta by a "ryot" that has to be instituted in revenue Courts under S. 56. For the same reason S. 189 also does not apply. The amount not being "rent" within the definition of the Act, no question of "presumption as regards the rate of rent" arises under S. 27; nor does any question of "enhancement of rent" arise within the meaning of Ch. 3 of the Act. We think that it was open to the parties to enter into the contract evidenced by Exs. A and B. Valuable consideration moved from the landholder to the defendants, and we do not think that the legal objections raised on their behalf by their learned advocate before us are tenable. The scheme of the Estates Land Act seems to be to protect persons who hold lands "for the purpose of agriculture." When the lands are not held for agricultural purposes, our attention has not been drawn to any provision of the Act which prevents parties from entering into any contract which it would otherwise be open to them to enter into. In *Meera Kasim Rowther* v. *Foulkes* (2) the Court held that a custom or contract entitling a ryot of agricultural land to erect buildings thereon is not opposed to the provisions of the Madras Estates Land Act, and can be enforced against the landlord, though such erections may impair the value of the holding for agricultural purposes. At p. 434, the learned Judges, Sundara Aiyar and Sadasiva Aiyar, JJ., observed that

> "section 11 does not deprive the ryot of the benefit of a contract or usage which would entitle him to use it in a manner which might impair the value of the land for agricultural purposes. . . . . It would, no doubt, probably have the effect, in case of relinquishment of the

(2) [1912] 37 Mad. 432=16 I. C. 220.

land by him, of depriving the landlord of the benefit of letting it out again for agricultural purposes. There is however nothing in the Act which renders such a contract or custom unenforceable against the landholder."

In *Ramachandra Mardaraja Deo* v. *Dukko Podhano* (1) Abdur Rahim and Spencer, JJ., held that money due for occupation of land let for the purpose of building houses is not "rent" within the meaning of S. 3, Madras Estates Land Act, and that a suit to recover the same is cognizable by the civil and not by the revenue Court. The reasoning of the learned Judges in that case supports the view we take.

In our view there is nothing in the Estates Land Act to which our attention was drawn which would prevent the parties from entering into a contract with each other that the land should in future be held or used not for agricultural purposes, but for building purposes. The consideration for the landlord agreeing to the same may be either a lump payment made to him or annual payments. Such annual payments are not "rent" within the meaning of the Estates Land Act, and a suit for specific performance of such a contract between the parties is not a "suit to enforce acceptance of patta" within the meaning of S. 56, Estates Land Act. Such a suit is maintainable in the ordinary civil Courts and the objection as to jurisdiction accordingly fails. There is no question of "enhancement of rent" within the meaning of Ch. 3, Estates Land Act, in the present suit, as contended for by the appellants.

We may state that we put the learned advocate for the appellants the question as to what procedure should be followed by the landholder and the ryot in case both of them wanted to have such land held and used in future for building purposes, and having regard to the benefit that would accrue to both the parties, the one agreed to make increased annual payments to the other. The learned advocate, with his usual candour, answered that the Estates Land Act stood in the way and that such a contract would be invalid under the Act. We naturally were unwilling to accept such a result unless there be anything specific in the Estates Land Act, which would necessitate the same. Our attention was not drawn to any such provision by the learned advocate, and we are not ourselves aware of any.

It has been held that the amounts payable to landholders in respect of grazing fees, and the like, are not "rent" within the meaning of the Act, since the same are not paid for the use or occupation of land for the purpose of agriculture. In Bengal it has been held that lands held for building, mining, or quarrying purposes are not lands held for agricultural purposes, and are not governed by the provisions of the Bengal Tenancy Act: see *Umrao Bibi* v. *Mahomed Roiali* (2) and *Ranigunj Coal Association Ltd.* v. *Judoonath Ghose* (4). Ss. 7 and 186, Estates Land Act, refer to mining rights, and in cases, where the ryot has any right in the minerals, the Court is directed to award compensation for such right when the landholder acquires the land under S. 186 for the opening and working of mines. Surely the landholder and the ryot, in cases where the ryot has a right in the minerals, could agree, as between themselves, as to the amount to be payable by the one to the other, in cases where minerals are to be worked. They are not bound to go to Court even if they could agree. This also indicates that it is open to the landholder and the ryot to enter into contracts relating to the user of land for other than agricultural purposes. The result of accepting the appellant's contention would be to make it impossible for the landholder and the ryot to agree to put up buildings unconnected with agricultural purposes on ryoti lands, wet or dry. In many districts, ryoti lands, mostly dry, are often purchased by persons for building houses thereon after paying money to the landholder and to the ryot in possession. In the view presented by the appellants, the title of such purchasers of ryoti land from both the landholder and the ryot, who build houses on such land, would be illusory since the landholder could eject them under S. 151, Estates Land Act, if, as is alleged, the contract be invalid in law.

It is clear that, unless we are driven to such a conclusion, we should avoid such a result; and we have not been referred to any provision of law which compels us to come to such a conclusion.

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(3) [1899] 27 Cal. 205=4 C. W. N. 76.
(4) [1892] 19 Cal. 489.

The general principle "once ryoti, always ryoti" is not violated in such cases, since the incidents of ryoti land would at once attach to such lands, should they subsequently, for any reason, again be held for agricultural purposes.

Chapter 14, Estates Land Act, relating to restrictions on contracts between landholders and ryots, does not in any way invalidate such a contract as the one before the Court.

There is no merit in the appellants' contentions, nor in our view any law in their favour.

For the above reasons I am of opinion that the second appeal fails, and I would dismiss it with costs.

Civil Revision Petition No. 878 of 1926 is against the decree awarding the plaintiff the amounts due for faslis 1332, 1333 and 1334; the same is also dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 198

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Peram Chennamma, In re—Plaintiff—Appellant.

Letters Patent Appeal No. 92 of 1929, Decided on 8th October 1929, from order of Walsh, J., D/- 11th September 1929, in Civil Misc. Petn. No. 3262 of 1929.

(a) Letters Patent (Madras), Cl. 15—Appeal raising substantial question of law—Letters Patent Appeal was allowed without notice to respondent.

Where an appeal raised a substantial question of law, the High Court, in allowing the Letters Patent appeal, reversed the order dismissing the appeal under Civil P. C., O. 44, R. 1, without notice to respondent: *Mad. L. P. A. No.* 248 *of* 1927; *Mad. L. P. A. No.* 351 *of* 1926 and *A. I. R.* 1925 *Mad.* 1178, *Rel. on.* [P 199 C 1]

(b) Civil P. C., O. 44, R. 1—Before allowing pauper appeal Court need not arrive at definite and final conclusion.

Before allowing a pauper appeal it is unnecessary that the Court should arrive at a definite and final conclusion that the decree complaiued against is contrary to law or is otherwise erroneous or unjust. That certainly cannot be the intention of O. 44, R. 1. [P 198 C 2]

Ch. Raghava Rao—for Appellant.

Venkatasubba Rao, J.—The plaintiff applied to the High Court to be allowed to appeal in forma pauperis. The application was rejected by a Judge of this Court and the plaintiff files this Letters Patent appeal.

Order 44, R. 1, says that the Court shall reject the application unless, upon a perusal thereof and of the judgment, it sees reason to think that the decree is contrary to law or some usage having the force of law, or is otherwise erroneous or unjust. The learned Judge who heard the application rejected it, quoting the words of this section and merely observing that its requirement has not been fulfilled. The lower Court dismissed the plaintiff's suit holding that the claim is barred under Art. 93, Lim. Act. The question to be decided is: What is the article applicable to such claims, Art. 93 as that Court has held, or Art. 144 or Art. 142 as the appellant contends.

The lower Court discusses the question at great length and refers to various authorities. It says that *Narayanan Chetti* v. *Kannamai Achi* (1) supports the plaintiff's contention, but expresses the view that it must be taken to have been impliedly overruled as a result of certain later cases. The matter thus requires further investigation. In other words the appeal raises a substantial question of law and we cannot foretell what view the Bench disposing of the appeal may take after hearing arguments on both sides. To decide the point at once would be to prejudge the appeal. It is unreasonable to hold that O. 44, R. 1, compels us to adopt such a course. This is the view that has generally been taken by this Court. In *L. P. A. No.* 248, *of* 1927, Kumaraswami Sastri and Wallace, JJ. were called on to interfere with an order made by a single Judge refusing leave. They reversed the order observing that the appeal raised a substantial question of law. The same question was again raised in *L. P. A. No.* 351 *of* 1926 to which one of us was a party. The Judge before whom the application was made having rejected it, a Letters Patent appeal was filed against his order. The Bench which heard the appeal reversed the order, stating that the appellant has a prima facie good case. A similar view was taken in *M. Parasuramudu* v. *M. Ramanna* (2). It is unnecessary in our opinion that the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law or is otherwise erroneous or unjust. That certainly cannot be the intention of O. 44, R. 1. We therefore set aside the order and allow the Letters Patent appeal. We may add that, in conformity with precedents, we

(1) [1904] 28 Mad. 338.
(2) A. I. R. 1925 Mad. 1178=87 I. C. 960.

have not directed notice to the respondents, before deciding this Letters Patent appeal: see the two Letters Patent appeals quoted above, No. 351 of 1926 and 248 of 1927. The appellant was allowed to sue in forma pauperis, and no further inquiry seems necessary. We understand that the application was made in time. We direct that the appeal may be admitted.

P.R.S./V.S. *Appeal allowed.*

A. I. R. 1931 Madras 199

RAMESAM AND JACKSON, JJ.

Unnamalai Ammal—Appellant.

v.

Gopalaswami Chetti and *others*—Respondents.

Second Appeal No. 494 of 1927, Decided on 28th April 1930, against decree of Dist. Court, West Tanjore, in A. S. No. 68 of 1925.

Transfer of Property Act (1882), S. 81—Time stated in S. 81 is when prior mortgagee seeks to realize his amount.

Section 81 refers to the right of the second mortgagee to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee and the time with reference to which the section is speaking is the time when the prior mortgagee seeks to realize his mortgage amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee, then the right of marshalling does not exist. [P 199 C 2]

R. Kuppuswami Ayyar—for Appellant.

A. V. Viswanatha Sastri and *N. S. Rangaswami Ayyangar*—for Respondents.

Judgment.—The facts of the second appeal may be stated as follows :

Defendant 1 was the original owner of the suit properties which are described in Schs. A and B of the plaint. Both these sets of properties were mortgaged to Kuppuswami Pillai on 20th June 1910, under Ex. 1. Afterwards defendant 1 effected a second mortgage of the properties in Sch. A only and some other properties not in the suit in favour of defendant 3's father in 1914 by Ex. E. The plaintiff obtained a mortgage decree in Small Cause No. 8 of 1916 against defendant 1, and in execution of the decree purchased the properties in Sch. B by a sale certificate Ex. 4 dated 6th August 1917. Afterwards, defendant 2, in execution of a decree in Small Cause No. 1238 of 1914, purchased in Court auction the properties in Sch. A. In 1917 a suit was filed by the first mortgagee to enforce his mortgage impleading defendant 1, the plaintiff, defendant 2 and defendant 3 and obtained a decree on 8th February 1919, Ex. C. He applied for execution of the decree in July 1923. The plaintiff paid off the decree amount. The plaintiff now brings the suit for contribution against Sch. A properties in the hands of defendant 3. It may be mentioned that defendant 3 himself in 1922 filed a suit on his mortgage and obtained a decree and purchased the properties in execution of his own decree (Ex. 2). This was on 8th February 1924. Both the lower Courts holding that defendant 3 has got the right of marshalling under S. 81, T. P. Act denied the right of contribution and dismissed the plaintiff's suit. The District Munsif in his judgment referred to *Rajkishwar Prasad Narain Singh* v. *Mahommad Khalil-ul-Rahman* (1). It is also relied on by the advocates for the respondent before us. That decision and the decision in *In the matter of Joshy Assam* (2) merely decide that the right of marshalling which a second mortgagee has got is not lost by the fact that he afterwards purchases in execution of his own decree. But the point with which we are concerned now is not whether the respondent is not entitled to the right of marshalling by reason of the fact he has purchased in execution of his own decree but whether he has got the right of marshalling against a person in the position of the plaintiff. S. 81, T. P. Act says that the right of marshalling exists against a mortgagor but not :

" so as to prejudice the rights of a first mortgagee or any other person who has acquired for consideration an interest in either property."

As the section refers to the right of the second mortgagee to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee it is clear that the time with reference to which the section is speaking is the time when the prior mortgagee seeks to realize his mortgage amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee then the right of marshalling does not exist. The section is therefore clearly in favour of the appellant. Primarily the right of marshalling is a right given against a

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(1) A.I.R. 1924 Pat. 459=78 I.C. 796=3 Pat. 522.

(2) [1896] 23 Cal. 290.

mortgagor. Any further extension of the equity must be made very clear by the language of the statute. Halsbury's Laws of England, Vol. 21, S. 544, relied on by the respondent is against him. It does not exempt right of marshalling in express terms against purchasers. It allows it against mere judgment-creditors. This obviously refers to judgment-creditors who had not become purchasers. The case cited in the foot-note "c" *Gray* v. *Stone* (3) refers to a case of judgment-debtors who had not yet purchased before the question arose. The dictum of Kay, C.J., in *Flint* v. *Howard* (4), viz: "It is not enforced against a mortgagee or purchaser of the other estate," supports the appellant. The right of the appellant not to be marshalled does not depend upon whether he had notice of the second mortgage: see Ghose on Mortgages, Vol. 2, p. 812. We think therefore that the Courts below have erred in dismissing plaintiff's suit. The plaintiff is entitled to contribution. No finding has been given as to the amount to which the plaintiff is entitled. The Court will have to find the amount which can be rateably charged upon the properties in Sch. A with reference to the value of the properties at the time of the first mortgage. The Court will submit its finding upon issue 5 with reference to the above remark with such incidental consideration of issue 3 as may be necessary. Time one month after the re opening of the High Court. Time for objection seven days.

P.R.S./K.N. *Appeal allowed.*

(3) [1893] W. N. 133.
(4) [1893] 2 Ch. 54=62 L. J. Ch. 804=2 R. 386=68 L. T. 390.

A. I. R. 1931 Madras 200

SUNDARAM CHETTY, J.

Seenia Pillai—Defendant—Appellant.

v.

Taluk Board of Shermadevi—Plaintiff—Respondent.

Second Appeals Nos. 991 and 992 of 1928, Decided on 17th October 1930, from decrees of Dist. Judge, Tinnevelly, in Appeal Suits Nos. 34 and 35 of 1926.

Madras Estates Land Act (1 of 1908), S. 77—Suit for arrears of rent by landholder against ryot — Uniform rate of grain assessment fixed for all tenancy holdings—In 1871 grain rent commuted into cash rent — Subsequently from 1878 and 1889 one-eighth and one sixth of the rent respectively was collected in kind and rest in cash without objection for 32 years—Ryots' contention that changes in 1878 and 1889 amount to enhancement of rent unenforceable in absence of valid and binding contract cannot be sustained.

Where a uniform rate of grain assessment was fixed for all the tenancy holdings and the grain rent was commuted into cash rent by adopting the value of each kottah of grain at Rs. 5 in 1871, but subsequently from 1878 one-eighth of the rent was collected in kind and since 1889 one-sixth of it was collected in kind and the rest in cash, and the tenants continued to pay in this manner without any objection for 32 years:

Held: that as the defendant had failed to prove that the slight changes made by levying a small portion of the fixed grain rent resulted in enhancement of rent, his contention that the subsequent changes in 1878 and 1889 amounted to enhancement of rent which could not be enforced in the absence of a valid and binding contract, such contract not being binding on the ryots without some consideration from the landholders, could not be sustained. [P 201 C 2]

Held further: that even if the changes made in 1878 and 1889 were to be termed as a substituted contract for the one of 1871, any further and independent consideration was not necessary to validate the substituted contract: *A. I. R.* 1918 *P. C.* 173 and 45 *I. C.* 401, *Ref.* [P 202 C 1]

K. V. Sesha Ayyangar—for Appellant.

S. Ramaswami Ayyar—for Respondent.

Judgment.—These are connected appeals arising out of two suits filed by the Taluk Board of Shermadevi, under S. 77, Madras Estates Land Act, for the recovery of arrears of rent due from the defendant. The facts of the case are briefly as follows:

Defendant is a tenant holding lands in an inam village which is an endowment for a chathram now under the management of the Taluk Board, Shermadevi, which occupies the position of a landholder. The village was originally under the management of the Board of Revenue which exercised supervision and control over public charitable trusts. It is admitted that the rent for the lands in this inam village was from time immemorial payable in kind. As would appear from Ex. A, the letter of Mr. Puckle, I. C. S., sent to the Board of Revenue in 1871, on which the defendant himself mostly relies, the ryots were paying the rent in kind as varam, or patam, or izarah rates, which were by no means uniform and which weighed heavily on the tenants, the system amounting almost to rack renting. In order to ameliorate the condition of the ryots, he proposed to fix a uniform rate of grain assessment for all the holdings, instead of the divergent and fluctuating rates prevailing till then. He further proposed to commute the grain

rent into cash rent, by adopting the value of each kottah of grain at Rs. 5. His proposal was approved by the Board of Revenue. It was acted upon for some years till about 1878. In that year, the managers of the estate found it necessary to collect a portion of the grain rent fixed according to the proposal of Mr. Puckle, in the shape of grain alone, as grain was required for meeting the requirements of the chathram charity. Accordingly, one-eighth of the rent was collected in kind and the rest in cash (at the commutation rate). This system went on for some years, till about 1889, or so, when a slight modification was made by collecting one-sixth of the rent in kind and the rest in cash. As observed by the District Judge, this system was in vogue for 32 years or so, and the tenants were paying the rent in this manner without any sort of objection.

The point for determination is, whether the claim for the recovery of one-sixth of the rent in kind, despite the payment of the rent in this manner by the ryots for more than three decades since 1889, is unenforceable. It is argued that the settlement in 1871 according to the proposal of Mr. Puckle in his letter, Ex. A, should be deemed to be one fixing a cash rent permanently at Rs. 5 per kottah, and that the subsequent changes in 1878 and 1889, whereby a portion of rent was collected in kind, amount to enhancement of rent, and as such, would not be enforceable in the absence of a valid and binding contract. The learned Deputy Collector, in a careful and well-considered judgment, has discussed these points, and found that the levy of one-sixth rent in kind and the rest in cash cannot be deemed to be an enhancement of the rent. The learned District Judge also says that there is no evidence to show that the rent calculated as per the changes in 1878 and 1889 were greater than the rent levied according to the proposal of Mr. Puckle in 1871.

On a careful consideration of Ex. A, I am of opinion, that a uniform and fixed rate of grain rent, more favourable to the ryots than the prevalent rates, was fixed in or about 1871, and instead of collecting the grain fixed as rent, its equivalent in cash, taking Rs. 5 as the value of each kottah, was to be received. It seems to me that this price was not fixed as a permanent price as Mr. Puckle himself wanted to see how this system would work during a period of five years, and then to consider the need for alterations for the purpose of extending the chattram charity or for making further reduction in rent. In a former suit of this kind it was held by this Court in S. A. 36 of 1923, on a consideration of Ex. A, that the price then fixed by Mr. Puckle was not intended to be a permanent one (Ex. G-4).

As observed by the learned Deputy Collector, even in the pattas issued subsequent to 1871 (which the defendant has filed as Exs. V-e to V-g), the rent is stated to be so many kottahs of grain, and in another column its equivalent value in money is mentioned. If, by the arrangement effected in 1871, a permanent cash rent alone was fixed for each holding, there would have been no entry in the subsequent pattas showing the quantity of grain due as rent. The change introduced by Mr. Puckle in the system of collection of rents in this village in 1871 was undoubtedly a favour shown to the ryots, and as the concessions granted to the ryots by that change were more or less an act of grace, and were not claimable by the tenants as a matter of right, the further continuance of the same may not be strictly enforceable by the tenants in the absence of a valid and binding contract. Ignoring this the appellant wants to proceed on the assumption that the favourable system of rent collection introduced in 1871 amounts to a valid and binding contract for which consideration passed from the ryots, so that the slight changes made in 1878 and 1889 would not be valid and binding on the ryots without some consideration flowing from the landholder. It is on this fallacy a strenuous argument was built to the effect that, though the ryots were paying according to the change made in 1889 without any sort of objection for 32 years or so, they are no longer bound to pay like that but should pay the whole rent in cash alone, at the rate fixed by Mr. Puckle in 1871. In the first place the defendant has failed to prove, as found by the Courts below, that the slight changes made by levying a small portion of the fixed grain rent, as such, resulted in enhancement of the rent, in which case alone there should be fresh consideration for the enhancement. The decision in *Jagaveera Rama Venkateswara*

Ettappa v. *Arumugham Chetty* (1), relied on by the appellant, has no application to the present case. In that case, it was found that there was a binding contract for paying the dry rate alone. Though the tenants were subsequently paying a higher rate (garden rate) for a series of years, it was not enforceable as no consideration for levying the higher rate was proved. In the second place, even assuming that by levying a portion of the rent in kind, instead of in cash, there was some enhancement of the rent, the grant of concessions to the ryots gratuitously in 1871 may be deemed to be consideration for the implied contract to pay one-sixth of the rent in kind and the rest in cash, presumable from the uniform payment in that manner ever since 1889. If this can be viewed as a substituted contract for the one in 1871, any further consideration or independent consideration would not be necessary to validate the substituted contract: vide *Vasudeva Mudaliar* v. *Velappa Nadar* (2).

For the foregoing reasons, I uphold the finding of the Courts below, that the claim for the recovery of one-sixth of the rent in kind and the rest in cash, is valid and enforceable.

The only other point argued is the levy of the road-cess. There is no force in the argument advanced on behalf of the appellant, in the face of the express legislative enactment (S. 88, Local Boards Act) which entitles the landholder to collect from the ryot one-half of the road-cess paid by him to the Government.

In the result, these second appeals fail and are dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

(1) A. I. R. 1918 P. C. 173=48 I. C. 907=45 I. A. 195=43 Mad. 174 (P. C.).
(2) [1917] 45 I. C. 401.

A. I. R. 1931 Madras 202

ANANTAKRISHNA AIYAR, J.

(*Kondreddi*) *Bulliraju*—Appellant.

v.

(*Kondreddi*) *Satyanarayanamurthi* — Respondent.

Second Appeals Nos. 1315 and 1316 of 1927, Decided on 23rd October 1929, from decrees of Sub-Judge, Rajahmundry, in Appeal Suit Nos. 60 and 61 of 1925.

Letters Patent (Madras), Cl. 15 — No hard and fast rule can be laid down as to when single Judge giving decision in second appeal should grant or refuse to grant leave to appeal from his judgment.

Under Cl. 15 an appeal would lie from the decision of a single Judge of the High Court passed in second appeal, only where the Judge who passed the judgment declares that the case is a fit one for appeal. It is not possible to lay down definite rules applicable to all cases as to when the Judge should grant or refuse to grant the leave to appeal. But the jurisdiction should not be exercised capriciously or arbitrarily but in a judicial manner and in the exercise of sound discretion having regard to all the circumstances of the case. The circumstance that second appeal is allowed or dismissed is by itself not a circumstance conclusive either way. The stricter tests of leave to appeal to Privy Council should not be applied to such cases. Leave to appeal can be restricted to certain points only : *A. I. R.* 1930 *Mad.* 75; 38 *I. C.* 818; *A. I. R.* 1923 *All.* 466 and *A.I.R.* 1923 *Bom.* 245, *Rel.on.*: (*English cases discussed*). [P 205 C 2, P 206 C 1]

G. Lakshmanna—for Appellant.

B. Somayya—for Respondent.

Order.—Under S. 15 of the amended Letters Patent, an appeal would lie from the decision of a single Judge of the High Court passed in a second appeal, where the Judge who passed the judgment declares that the case is a fit one for appeal. In *Ramanayya* v. *Kotayya* (1) a Bench of this Court held that no appeal lay from the refusal of such leave by the Judge.

The question has been raised before me as to the grounds on which leave to appeal should be granted or refused in such cases. The section only enacts, that the Judge concerned should "declare" that the case is a fit one for appeal. The principles that should guide him in dealing with such applications are not specified in the section.

It was argued that if there was any question of law, leave must be granted. It was further argued, that if a second appeal was allowed, and the decision of the lower appellate Court reversed, or modified, leave must be given since the single Judge had no jurisdiction to interfere with the judgment of the lower appellate Court in a second appeal except on a question of law, and his interference with the lower appellate Court's decision was proof positive that there was a question of law. It was also argued that when the valuation of the second appeal was not insignificant, leave should similarly be granted.

I am of opinion that the considerations mentioned above are by themselves not

(1) A. I. R. 1930 Mad. 75=121 I. C. 621 = 52 Mad. 952.

conclusive for the grant of such leave. A second appeal would lie to the High Court under S. 100, Civil P. C., only on a question of law or on one of the grounds specified in S. 100, Civil P. C. When a second appeal is admitted and notice issued to the respondents, it may generally be taken that the second appeal is assumed to involve a question of law. If the petitioner's contention be correct, then from every dicision passed by a single Judge after notice is issued to the respondent, leave to appeal should be granted, even though the second appeal was dismissed. The same reasoning would also apply when a second appeal is rejected under O. 41, R. 11, Civil P. C., on the ground that the decision of the lower appellate Court was right and in accordance with law, though a question of law might be involved in the case. S. 100, Civil P. C., makes it clear that it is only when the decision of the lower appellate Court is contrary to law, etc., that a second appeal would be successfully entertained. The wordings of S. 15 of the amended Letters Patent make it abundantly clear that the circumstance that the decision was passed in a second appeal is not enough to entitle the unsuccessful party to leave to appeal; but the Judge must be satisfied that the case is a "fit one" for further appeal and should "declare" accordingly. The circumstance therefore that the decision of the lower appellate Court was reversed by the High Court does not by itself entitle the petitioner to leave to appeal. Nor does the valuation of the appeal by itself so entitle him.

Similar questions have arisen in England and the English Courts have held that the object of such a provision is to prevent frivolous and needless appeals. For example in *Lane* v. *Esdaile* (2) Lord Halsbury observed : It is intended as a check to unnecessary or frivolous appeals." Fry, L. J., in *In re Housing of the Working Classes Act*, 1890, *Ex-parte Stevenson* (3) remarked: "The object was to prevent frivolous and needless appeals:" see also remarks of Lopes, L. J., at p. 613. In the English Bankruptcy Act of 1849 (12 and 13, Victoria, Ch. 106), S. 18 provided as follows:

"If it was deemed that any matter of law or equity brought before Court to be of sufficient difficulty, or importance, to require the decision of the House of Lords, leave to appeal might be given."

The provision was not re-enacted in the subsequent Bankruptcy Acts. Yet, the Court of appeal, in England held that the same principles apply, and that the test to be applied before leave to appeal is granted was to see whether the question before the Court was of sufficient difficulty or importance: see *In re Calthrop* (4) and *Ex-parte Jackson, In re Bowes* (5). As observed by Lord Cairns. L. J., in *In re Calthorp* (4) at p. 256:

"Of course, it would always be very much more agreeable to the Court to find no impediment in the way of its decision being reviewed by a Court of appeal; but the legislature has thought fit to impose upon this Court the duty of determining whether in any case any matter of law or equity is of sufficient difficulty or importance to require the decision of the House of Lords; and that duty the Court must discharge like any other duty which is put upon it. But I cannot say that I think this a matter of sufficient difficulty to require the decision of the House of Lords. I may be wrong, but I am bound to express my opinion."

His Lordship held, that simply because there was a "fragment of law" it did not follow that he should grant leave. In *Ex-parte Jackson, In re Bowes* (5) it was argued that

"the amount at stake was large and that the point in the case was important"

but the Court of appeal refused leave. Baggallay, L. J., remarked at p. 747:

"Though the same limitations and requisites are not to be found in the present Bankruptcy Act as existed under the Act of 1849, we think we ought to act upon similar principles. And, speaking for myself, I am bound to say that I do not entertain the slightest doubt as to the correctness of the decision at which we have arrived."

Cotton and Thesiger, L. J., concurred. In *Ex-parte Pillers, In re Curtoys* (6), Lush, L. J., stated:

"None of us entertains the least doubt of the correctness of our decision."

Leave was therefore refused. Similarly Cotton, L. J., held in *Ex-parte Edwards, In re Tollemache* (7):

"In my opinion leave to appeal ought not to be given. There is not any doubtful question of law raised."

Similarly Bretts, M. R., observed that: "leave to appeal should not be given when the judgment is so clearly right."

(2) [1891] A. C. 210 = 60 L. J. Ch. 644 = 64 L. T. 666=40 W. R. 65.
(3) [1892] 1 Q. B. 609=61 L. J. Q. B. 492=56 J. P. 501=66 L. T. 544=40 W. R. 417.
(4) [1868] 3 Ch. A. 252=37 L. J. B. K. 17=18 L. T. 166=16 W. R. 446.
(5) [1881] 14 Ch. D. 725 = 29 W. R. 253 = 43 L. T. 272.
(6) [1881] 17 Ch. D. 653 = 29 W. R. 575 = 50 L. J. Ch. 691=44 L. T. 691.
(7) [1884] 14 Q. B. D. 415.

No doubt, the single Judge may find that the questions that arose for decision were difficult and that he was not himself quite sure whether his decision was right. A Judge is bound to give judgment in every case that comes before him including cases where the question raised is difficult or complicated ; but if he felt any reasonable doubt as to the correctness of his judgment, it is appropriate that he should "declare that the case is a fit one for further appeal." It may also happen that after the argument in an appeal had progressed to a considerable extent, he may feel some doubt about the correctness of a decision, to which he is referred and which is binding on him, and in the circumstances he may consider it proper that he should record his judgment. In such cases, leave to appeal should be given, so that the matter might be reagitated before the proper Court. Further in such cases if the circumstances were exactly known to him at the opening of the case it would even be open to him to have the matter referred to the decision of a Bench of two Judges. In considering applications for leave to appeal, it is also relevant to consider whether the question raised is one of private or public importance ; whether the same will ordinarily govern other pending cases between the parties and whether the dispute relates to a recurring right. The Court may also take into consideration the circumstance that under S. 111, Civil P. C., the only further right of the unsuccessful party would be to apply to the Privy Council for special leave to appeal. In proper cases the Judge may consider it more appropriate that the matter should be considered by a Bench of two Judges, before the same is taken up before the Privy Council. At the same time I should like to point out that leave to appeal should not be refused simply because the Judge was of opinion that his decision was correct. Most often learned Judges do think so but if the question is one of principle and a novel one ordinarily leave to appeal should be granted. In *Ex parte Gilchrist, In re Armstrong* (8) Lord Esher, M. R., said:

"Merely to say that they are satisfied that their decision is right is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case."

As put in S. 504 of Halsbury's Laws of England, Vol. 2, p. 303, that:

"leave should be given as a rule if the question is one of principle and novel."

When an unrestricted right of appeal is conferred by Statute an appeal would lie even on a "technical point". How the Court of appeal would eventually deal with the "technical point" is a question for that Court to consider. But the circumstances that "a technical point" arises in a second appeal is by itself not a sufficient ground which would entitle the appellant to leave to appeal. Substantial justice should not altogether be lost sight of in considering finality of decision in cases where the legislature has thrown the duty of deciding whether the litigation should be continued further on the Judge who decided the second appeal. If the question raised be one of frequent occurrence in which there is no authoritative decision that would be a circumstance in favour of granting leave.

Cases where the appeal was remanded to the lower appellate Court for fresh disposal on the ground that the existing judgment of the appellate Court was not satisfactory either because it did not satisfy the requirements of O. 41, R. 31, Civil P. C., or because it omitted to consider important items of evidence or because the judgment proceeded under some misapprehension of fact are ordinarily not cases for grant of leave. So also are cases where a similar procedure is adopted on the ground that parties had not proper opportunity to put forward their cases before the lower appellate Court. and the judgment accordingly proceeded in the absence of one of the parties or in the absence of evidence on the side of one of the parties. Similarly when it is found in second appeal that an important question arising in the case was not properly dealt with by the lower Courts, and the Judge is of opinion that the attention of the parties had not been properly directed to it in the absence of specific issue on the point and the appeal is accordingly remanded for fresh disposal after the framing of a proper issue and after giving the parties an opportunity to adduce evidence on the same, leave to appeal should not ordinarily be given. If in any of the above cases a question of principle either of pleading or of practice

(8) [1883] 17 Q. B. D. 521=55 L. T. 538=55 L. J. Q. B. 578.

of frequent occurrence be raised on which there is no authoritative ruling then that would prima facie be a ground for granting leave.

In cases arising under new statutes where "ambiguous expressions" are construed by the Court for the first time leave to appeal may be given having regard to the importance of the question till the construction put on the words of the statute has become so well known and have been followed in transactions of everyday occurrence that in the public interest it may be considered not proper to have these matters unsettled. Some of these are probably considerations which should weigh with the final appellate authorities but it seems to me that they would also be relevant though by no means conclusive in considering the question of grant of leave. It may be possible to give a few more instances of cases where ordinarily leave to appeal should or should not be given.

In cases where the question relates only to exercise of discretion (not point of law) leave should generally be refused: see *Ex parte East and West India Dock Co., In re Clarke* (9).

In *Ex Parte Wolverhampton and Staffordshire Banking Co., In re Campbell* (10) Stephen, J., held :

"We cannot give leave. The case is not one of any magnitude or of any general importance."

Cave, J., said:

"I agree. There is not a large sum at stake, and the principle involved is one about which I do not entertain any doubt."

Leave to appeal should be asked for under R. 95 of the Appellate Side Rules, orally and immediately after the judgment has been delivered. This is also the English practice (2 Halsbury's Laws of England, p. 303, S. 504). No elaborate arguments on the point are contemplated as the facts and the circumstances of the case would be present to the mind of the Judge at the time.

It follows that where a single Judge only followed a ruling of an authority binding upon him or applied it to cases clearly within the purview of the principles so laid down, no leave should be granted except in cases already mentioned where he himself felt doubt about the correctness of such ruling or thought that a re-consideration of the same was necessary.

In cases relating to construction of ordinary documents the Judge has got a greater discretion in declining to grant leave to appeal for it very rarely happens that two private documents are generally exactly similar in terms. The circumstance that the decision of the lower appellate Court was reversed is not conclusive for grant of leave, any more than the circumstance that the decision of the lower appellate Court was confirmed is conclusive for its refusal; the circumstance that the second appeal is allowed or dismissed is by itself not a circumstance conclusive either way.

Provisions of the Civil Procedure Code relating to appeals to the Privy Council, impose a stricter test for granting leave to appeal. Under S. 15 of the Letters Patent I am inclined to think that the Judge should not insist on such a strict test. Leave to appeal against the decision of county Court Judges is granted if it is reasonable and proper that such appeals should be allowed. The circumstance that leave to appeal to the Privy Council would not be granted in a case is not conclusive that leave to appeal should not be granted under S. 15 of the Letters Patent.

Three decisions of Indian Courts were brought to my notice which contain some indications of principles which should guide me in deciding the question under S. 15 of the Leters Patent of 1927; a similar provision already existed in the Letters Patent of the Rangoon High Court as seen from Cl. 13 of the Letters Patent issued to the Rangoon High Court in 1922.

In *Madhava Aiyar* v. *Muthia Chettiar* (11). Ayling and Seshagiri Ayyar, JJ., remarked that under the provisions of the Provincial Insolvency Act, "no leave to appeal could be claimed against an order which did not decide any substantial question of law or which did not directly or indirectly enunciate any proposition on which a pronouncement of a Court of appeal is desirable" (p. 170). In *Radha Mohan* v. *White* (12), leave was given under the Provincial Insolvency Act:

"as the case was argued on principle and appeared to require careful consideration in view of certain existing decisions: p. 365."

(9) [1881] 17 Ch. D. 759=50 L. J. Ch. 789=45 L. T. 6=30 W. R. 22.
(10) [1884] 14 Q. B. D. 32=23 W. R. 642.
(11) [1917] 38 I. C. 818.
(12) A. I. R. 1923 All. 466=73 I. C. 413=45 All. 364.

In *Panachand Narsey* v. *Stanley Dobsen* (13), it was held that in cases arising under the Presidency Towns Insolvency Act, an appellate Court can grant leave to appeal if a question of principle be involved.

It is not possible to lay down definite rules applicable to all cases. As has been remarked with reference to the exercise of the power of revision by the High Court, it is not advisable to crystallize into definite propositions the principles that should govern the Court in the exercise of its revisional jurisdiction. Similar remarks would apply to the exercise of the jurisdiction vested in a single Judge under S. 15 of the Letters Patent. The jurisdiction should not be exercised capriciously or arbitrarily but in a judicial manner and in the exercise of sound discretion having regard to all the circumstances of the case.

The legislature has entrusted the duty of declaring whether he considers the case a fit one for further appeal to the Judge himself. Before the amendment of the Letters Patent in 1927, there was a right of further appeal to two Judges as a matter of course in such cases. It is clear that the object was to restrict such unlimited right of appeal which existed before. Right of appeal does not exist apart from statute. The statute has substituted a limited right of appeal in the place of unlimited right of appeal which existed before. Obviously the Judge should be satisfied from all the circumstances that a further right of appeal should be sanctioned. He is the sole authority charged with the duty of deciding the same and in him full discretion has been vested in that respect. What I have stated above covers only certain aspects of the matter which have come before Courts and which would be useful in coming to a conclusion whether leave should be granted or not.

From the very nature of the case no hard and fast rule could be laid down. It has also been said that "leave to appeal may be limited to certain points": see Halsbury's Laws of England, Vol. 8, S. 604, para. 1452. In *Jones* v. *Biernstein* (14) A. L. Smith, L. J., addressing the appellant's counsel, Schwabe, said:

"You have obtained leave to appeal on one point and only one and you are confined to that point."

(13) A. I. R. 1923 Bom. 245=72 I. C. 261.
(14) [1900] 1 Q. B 100=69 L. J. Q. B. 1=81 L. T. 553=48 W. R. 232=16 T. L. R. 30.

Collins. L. J., in his judgment at p. 102 stated:

"We have no jurisdiction in this case except as to the point on which leave to appeal has been given by the Divisional Court."

Vaughan Williams, L. J., agreed: see also *Sanderson* v. *Blyth Theatre Co.*, (15): per Romer, L. J.

In the case before me (second appeals 1315 and 1316 of 1927), I had to construe a deed of adoption executed in 1920. which contained certain peculiar provisions. I do not think I should be justified in declaring that these cases are fit for further appeal.

P.R.S./S.N. *Leave refused.*

(15) [1903] 2 K. B. 533=72 L. J. K. B. 761=89 L. T. 169=52 W. R. 33.

A. I. R. 1931 Madras 206

SUNDARAM CHETTY, J.

B. Rajarajeswara Sethupathi and *another*—Defendants—Appellants.

v.

T. K. Kuppammal—Plaintiff—Respondent.

Second Appeals Nos. 1216, 1217, 1252 and 1253 of 1918, Decided on 18th September 1930, against decree of Dist. Judge, Ramnad, in A. S. Nos. 1129 and 1128 of 1916.

(a) Civil P. C. (1908), S. 100 — Finding of fact.

The finding of fact arrived at by the lower appellate Court has to be accepted in second appeal. [P 207 C 1]

(b) Landlord andTenant—(Madras)—Zamindar has right to collect pada nazir as rent.

Pada nazir forms part of the rent which the tenants are bound to pay to the zamindar: *S. A.* 620 *to* 652 *of* 1923, *Foll.* [P 207 C 1]

S. Soundararaja Ayyangar— for Appellants.

A. Venkatarayaliah and *L. Venkatanarasiah*—for Respondent.

Judgment.—These are connected appeals. The question for decision in S. A. 1252 and 1253 of 1918 is whether the tenants are liable to pay an extra charge for vanpayir or garden crop raised on dry lands by means of wells dug at their expense. It is argued for the appellants that upon the evidence these wells should be deemed to have been dug about ten years before the filing of these suits. Though the trial Court was of that opinion the finding of the lower appellate Court is otherwise. It has discussed the evidence both oral and documentary in paras. 4 and 5 of its judgment and found that the wells must have been dug long

ago and that the vanpayir rate was being levied for over a century. The zamindar's claim for vanpayir is not therefore affected by S. 13, Cl. 3, Estates Land Act. The finding of fact arrived at by the lower appellate Court has to be accepted in these second appeals.

S. A. Nos. 1252 and 1253 of 1918, are dismissed with costs (one fee for both.)

Two questions arise in the other two appeals.

The claim for rent in respect of lands allowed to lie fallow would be unsustainable on the authority of the recent decision of the Privy Council, in *Raja of Ramnad* v. *Mangalam* (1).

As regards pada nazir, the decision of a Bench of this Court in a batch of S. A's. Nos. 620 to 652, 654 to 663. 665 to 693 and 1163 to 1223 of 1923, given on May 1929 in respect of lands in the village in which the present suit lands also are situate is a direct authority in favour of the appellants' contention. The question relating to the zamindar's right to collect the fee called pada nazir has been fully considered in all its aspects and it has been held that pada nazir forms part of the rent which the tenants are bound to pay to the zamindar. It is needless to refer to the reasoning of the learned Judges in those appeals. Their conclusion was not based simply on the long-continued payment of pada nazir but it rested on several other grounds. Following that decision I hold that the zamindar has a right to collect pada nazir as rent.

S. A. Nos. 1216 and 1217 of 1918, are partly allowed. In the result the decrees of the lower appellate Court in the two suits are confirmed with this modification, viz. that the clause in the pattas about the payment of pada nazir should stand. The parties will bear their own costs in these two appeals.

P.R S./B.V. *Order accordingly.*

(1) A. I. R. 1930 P. C. 234=126 I. C. 84=53 Mad. 597.

A. I. R. 1931 Madras 207

BEASLEY, C. J., AND CURGENVEN, J.

(*Nanduri*) *Saradamba* —Appellant.

v.

(*Parakala*) *Pattabhiramayya* — Plaintiff—Respondent.

Appeal No. 225 of 1925, Decided on 14th February 1930, against decree of Sub-Judge, Narasapur, D/- 28-2-1927.

(a) Evidence Act (1872), Ss 63 and 65—Admissibility—Statement of witness abstracted in judgment given in previous suit cannot be used in lieu of original statement—Evidence Act, S. 33.

A statement of a witness abstracted in a judgment given in a previous suit cannot be made use of in lieu of the original statement itself. If a party wants to prove what a witness has said in the previous suit, he can do so only by the production of the original deposition or a certified copy of it : *A. I. R.* 1922 *Mad.* 394, *Ref*, [P 209 C 1]

(b) Evidence Act (1872), S. 145—Deposition of witness made in previous suit sought to be used to contradict him—It is necessary to call his attention to those parts of it which are to be so used before proving it.

Where the deposition of a witness made in a previous suit is sought to be made use of under S. 145 to contradict him, it is incumbent upon the party examining the witness, before proving the writing, to call his attention to those parts of it which are to be used for the purpose of contradicting him : *A. I. R.* 1915 *P. C.* 7, *Foll.* [P 209 C 2 ; P 211 C 1]

(c) Contract Act (9 of 1872), Ss. 69 and 70—Suit for reimbursement—Plaintiff's utmost good faith must be established.

In order to qualify for a decree for reimbursement the Court must be satisfied of the plaintiff's abundant good faith.

The plaintiff gained possession of the property under a false title (a forged will), and while so holding it claimed that he made several voluntary payments to discharge debts that would be enforceable against it, voluntary in the sense that the payments, with one exception, were not made to avert the imminent loss of the property. Plaintiff neither admitted that his title was false nor did his conduct otherwise establish his good faith.

Held : that before granting him a decree the Court must be satisfied that the condition of good faith was fulfilled. Unless he establishes the most unquestionable good faith he can have no claim in equity to reimbursement, and in view of the finding that the will was not genuine and the plaintiff knew it to be so, though he was a minor at that time, the plaintiff's claim must be dismissed: (*Case law discussed.*) [P 210 C 1]

(d) Contract Act (9 of 1872), Ss. 69 and 70 Suit for reimbursement — Plaintiff's bona fides not established—Payments of mortgage debts and decree do not of themselves make plaintiff entitled to reimbursement.

Where the plaintiff's alleged title is found to have been false, and he has not succeeded in showing that he held possession of the property in good faith, believing it to be true, a payment made to discharge a mortgage debt does not stand on any better footing than a payment made to discharge an unsecured debt or, the mere fact that a debt is secured by a decree will not render any payment of it as one for preservation of property. [P 212 C 2]

(e) Limitation Act (1908), Arts. 61 and 120—Suit for reimbursement—Art. 120 and not Art. 61 applies.

To a suit for reimbursement under Contract Act, Ss. 69 and 70, Art. 61 has no application, but the correct article is Art. 120. [P 213 C 1, 2]

Appa Rao—for Appellant.

S. Varadachari—for Respondent.

Curgenven, J.—One Viyanna died without issue in November 1915 leaving a widow, Saradamba, who is the present defendant. Viyanna's sister, Bayamma, upon his death, took possession of his estate, which included about six acres of land, on behalf of her minor sons, under a will alleged to have been executed in favour of the boys by Viyanna on 17th July 1915. In O. S. No. 885 of 1920, on the file of the Principal District Munsif's Court, Tanuku, the widow sued for recovery of the property together with mesne profits on the ground that the will was a forgery, and obtained a decree on 6th February 1922. Of Bayamma's sons, the elder, Lachanna, died during the suit, and the younger brother is the present plaintiff. He has brought the suit out of which this appeal arises to recover from Viyanna's estate in the defendant's hands a sum of Rs. 5,000 odd on the ground that he paid this amount to Viyanna's creditors while he and his brother were in possession of the estate. The payments alleged are four in number, and further particulars of them will be found in the schedule attached to the plaint. The learned Subordinate Judge has found that the payments alleged are true and that since the plaintiff made them in good faith he is entitled to be reimbursed from the estate. The defendant appeals against a decree framed in these terms.

It is necessary in the first instance to decide what is the true foundation for a suit of this character, and in what circumstances, apart from the question of proof of the debts, the plaintiff can succeed. Mr. Varadachari for the plaintiff, now respondent, suggests that every suit for reimbursement of such payments falls into one of three categories :

1. Where the person making the payment may be deemed to represent the estate, as in the case of a trustee or executor de son tort.

2. Where the payment is necessary for the preservation of the property.

3. Where the payment is made on behalf of the defendant and there is an implied contract for reimbursement. Suits of this character are provided for by Ss. 69 and 70, Contract Act.

He concedes that Cl. (3) has no application to the present suit, and that Cl. (2) will only apply where the debt is, for instance, a mortgage decree under which the sale of the property has to be averted. The claims, he argues, fall under Cl. (1), the payments made being recoverable on the ground that the plaintiff made them as representing the estate. In order to make good this position, it is further admitted that the Court must be satisfied of the plaintiff's bona fides, embracing in that term, not only his good faith in making the payments in the interests of the estate, but also his belief in his own title to the estate. The question first arising therefore is whether that good faith may be presumed or has been proved.

Upon this point the case of the appellant is that, in the litigation by which the defendant recovered the property, it was found that the will was a forgery, and that the plaintiff and his brother were privy to its fabrication. The respondent's case is that they were innocent instruments in the hands of others or at least that there is no proof of their complicity. As a preliminary to the discussion of this matter, some questions relating to the admissibility of evidence have to be decided. The judgment of the District Munsif in the will suit is Ex. 2, and the appellate judgment is Ex. S, and the appellant wishes to make use of certain of the contents of the former of these two judgments in order to show the plaintiff's guilty knowledge. For all that appears, the only object with which these judgments were filed was to prove the decision in the will suit, which of course is res judicata in the present proceedings. That this is so is probable from the circumstance that the learned Subordinate Judge refrained in his judgment from any reference to their further contents. Nor is there anything to show that in the lower Court the defendant argued that those contents were admissible in evidence. Now however she wishes to use Ex. 2 as proof not only that the will is a forgery but that defendant 2 knew it. It is open to question whether this judgment, or the appellate judgment, is strictly speaking legal evidence even of the first of these propositions. The issue tried was:

> "whether the will set forth in the defendant's statement is true, valid and binding on the plaintiff,"

and it is clear that, speaking generally a finding on an issue so framed, to give the

plaintiff a decree, need not necessarily involve more than the conclusion that the will was not proved to be either true or false. The affirmative finding that it was false, clearly expressed by the District Munsif, less clearly by the Subordinate Judge, was not really necessary for the purposes of the decree. Inasmuch however as the question substantially between the parties was whether the will was true or false, it may be taken to have been settled between them that it was a forgery. It remains to be seen whether there is evidence that the plaintiff and his brother were privy to it.

The plaintiff was examined as P. W. 2 in the suit, but no effective questions were put to him in cross-examination under this head a seemingly inexplicable omission on the part of the defendant's vakil. In particular, he was not questioned with reference to statements made by him as a witness in the prior litigation. That being the position, it is now sought to import into the present case not indeed his deposition in the will suit but an abridged version of it contained in the judgment, Ex. 2. This version relates to the circumstances in which the rough draft of the will was alleged to have been prepared and so far as appears, the plaintiff as defendant 2 in that suit deposed to these circumstances from first-hand knowledge. We are clearly of opinion that no such use may be made of this extract. In the first place the circumstances did not resemble those in *Gopu Nataraja Chetty* v. *Rajammal* (1), where the recital in a judgment of the terms of a codicil were allowed in proof of the contents of the document on the exceptional ground that it was admissible by consent of parties, no objection having been taken to its admission. As we have said, for all that appears, no attempt was made to use this portion of the judgment in this manner at the trial so that the question of the unchallenged admission of legally inadmissible evidence does not arise. We have not been referred to any provision of the Evidence Act under which a statement of a witness abstracted in a judgment can be made use of in lieu of the original statement itself. Indeed it seems clear from S. 63 of that Act, that such a record is not even secondary evidence of the statement and even if it had been, the conditions laid down by S. 65 for its use had not been fulfilled. We think therefore that if the defendant wanted to prove what the plaintiff had said as a witness in the will suit she could have done so only by the production of the original deposition or of a certified copy. Apart however from this difficulty, it seems that the statement could have been used only in one of two ways: either under S. 145. Evidence Act, to contradict the witness or as an admission under S. 21. For the former purpose it was incumbent upon the party examining the witness, before proving the writing to call his attention to those parts of it which were to be used for the purpose of contradicting him.

It has been pointed out by the Judicial Committee in *Balagangadhar Tilak* v. *Srinivasa Pandit* (2) that this is an essential step in the procedure, the omission of which is likely to cause grave injustice. In point of fact not only was his prior statement or even the version of it given in the judgment not put to the plaintiff but he was not asked a single question as to what he said. It may be that as an admission the original deposition might have been filed in evidence without putting it to the party but even assuming that the version in the judgment could be made use of in its place, it is clear that it would be an admission not that the will was a forgery but that it was genuine. We think then that it is not open to the appellant to make use of Exs. 2 and 8 further than to show, at most that the will was a forgery, in order to establish the plaintiff's lack of of good faith.

This seems to have been the view taken by both parties and the Court at the trial, because the learned Subordinate Judge seems deliberately to have abstained from drawing any conclusions from the contents of those records. Had the vakil for the defendant obtained a copy of the deposition and cross-examined the plaintiff upon it, it may be that he would have been able to show from his answers that he must have known about the fabrication of the will; but it is even doubtful whether this conclusion should be drawn from what the plaintiff said in the prior suit, because it does not follow that because he gave false evidence in support of its genuineness he must have

(1) A. I. R. 1922 Mad. 894=69 I. C. 15.

(2) A. I. R. 1915 P. C. 7=29 I. C. 639=42 I. A. 135=39 Bom. 441 (P.C.).

known that it was a orgery. We think accordingly that the footing upon which the learned Subordinate Judge deals with the question of good faith in para. 12 of his judgment is correct in so far as he disregards the findings of fact in the previous suit and bases his conclusion in the plaintiff's favour merely upon the grounds that he and his brother Lachanna were minors at the time of Viyanna's death and were not shown to have had any hand in bringing the will into existence. The question is whether upon the evidence which we are entitled to consider, this is a correct conclusion.

We think it is clear from a variety of cases cited before us that, in order to qualify for a decree for reimbursement, the Court must be satisfied of the plaintiff's abundant good faith. In the Privy Council case, *Dakshina Mohan Roy* v. *Sarada Mohan Roy* (3), the plaintiff enjoyed a period of possession under a decree of the High Court of Calcutta which was subsequently reversed by the judgment of the Privy Council. In the interval, although he received only a trifling sum on account of rents and profits, he was called upon to pay, and did in fact pay, large sums for Government revenue and other charges assessed upon the estate. In a suit to recover the amounts of these disbursements he obtained a decree which was reversed on appeal to the High Court. In further appeal to the Privy Council their Lordships said that

"it seems to be common justice that when a proprietor in good faith, pending litigation, makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents."

They point out that in the interval between the High Court and Privy Council decrees he was not in wrongful but in rightful possession; so much so that the defendants acted wrongfully when they interfered with the tenants upon the estate. The circumstances of that case were, we think, widely different from the present one. A person who gets possession of property under a forged will can in no sense be said to be in rightful possession; and, in so far as their Lordships base their decision upon the danger to the estate which would have been involved by the plaintiff's refusal to pay the Government revenue, the case falls rather under Mr. Varadachariar's second category. Here, in respect of at least the majority of the debts, the plaintiff cannot assert that payment was unavoidable in order to avert loss of the property. In another Privy Council case in the same volume, *Abdul Wahib Khan* v. *Shaluka Bibi* (4), where one of two cosharers who was in possession of the whole property was sued for the other half-share and counter-claims in respect of certain litigation expenses defrayed which it was claimed were necessary to protect the property, it was held that the mere circumstance that the plaintiffs had got a benefit therefrom was not a ground for making them liable for any portion of those costs:

"The proceedings were taken by the defendant for his own benefit, and without any authority, express or implied, from the plaintiffs; and the fact that the result was also a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiff."

This case, it is true, does not deal with the question of bona fides, and seems to have been decided with reference to the terms of S. 69, Contract Act. Instances of cases where the claim has failed from lack of bona fides are *Chinna Alagaperumal Karayalar* v. *Vinayagathammal* (5), and, if we take the judgment of Devadoss, J., in *Gopala Iyengar* v. *Mummachi Reddiar* (6), the learned Judge held that the plaintiff, who took a conveyance of the property from defendant 1's vendee after defendant 1 had warned him that the sale to the vendee was nominal, was no better than a speculative volunteer and could not have made in good faith certain subsequent payments to defendant 1's creditors. This view was not agreed in by Spencer, J., who considered that the plaintiff could recover under Ss. 69 and 70, Contract Act, but it seems clear that if the test of good faith should have any application the plaintiff was out of Court. Special considerations, arising out of the repurchase of the property by the ostensible owner at a Court sale, were held by Kumaraswami Sastri, J., in *Mollaya Padayachi* v. *Krishnaswami Aiyar* (7), to qualify a mortgagee from that owner to a charge upon the property; but we think

(3) [1894] 21 Cal. 142=20 I. A. 160=6 Sar. 366 (P.C.).

(4) [1894] 21 Cal. 496=21 I. A. 26 (P.C.).
(5) A. I. R. 1929 Mad. 110=117 I. C. 731.
(6) A. I. R. 1923 Mad. 392=74 I. C. 416.
(7) A. I. R. 1925 Mad. 95=85 I. C. 855.

it is clear from the learned Judge's observations that in the absence of those circumstances he would have held that the knowledge of the mortgagee of the infirmity of his mortgagor's title would have been fatal to his claim.

A number of other cases have been cited before us by the learned advocate for the appellant, but they do not, in our view, throw any further light upon the question before us, which is indeed a question to be answered upon general considerations of justice, equity and good conscience. The plaintiff gained possession of the property under a false title, and, while so holding it claims that he made several voluntary payments to discharge debts that would be enforceable against it, voluntary in the sense that the payments, with one exception, were not made to avert the imminent loss of the property. Whether or not it is enough that the plaintiff should prove, to entitle him to recover the money from the real owner, that he believed in his own title, it seems indisputable that, before granting him a decree, the Court must be satisfied that that condition was fulfilled. Unless he establishes the most unquestionable good faith he can have no claim in equity to reimbursement. Now it seems to us that, in view of the finding that the will is not genuine, which we must adopt here as res judicata, the only footing upon which the plaintiff can get the relief for which he asks is by avowing the falsity of the will, or, at the least, conceding that it is not genuine, and by pleading that he set up a title to Viyanna's property, and paid the debts in the belief that it was true. In the plaint however he adheres to the falsehood that the will is true, alleging in unqualified terms that it was executed by Viyanna ; and necessarily there is no disavowal of knowledge that the will was not genuine. He repeats in his deposition as P. W. 2 the story that Viyanna executed the will. That being so it seems scarcely open to him now to contend that he at least acted in ignorance that the will was false. The two positions are irreconcilable.

It may be objected that this line of reasoning is based upon a too strict standard of pleadings and conduct ; let us therefore see whether, in spite of the plaintiff's attitude, there are grounds upon which to infer his good faith. The learned Subordinate Judge thinks that, as the plaintiff and his brother Lachanna were minors at the time of Viyanna's death, and as they were not shown to have any hand in bringing the will into existence they should be held to have made the payments in good faith. The test proposed should be, we think, not whether or not they had a hand in the fabrication, but whether at the time or within the period to which the payments relate they had knowledge that the will was false. It must in our opinion be inferred against an ordinary party who holds property under a false will that he has knowledge of the true state of affairs. How far, if at all, does the inference hold good in the case of a minor ? To accept the mere fact of minority as sufficient to exonerate a person from the imputation of guilty knowledge is to go a great deal further than, for instance, the Indian Penal Code goes in S. 83, under which a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, is to be deemed not to have committed an offence. Youthfulness, it is true, must always be taken into consideration in inferring knowledge and intention ; but in this respect no hard and fast line can be drawn, we think, between persons above and persons below the age of 18.

The few facts which the evidence in this case discloses are these : The elder brother Lachanna is shown as of age when he executed the promissory note Ex. B on 14th November 1915, a few months after the date of the will. The plaintiff himself gives his age, when he deposed in 1927, as 26. In the receipt Ex. A, passed to his brother and himself on 28th January 1918, he is no longer described as a minor with his mother as guardian. He was probably therefore about fifteen when Viyanna died and the alleged will came into existence. It may perhaps be a fair inference that he was too young to bear a part in the fabrication of the will although no such inference would arise, we think, in the case of Lachanna. But confining ourselves to the real essential knowledge of the facts, and remembering that the mother must be assumed to have known them, it appears to us impossible to draw the affirmative conclusion, or grounds of abstract probability, that the two sons, who alone

stood to gain by the fraud, would have been kept in ignorance of them. This part of the case is very difficult to deal with, owing to what we cannot but regard as its mishandling by the defendant's advisers. But this is no reason why the plaintiff should get a decree to which he is not entitled, and, giving the matter the best consideration we can, we do not think that upon the record, as it stands, the requisite good faith has been established. This, in our view, disentitles the plaintiff from recovering in respect of any debts payment of which by him was voluntary and not affected by any special considerations.

It remains to apply these conclusions to the four instances in which the plaintiff claims reimbursment for debts paid. Two of these items 3 and 4, were debts upon promissory notes, and it is not claimed that payment of them was forced upon the plaintiff by immediate threat to any part of the property. The claims in respect of them, assuming them to be true, must accordingly be disallowed. Item 2 is a decree debt, in settlement of which the plaintiff and his brother are said to have paid Rs. 200 on 28th January 1928 and obtained the receipt Ex. A-1. In proof of this the plaintiff has examined the creditor himself as P. W. 1 and the writer and an attestor of the receipt, P. W's. 6 and 5. The creditors say that the payment was entered in his accounts, but these were neither produced for the plaintiff nor summoned for by the defendant. Our attention is drawn to the circumstances that, not only was the payment not certified to the Court, as the plaintiff says the creditor promised to do, but execution was actually taken out again subsequent to the date of Ex. A-1 : vide Exs. 3 and 3a. The creditor himself denies that he took this course, and it may be that, as suggested, it was done under his standing instructions which he failed to withdraw. Mr. Varadachari points out that, in the earlier execution proceedings, the sale proclamation (Ex. A) is dated 8th January 1918, and that it is reasonable to suppose that since no sale took place something must have been done to induce the creditor not to proceed ; and that that makes it very probable that the payment was made on 28th January. As will be seen from para. 13 of the written statement it is not the defendant's case that the decree was ever realized by execution, and, in view of the positive evidence of payment, we agree with the lower Court that it should be accepted as true. Since, further, when payment was made the sale was imminent, we think that here no question of good faith arises, but that the defendant is bound to honour an obligation incurred for the purpose of saving the estate.

Finally, there is item 1, which relates to a settlement of two debts due to one Rapaka Viyanna under a mortgage and a decree respectively. The decree was for a sum of Rs. 1,278 on a promissory note, and is dated 4th May 1912. Execution of this decree was taken out in 1912 by warrants of arrest and for attachment of moveables but nothing was realized ; and the decree-holder subsequently assigned the decree to one Lakshminarayanmurthi. It has not been contended that in execution of this decree matters ever reached the stage of proclaiming any part of the estate for sale, much less that the payment was rendered unavoidable by the need to avert such a proceeding. We do not think that the mere fact that a debt is secured by a decree will render applicable the principle which we have accepted in the case of item 2. Even admitting therefore the truth of this payment we do not consider that the amount can be recovered.

There remains the question whether upon any special considerations the plaintiff can claim refund of a payment of Rs. 1,593-6-6, assuming it to have been made on the ground that the debt was under a mortgage secured upon the property. Our attention has been drawn to three cases decided by this Court : *Syamalarayudu* v. *Subbarayudu* (8), *Chamaswami* v. *Padala Anandu* (9) and *Palamalai Mudaliar* v. *The South Indian Export Company* (10), in which a claim of this kind was allowed, and it is argued that, at least so far as title to the property was concerned, the element of good faith was not deemed to be requisite. The first of these cases related to a sale found invalid as ante-dated to an agreement. The circumstances of the second do not appear in full, but it was a case of a sale found to be invalid. In the third there was a sale which was set

(8) [1897] 21 Mad. 143.
(9) [1908] 31 Mad. 439=18 M. L. J. 306.
(10) [1909] 33 Mad. 334=5 I. C. 33.

aside as in fraud of creditors. It will be observed that in each of these cases the plaintiff acted under colour of a sale deed, voidable no doubt, but apparently supported by consideration, and occupied a position quite other than that of a mere trespasser. This distinction was stressed by Devadoss, J., in *Gopala Iyengar* v. *Mummachi Reddiar* (6). That, as has been already said, was a case of a purchaser whose vendor had, to the purchaser's knowledge, only a nominal sale deed in his favour, and who discharged certain encumbrances on the property. Spencer, J., considered that the payments fell within the terms of S. 69, Contract Act, a contention which, as I have explained, is not advanced here. Devadoss, J., differred, and, since it was clear that the plaintiff's object was to sustain his claim to the property, held that he did not make them bona fide for the purpose of preserving the property. He distinguishes between a person holding under a title voidable or defeasible and a volunteer who knows that his so-called title is a mere sham. We must take it that the plaintiff's title in the present case is of this latter description. In *Narayanakutti Goundan* v. *Pechiammal* (11) Sundara Ayyar, J., has discussed in what circumstances a person having no actual vested interest in the property—the case was one of a reversioner—may discharge a mortgage upon it, and on what principles he may recover the money. He decided that a reversioner is not entitled to be subrogated to the mortgagee's rights and that he is not among the persons whom S. 91, T P. Act, permits to redeem. Finally he held that, where the mortgagee held a decree under which he was proceeding to sell, and the reversioner intervened in order to save the property, he has sufficient interest in it to entitle him to a charge for repayment.

The decision is based upon the interest possessed by the reversioner, and there can be little doubt, from the learned Judge's observations, that he would have held that no such relief could be granted to a holder under a false title. We have been referred to no authority for the view that, where the plaintiff's alleged title is found to have been false, and he has not succeeded in showing that he held possession of the property in good faith believing it to be true, a payment made to discharge a mortgage debt stands on any better footing than a payment made to discharge an unsecured debt. Nor do there seem to be any grounds based upon general principles of equity to make any such distinction. We must therefore disallow the claim in respect of the whole of item 1.

On the issue of limitation we agree with the learned Subordinate Judge that, Art. 61 has no application, but that the correct article is Art. 120, under which the suit was within time. The result of our findings is that, except as regards item 2, a claim to a sum of Rs. 200 and interest thereon as allowed by the lower Court, the appeal must be allowed and the plaintiff's suit dismissed. The appellant will get her costs throughout.

P.R.S./S.N. *Suit dismissed.*

(11) [1913] 33 Mad. 426=15 I. C. 203.

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* A. I. R. 1931 Madras 213

VENKATASUBBA RAO, J.

K. R. Ramaswami Iyer and *others*—Plaintiffs—Appellants.

v.

Secy. of State and *others*—Defendants—Respondents.

Second Appeal No. 1323 of 1926, Decided on 5th March 1930, against decree of Sub-Judge, Tinnevelly, D/- 25th January 1926.

(a) Easements Act (1882), S. 18—Customary rights need not be immemorial.

The English rule that in the case of a customary right it must be shown to have been immemorial does not apply in India and no fixed period of enjoyment is laid down by law as necessary to establish such a right: 17 *All.* 87 and 20 *Mad.* 389, *Foll.* [P 214 C 2]

(b) Civil P. C. (1908), S. 100—Question of communal character of land is mixed question of fact and law—Finding can be interfered with if correct principles are not applied.

Whether the communal character of the land has been proved is a mixed question of fact and law, and if the lower Court did not apply correct principles its finding can be disturbed in second appeal. [P 215 C 1]

*** (c) Easements Act (1882), S. 18—Customary right—Change in conditions and circumstances changes right—Limitation of right is not only quantitative nor restricted to particular land.**

A customary right, say of free pasturage, acquired at some remote era by a village once thickly inhabited cannot continue undiminished or unaffected, even after it has become a dwindling hamlet : (*English cases referred.*) [P 215 C 1, 2]

The limitation on the right is not only quantitative, that is, not only may the extent of the land affected be abridged, but if there be other land more or less equally suitable, the Courts

may, for proper reasons, substitute that land for the original property. [P 216 C 2]

B. Sitarama Row and *A. Swaminatha Iyer*—for Appellants.

Govt. Pleader and *C. S. Venkatachariar*—for Respondents.

Judgment.—This appeal raises an important question regarding customary rights. The plaintiffs are inhabitants of a village known as Melagaram in the District of Tinnevelly. They have filed the suit under O. 1, R. 8, Sch. 1, Civil P. C., as representing the whole body of the villagers. They claim the suit land of the extent of 1 acre and 95 cents to be communal land, and allege that it has been, so far as living memory goes, used for certain communal purposes. In the plaint, the purposes are thus set out:

(1) For herding cattle; (2) for grazing of cattle; (3) as a cart track; (4) as a threshing floor; (5) as a burial ground for Brahmin children and (6) as a seat of the guardian deity.

The plaintiffs strongly rely upon the fact that at the Settlement of 1875 and again at the Resettlement of 1911 the land was classed as mandai (cattle stand) poramboke. In 1918, the land was transferred by the Government from the category of mandai poramboke to natham poramboke. Defendant 1 is the Secy. of State. Defendants 2 to 8 are persons belonging to the potter community, who have built huts on sites granted to them by the Government out of the suit land. The District Munsif has held that the customary right has been proved in regard to three out of the six uses referred to in the plaint namely (1) for herding cattle, (2) as a threshing floor and (3) as a seat of the guardian deity. I may remark that the other uses alleged by the plaintiffs do not require serious notice. The Subordinate Judge seems to find (though his finding is not express) that the communal nature of the land has not been proved. In any event, he appears to think that, at the most, the only use by the community that can be said to have been made out is that of a cattle stand. This he infers from the fact that the land was described only as mandai poramboke and no other purpose was mentioned in the Settlement Registers. First, as regards the stone image, I am not prepared to hold that it is an object of public worship. The image is an exposed one and is within the land granted to defendants 2 to 8. They have no objection to the plaintiff's removing the image from the land.

Then remain two purposes of those mentioned namely (1) for herding cattle and (2) as a threshing floor. The Subordinate Judge is disposed to discredit the plaintiff's version, as their conduct is inconsistent with their case. Several persons belonging to their party had themselves applied for grants of house sites out of the plot in question. The first application was made so far back as 1908. Again in 1918, subsequent to the classification of the land as natham poramboke, several requests were made by them for grant of sites. The Subordinate Judge argues that this can hardly be the conduct of persons conscious of the right now put forward. He has accordingly dismissed the suit.

Mr. Sitarama Rao for the plaintiffs attacks the judgment of the lower appellate Court. He first relies upon *Kuar Sen* v. *Mamman* (1), for the position that the English rule does not apply namely that in the case of a customary right, it must be shown to have been immemorial. I agree; for, it may now be taken as settled, that no fixed period of enjoyment is laid down by law as necessary to establish such a right: *Palaniandi Tevan* v. *Puthirangonda Nadar* (2), (which follows the Allahabad case). Mr. Sitarama Rao next distinguishes *Collector of Godavari District* v. *Peda Rangayya* (3), and the *Taluk Board, Dindigul* v. *Venkatramier* (4), on the ground that those cases related to natham poramboke, whereas the plot with which we are concerned is mandai poramboke. As regards natham poramboke, Benson and Bhashyam Aiyangar, JJ., observe thus in the first mentioned case:

> "They throw rubbish on it, graze their cattle on it, use it as a latrine, and the like, and they are rarely interfered with. But it is always understood that this use is permissive on the part of Government and, that Government has the right at any time to appropriate it for any special purpose or grant it to an individual for building purposes."

In the second case, Ayling, J., remarks that where the land is natham, the enjoyment is patently of a permissive kind and cannot give rise to any custo-

(1) [1895] 17 All. 87=(1895) A.W.N. 10.
(2) [1897] 20 Mad. 389.
(3) [1908] 4 M.L.T. 440.
(4) A.I.R. 1924 Mad. 197=75 I.C. 38=46 Mad. 866.

mary right. Mr. Sitarama Rao's contention is this: When the Government describes a particular plot of land as natham poramboke, it declares in terms that it is building site, that, in such a case, any different mode of enjoyment however long, may be presumed to be permissive in its origin and that the Government may, at its pleasure, resume, as it were, such land and dispose of it as it likes; but, argues the learned counsel, the very description of the land in the present case as mandai poramboke, involves a recognition on the Government's part that it is a cattle stand, and the cases cited therefore do not apply. There is force in this connexion, but, as the learned counsel himself admits, the description in the Settlement Register is only *some*, and not conclusive evidence, that the land has been set apart for that purpose. Whether the communal character of the land has been proved is a mixed question of fact and law, and if I thought that the lower Court did not apply correct principles, I would interfere with its finding, but I consider it unnecessary to pursue this, having regard to my view on the next point, with which I shall proceed to deal.

That point arises thus. The suit plot is Survey No. 71 and measures 1 acre, 95 cents. The extent granted to the potters is 41 cents, or, roughly a fifth of the total land. There is thus a balance of more than an acre and a half available for being used as cattle stand or threshing floor, as the case may be. It is not pretended that this area is insufficient, having regard to the needs of the community. Moreover there is another plot in the village, Survey No. 76 measuring 2 acres. 77 cents. Regarding this the Collector observes, that it is just a few yards from the suit plot, that it is fit for being used as a cattle stand and threshing ground and that the potters' houses need not therefore be removed from the site in question. Is the plaintiffs' customary right then an absolute one in the sense that it has to remain intact and inviolate through all time, irrespective of changed conditions or circumstances ? The answer is, in my opinion, decidedly in the negative. Is a right, say of free pasturage, acquired at some remote era by a village once thickly inhabited, to continue undiminished or unaffected, even after it has become a dwindling hamlet ? Supposing its right extended at one time to 10 acres, must it remain undiminished through all time, even though the village has declined ? It is stated in Halsbury :

" The nature of the right enjoyed, and also the extent of the land over which it is exercised, are capable of reasonable modification and extension."

A very clear exposition of the doctrine is contained in the judgment of Farwell, J., in *Mercer* v. *Denne* (5) affirmed by the Court of appeal in *Mercer* v. *Denne* (6). In that case, certain fishermen claimed a right to spread their nets and dry them on the beach ground of the defendant, a private owner. On behalf of the latter, it was argued that the plaintiffs may dry their nets only on the condition of fishing for such fish and at such times and with such nets, as the fishermen in the reign of Richard I used to do. Farwell, J., observes that if this contention is sound, " all improvements and progress are debarred." Its effect, the learned Judge, remarks, is to discard the kernel for the shell and it

" might result in making an arrangement that was in its inception reasonable, because of public benefit, become actually injurious to public interests."

A custom derives its validity from its being reasonable in its inception. By the expression " that it is reasonable " is meant, that it is for the benefit of the commonwealth. Can, then, a customary right, reasonableness being of its very essence, be so exercised as to be injurious to public interests ? Care must be taken not to confuse reasonableness, an essential element of a valid customary right, with reasonable exercise of that right. The word " reasonable " in one case refers to the origin of the right, in the other, to the present exercise of it. The distinction is brought out very clearly in the judgment of Tindal, C. J., in *Tyson* v. *Smith* (7), cited by Farwell, J. :

" It is obvious that this is not an argument against the custom being reasonable in its original commencement * * * It is an objection only as to the mode of exercising the right so claimed * * *."

That the contention that the right is absolute and inviolable is unsound, appears again from the observations of Lord St. Leonards in *Dyce* v. *Hay* (8), also relied on by Farwell, J. :

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(5) [1904] 2 Ch. 534.
(6) [1905] 2 Ch. 538=93 L. T. 412 = 54 W. R. 303=70 J. P. 65=21 T. L. R. 760.
(7) 48 R. R. 589.
(8) 1 Macq. 312.

"There is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. * * * The law of this country as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles."

Thus, the fishermen were allowed to exercise their rights according to the varying exigencies of the fishing industry and the requirements of improved nets: p. 549. This decision also shows that the right or obligation, as the case may be, is not one sided, but reciprocal. The right of the fishermen to reasonably vary the mode of enjoyment is recognized, as I have said, in the portion of the judgment to which I have referred. But what of the right of the landowner? In that case it was urged that there was a gradual accretion by the receding of the sea and that the fishermen were not entitled to exercise their rights over the added extent. This contention was rejected. But, then it was hypothetically argued, supposing there were now a mile or more of such accretion, would the plaintiffs be still entitled? Farwell, J., answers in the first place, it would hardly be possible to get evidence of actual user over more than the fringe near the sea and in that case "the extent of the custom could be limited by such user," but granting that such uses could in fact be shown, even then

"the landowner's right of free enjoyment would only be limited by a reasonable exercise of customary rights and it would probably be held unreasonable to insist on drying nets over a large tract of land."

Of the cases referred to at the Bar, no case, I think, contains a clearer statement than this, of the principle in regard to the reasonable exercise of a customary right.

This is consistent with the view taken by the Judicial Committee, of the law in this country regarding customary right. In *Bholanath* v *Midnapore Zamindari Co.* (9) the plaintiffs, resident cultivators of the villages, belonging to the defendants the proprietors of an Indigo concern, claimed a right of free pasturage over the waste lands of the villages. Their Lordships, while upholding the claim guard themselves by saying that it will be advisable to insert a provision that the decree should not prevent the defendants from improving their property provided sufficient pasturage were left. That this is not a casual remark, is shown not only by the judgment but also by the point having been expressly raised in the argument of the respondents' counsel. This case is referred to and followed in *Sayid Ali* v. *Sarjan Ali* (10); the learned Judges observe:

"But if there is nothing to show that the land in suit differs in any respect from other waste and if there is plenty of pasturage left in the village, the plaintiffs are not entitled to relief."

They also refer (as a circumstance to be considered), to the possibility of the cattle having to be driven to an unreasonable distance in order to obtain pasture. The principle recognized in these cases, was again applied in *Khartar Singh* v. *Ralla* (11), where the judgment shows that the Court may have regard in deciding what is reasonable exercise, to changing and fluctuating circumstances. I may lastly point out, that the limitation is not only quantitative, that is, not only may the extent of the land affected be abridged, but if there be other land more or less equally suitable, the Courts may, for proper reasons, substitute that land for the original property. The cases to which I have referred deal with private owners of lands but the reasoning applies even with greater force to a case like the present, where the Government, as the party affected, is under a clear duty to have regard to public interests under changing conditions. The second appeal fails and is dismissed with costs (two sets).

P.R.S./M.N. *Appeals dismissed.*

(9) [1904] 31 Cal. 503=31 I. A. 75=8 Sar. 611 (P. C.).

(10) [1913] 19 I. C. 890.

(11) [1919] 67 I. C. 306.

A. I. R. 1931 Madras 216

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

Chinnan and *others*—Defendants—Appellants.

v.

Ranjithammal — Plaintiff — Respondent.

Appeal No. 55 of 1927, Decided on 22nd October 1930, against decree of City Civil Judge, Madras, D/- 12th October 1927.

Easements Act (1882), S. 59—Licensor and Licensee—License is not annexed to property nor is it transferable or heritable right—Licensor parting with property or licensee dying—License comes to end.

If a man gives a license and then parts with the property over which the privilege is to be exercised the license is gone. [P 217 C 2]

A license is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears it cannot be exercised by the licensee's servants or agents. [P 217 C 2]

Representatives of a tenant on sufferance are mere trespassers, since they cannot be regarded as succeeding to any interest in the tenancy; and what is true of a tenant on sufferance is true also of a licensee. From the date of licensee's death the possession of his heirs becomes adverse to the owner of the property: 108 *R. R.* 442 and 150 *E. R.* 1543; 18 *Bom.* 256; 22 *Bom.* 893 and 24 *Bom.* 504, *Ref.* [P 218 C 1]

T. R. Venkatesa Ayyar and *T. V. Gopalaswami Ayyar*—for Appellants.

G. Devasahayam—for Respondent.

Curgenven, J.—In the suit out of which this appeal arises the plaintiff, as owner of land—a claim not now disputed—sued to eject the defendants from a portion of it. Her case was that one Punjolai had served her predecessor-in-title as watchman, and had been permitted to put up a hut and live on a small portion of the land. The defendants are relatives of Punjolai, and have succeeded him in occupation of the suit site, and have moreover, according to the plaintiff, encroached upon a further area. There are thus two questions arising for decision:

(1) Can the plaintiff eject the defendants from the site which Punjolai was allowed to occupy?

(2) Can she eject them from the area encroached upon?

(1) It is agreed that Punjolai was allowed to occupy the site as a licensee. Since the license was granted the property has changed hands, the plaintiff's mother purchasing it from the Administrator-General in 1902 and settling it up on her daughter, the plaintiff, in 1922. It is not very easy to decide what is the effect upon a license in India of a transfer of ownership. Under S. 59, Easements Act:

"when the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license,"

and under S. 62 a license is deemed to be revoked

"(a) When, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license."

These provisions do not in terms lay down that a license is revoked by a conveyance of the property. On the other hand, the English law, which undoubtedly forms the basis of the Indian Statute, seems clear that the license terminates.

"if a man gives a license and then parts with the property, over which the privilege is to be exercised,"

says Pollock, C. B., in *Coleman* v. *Foster* (1),

"the license is gone. A license is a thing so evanescent that it cannot be transferred."

The same view is to be found expressed in *Willis* v. *Harrison* (2). There can be no doubt that the transferee is not bound by the license. But does the licensee, from the moment the transfer takes place, become a mere trespasser, or should be considered, until the contrary appears, to hold under an implied license? We do not think that it will become necessary in this case to decide that point because if the information given to us is correct (no evidence was taken), Punjolai died in or about 1904 and there seems no doubt that license expired with his death. The learned City Civil Judge seems to be in error in holding that the defendants came in as licensees, if by that he means that, after Punjolai died, the license was (renewed) in their favour. Nor do we think, that the license granted to Punjolai became vested in them as his successors. A license is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents: S. 56. Accordingly, in their occupation of the plot, and especially so since the death of Punjolai, the defendants have been mere trespassers. We have been invited to hold, on the analogy afforded by a Bombay decision, *Krishnaji Ramachandra* v. *Antaji Panduranga* (3), that the occupation was permissive and not adverse. That case related to the successors to a life-tenant deceased, and it was held that the occupation was of that character unless and until an adverse title was expressly set up. But in two later Bombay cases, *Kantappa* v. *Seshappa* (4) and *Chandri* v. *Daji Bham* (5), it has been held that the possession of a tenant holding over is wrongful, and time begins to run against the landlord under Art. 139, Limitation Act, as soon as the term of the lease expires, a view which is not easily recon-

(1) 108 R. R. 422.
(2) 150 E. R. 1543.
(3) [1894] 18 Bom. 256.
(4) [1898] 22 Bom. 893.
(5) [1899] 24 Bom. 504=2 Bom. L. R. 491.

cilable with the position that the occupation of a tenant's successors is to be deemed permissive. We need not however look further for authority than to *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthy* (6), for the proposition that the representatives of a tenant on sufferance are mere trespassers, since they cannot be regarded as succeeding to any interest in the tenancy; and what is true of a tenant on sufferance would seem to be true also of a licensee. We think therefore that at least from the date of Punjolai's death the possession of the defendants became adverse to the owner of the property. It will now be for the lower Court to decide upon evidence (1) whether the claim to that portion of the site is barred.

(2) With regard to the area said to have been encroached upon—a matter not dealt with at all by the Court below—it will be for decision whether the plaintiff's suit is within time.

For trial of these questions, allowing the appeal and setting aside the decree, we remand the suit to the lower Court. Costs to abide the event.

P.R.S./K.N. *Appeal allowed.*

(6) [1908] 31 Mad. 160=18 M. L. J. 26.

A. I. R. 1931 Madras 218

PHILLIPS AND REILLY, JJ.

Marivada Veeranna and *others*—Appellants.

v.

Vytla Seetanna and *others*—Respondents.

Civil Appeals Nos. 309 and 310 of 1924, Decided on 19th March 1929, against decree of Addl. Sub-Judge, Cocanada, D/- 15th November 1923.

(a) Hindu Law—Widow—Settlement of bona fide dispute and consequent family arrangement is binding on reversioners.

When a settlement is effected of a bona fide family dispute between the widow and some members of her husband's family, whether the claim by the family members was legally valid or not, does not matter, provided it had been made in good faith and such compromise is binding on the reversioners: *A. I. R.* 1924 *P. C.* 56 and *A. I. R.* 1917 *P. C.* 146, *Dist.* [P 220 C 1]

(b) Hindu Law — Widow—Surrender—Reservation of some property for widow's maintenance does not invalidate surrender.

A surrender is tantamount to a gift and may be effected either by gift or by relinquishment of rights. When a widow makes a gift of the whole of her property to the next reversioner, it must be deemed to be a surrender of the widow's whole estate. The reservation of some immovable property for her own maintenance during her lifetime, does not invalidate the surrender: *A. I. R.* 1919 *P.C.*, 75, *Rel. on.* [P 220 C 2]

(c) Hindu Law — Widow — Surrender—Effect of, is effacement of widow—When next reversioner dies, property does not revert to widow, though she be alive—It will go back to the surviving next reversioner.

A surrender by the widow to the next reversioner causes an effacement of the widow, which in other circumstances is caused by actual or civil death, which opens the estate of the deceased husband to his next heirs at that date.

Where therefore the next reversioner dies after such surrender the estate will not revive to the widow even if she were surviving at such date, but will go to the surviving next reversioner: *A. I. R.* 1918 *P. C.* 196; *A. I. R.* 1924 *All.* 166, *Rel. on.* [P 221 C 1]

(d) Hindu Law — Widow—Surrender—Provision for widow's maintenance—Reversioner can sue for actual possession of such property after widow's death.

Where some property of her husband has been reserved for the widow's maintenance after she surrenders the whole of her property to the next reversioner, the actual reversioner is not bound to sue for symbolical possession of that property when he becomes entitled to the estate, but can wait upto the widow's death for recovery of the actual possession of such property. [P 221 C 2]

(e) Civil P. C. (1908), O. 32, R. 7—Compromise of suit entered by member of Hindu family on behalf of his minor wards and himself, without leave of Court, does not bind minors nor him when there was no legal necessity for it.

Where a member of a joint Hindu family enters into a compromise of the pending suit, with the other party on his own behalf as well as on behalf of his minor wards, without leave of Court, such compromise is not binding on the minors nor does it bind him, when there is no legal necessity for it: *A. I. R.* 1922 *P. C.* 69, *Ref.* [P 221 C 2]

(f) Hindu Law — Widow — Surrender—Duty of Court in such cases indicated.

When the Court examines what purports to be a surrender by a Hindu widow to the next male reversioner the Court has to see that it is a real surrender and not a devise, either to divide the property with him explicitly or by means of some undisclosed consideration or to insure the succession of a particular reversioner for reasons of partiality. But when the surrender is to the widow's daughter who in the majority of cases is likely to outlive the widow, and whose immediate succession is not likely to affect the ultimate devolution of property to one male reversioner rather than another, it is unnecessary to scrutinize the surrender with suspicion so long as the widow's estate is in effect wiped out but for a reasonable provision for her maintenance. [P 224 C 1]

Advocate-General and *A. Satyanarayana*—for Appellants.

S. Varadachariar and *C. Rama Rao*—for Respondents.

Phillips, J.—These are appeals against the decree in O. S. No. 63 of 1921

on the file of the Additional Subordinate Judge's Court of Cocanada, by which the plaintiff, as reversioner, has been given a decree for recovery of certain properties belonging originally to one Tiruppayya, the last male owner. The facts of the case are somewhat complicated and are as follows:

Tiruppayya was the son of one Dorayya who died a very long time ago, the exact date being unknown. Dorayya had a sister, Venkamma, who was widowed at an early age and went to live with her brother. Subsequently Ammanna, son of another sister, was taken in by Venkamma and was afterwards described as her foster son. This Ammanna married Dorayya's daughter, Ademma, and lived in his father-in-law's house. Venkamma was apparently managing the family affairs while Tiruppayya was young, and Ammanna was also assisting in the cultivation of lands etc. After Tiruppayya's death in 1880, there was a mediation between Tiruppayya's widow, Venkataramanamma, and Ammanna, and the award of the mediators, Ex. 1, decided that Venkataramanamma and Ammanna should take the moveable and immovable properties of the family in equal shares. In 1888, Venkataramanamma executed a document Ex. 8 (a), in favour of Ammanna by which she gave up to him a half of the family properties. On the same day she executed another document, Ex. 8, in favour of her daughter Nagayya whereby she transferred the other half of the family properties to her daughter, reserving for herself 6 acres 42 cents of land which should be "under her so long as she lived." Nagayya died about 1904. After her death the properties transferred to her seem to have been enjoyed by her minor daughter, her husband Munnayya and Venkataramanamma. On Munnayya's death he left a will bequeathing some of these properties to a relation and there was a suit between that legatee and Venkataramanamma and Papamma, Munnayya's widow, which was compromised, and in accordance with the compromise the lands were divided between the parties. Venkataramanamma died in August 1921 and this suit was filed in the following October by the plaintiff as the next reversioner of Tiruppayya.

The questions for consideration are:

"(1) Whether the settlement of 1880 was valid and binding on the estate.

(2) Whether the gift to Nagayya in 1888 was a surrender of the widow's interest in the estate.

(3) Who succeeded to the property on the death of Nagayya? and

(4) Whether the compromise entered into during the pendency of this suit between the plaintiff and defendants 1, 2 and 3 is binding on the defendants."

On the first point it has to be determined whether the compromise of 1880 was in settlement of bona fide family disputes or whether it was a mere alienation by the widow which was not binding on the estate. The case of defendant 1, who is the son of Ammanna is that his father was the illatom son-in-law of Dorayya and as such was entitled to a share in the family property, and that the compromise was arranged in settlement of his claim. The Subordinate Judge has found that Ammanna was not the illatom son-in-law of Dorayya and certainly the evidence adduced to prove the illatom transaction is inadequate. This is not surprising considering the very long time that has elapsed since those events took place. It is certainly true that Ammanna married Dorayya's daughter and came to live in his father-in-law's house. Whether it was before or after the death of his father in-law is not certain as the evidence on the point is very conflicting. In any event, he seems to have been treated as one of the family, for he gave up his rights in his natural family and looked after the affairs of Dorayya's family helping his aunt and fostermother Venkamma. It has also been shown by the plaintiff's own witnesses that Dorayya became divided from his brothers and that his estate was considerably augmented by the exertions and care of Venkamma. It is not clear whether she applied any of her own money towards these acquisitions or whether it was merely her care and attention that increased the family properties. On this point it is impossible to secure any definite evidence after the lapse of at least 60 years. We have these facts which support the theory that it was intended to introduce Ammanna into the family as the illatom son-in-law. We also have the fact that Venkamma was in possession and urged her claim to some of the family properties and her claim must be deemed to be the claim of Ammanna, for it was as her foster son that Ammanna put forward his claim before the media-

tors. The mediation was quite open and in settlement of disputes between the parties as admitted by the plaintiff's own witnesses. It took place more than 40 years before the suit was filed and has not been questioned till now, when it is very difficult to ascertain accurately details of the dispute and the grounds on which Ammanna put forward his claim. In view of the circumstances which we do know, and of the fact that the transaction has been unquestioned for over 40 years, I think it must be held that Ammanna had a bona fide claim and this settlement therefore was a settlement of bona fide family disputes and would therefore be binding on the estate which was represented by the widow in that dispute.

It is contended by Mr. Varadachariar for the respondents: (1) that the so called award, Ex. 1, is merely a division of the properties and not an award in settlement of disputes, (2) that Ammanna had no legal title to the properties when he put forward his claim and that therefore the compromise is invalid so far as the estate is concerned. The first contention must clearly be negatived, for the plaintiff's own witnesses admit that the mediators settled all the disputes between Ammanna and Venkataramanamma, and, if the award were merely a partition of the properties between them which had already been arranged, we should have expected to find a partition of the properties by metes and bounds. It is clearly not such a partition, for there is a recital in the document:

"the parties having had disputes in the division of moveable and immovable property they owned . . . . the mediators decided as follows,"

and what follows is consistent with a definite settlement of the claims of the respective parties, but not with a mere partition by metes and bounds.

As regards the second contention, Mr. Varadachariar relies on the decision of the Privy Council in *Kondama Naicker* v. *Kandasami Goundar* (1) and *Gunjeshwar Kunwar* v. *Durga Prashad Singh* (2); but in these cases the claimant knew that the title he put forward was an untrue one, and it was consequently held that the compromise of the claim was not one that would bind the estate. The real question is whether the dispute is a bona fide dispute, and these cases are merely authority for holding that if the dispute is not bona fide it is not binding on the reversion. In the present case I have discussed the circumstances and come to the conclusion that Ammanna did put forward a bona fide claim, believing that he had some right in the family properties. Whether that claim was valid in law or not (and after this long interval it would be very difficult to elicit the facts necessary for deciding such a matter) is not material, for, if the claim of Ammanna was put forward in good faith and had some foundation, and the dispute between him and the widow was compromised with the aid of mediators, that compromise is binding on the reversioners.

This compromise being valid the transfer of the remaining properties by the widow to her daughter Nagayya amounted to a transfer of the whole estate remaining to her. The reservation of 6 odd acres for the widow's enjoyment is a small reservation for her maintenance and does not affect the validity of the surrender which otherwise included the whole estate. Mr. Varadachariar has sought to draw a subtle distinction between a gift by the widow of the whole estate to her daughter and a surrender of the same, his contention being that Ex. 8 was only a gift for the daughter's life and that the property would revert to the donor on the daughter's death. It is possible that such a gift might be made, but it would have to be clearly so expressed. A surrender is tantamount to a gift and may be effected either by gift or by relinquishment of rights. The widow's gift was to the next reversioner and must be deemed to be a surrender of the widow's whole estate. The reservation of some immovable property for her own enjoyment during her lifetime does not invalidate the surrender. For this we have the authority of the Privy Council in *Bhagwat Koer* v. *Dhanukdhari Prasad Singh* (3).

The next question for consideration is: Who became entitled to the properties enjoyed by Nagayya on her death? It is contended for the respondents that, when Nagayya died, those properties would devolve on the heir of the deceased

(1) A. I. R. 1924 P. C. 56=79 I. C. 961=51 I. A. 145=47 Mad. 181 (P.C.).
(2) A. I. R. 1917 P.C. 146=42 I. C. 849=44 I. A. 229=45 Cal. 17 (P.C.).
(3) A. I. R. 1919 P. C. 75=53 I. C. 347=46 I. A. 259=47 Cal. 466 (P.C.).

Tiruppayya and that therefore, as his widow was then alive, she would again succeed to the properties. It has however been held that when a widow surrenders her estate, she effaces herself so far as that estate is concerned, and the estate of the deceased husband is opened to his next heirs at that date; or, to put it in the language of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (4):

"It is the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date."

It is not said that the effacement amounts to civil death and that the widow is therefore incapable of holding any property at all, for that would be inconsistent with the reservation of any property for her maintenance or with her ability to hold moveable property after surrendering immovable property, which has been held to be possible under another system of Hindu law. If the widow is effaced, so far as the estate is concerned there is no ground for holding that her right is revived by the death of her daughter during her lifetime. The effacement is made in order to accelerate succession to her husband's estate. On the surrender therefore the next heir takes the property and when that heir dies, the devolution must continue in favour of the next reversioner and the succession cannot be interrupted by the mere fact that the widow is still alive. After the daughter, the deceased's estate must go to the next reversioner and it cannot be contended that the widow is in any sense a reversioner. To allow her therefore to revive the rights which she has deliberately surrendered would be to retard succession rather than to accelerate it. There is only one direct authority on this point and that is *Sartaji* v. *Ramjas* (5), where it was held that, upon the death of the daughter, the rights to the property vested in the next reversioner to her father and not in her mother. On Nagayya's death therefore the right to succeed to the property devolved on the plaintiff as the next reversioner and his suit in respect of that property is barred by limitation as being brought more than 12 years after the daughter's death.

A further contention is raised that in respect of the 6 odd acres left in the widow's possession, the plaintiff's right to sue for possession did not accrue until after the widow's death. Undoubtedly he could not sue for physical possession, for this provision for maintenance was binding on the estate and therefore was binding upon the plaintiff when he became entitled to that estate; but, although he could not get physical possession, yet he could ask for symbolical possession, namely such possession as was capable of being given; but this is in effect really a declaration that he is entitled to the property. He is not bound to bring such a suit, but can wait until the widow's death and then bring a suit for actual possession to which he would then be entitled. Plaintiff's claim in respect of the 6 acres, 42 cents is not barred by limitation.

The next point relates to the compromise entered into between the plaintiff through his guardian and defendant 1 for himself and as guardian of defendants 2 and 3. Under O. 32, R. 7, a guardian cannot enter into compromise of a suit on behalf a minor except with the permission of the Court. In this case leave to compromise was not granted. The compromise therefore is certainly not binding on defendants 2 and 3 and must be set aside so far as they are concerned.

The more difficult question is whether that compromise is binding on defendant 1 so far as his share of the family property of himself and defendants 2 and 3 is concerned. The same question was under consideration by the Privy Council in *Venkata Row* v. *Tuljaram Row* (6). I am unable to distinguish this case from that. In that case a father entered into a compromise on behalf of his minor son, whereby he gave up his right under certain decrees in favour of the other party and it was held that not only was the compromise not binding on the minor son, but that it was not binding on the share of the father. The reason given for this decision is at p. 306 (of 45 *Mad.*):

"Rajaram Row, unless he was attempting to divide the joint family, could only deal with this property with the consent of his son or in his

(4) A. I. R. 1918 P. C. 196=50 I. C. 498=46 I. A. 72=42 Mad. 523 (P.C.).
(5) A. I. R. 1924 All. 166=79 I. C. 25=46 All. 59.
(6) A. I. R. 1922 P. C. 69=74 I. C. 765=49 I. A. 91=45 Mad. 298 (P.C.).

capacity as manager of the estate. In his capacity as manager of the estate he was only able to deal with t for certain limited purposes, and none of those purposes are, or can be, suggested as the consideration why these considerable sums were released. It follows therefore that the attempt to alienate, or to release, from the estate these substantial portions of the joint family property failed and that there was no efficacy given to the arrangement that was then contemplated."

The only difference between that case and the present is that there the property was money due under decrees and here it is immovable property. It has not been shown that the alienation of this immovable property was for necessity or for any other purpose binding upon the sons. The compromise did not purport to alienate the father's share alone but the whole of the family interest in the property. It would therefore not be binding on the family. Although in somewhat similar circumstances when such an alienation has been effected the Court will enforce an equity in favour of the alienee to the extent of the alienor's share, it does not follow that the Court will enforce such a compromise before the equity has in fact arisen. It is only when the decree is passed that such an equity can arise and therefore the Court should refuse to validate a transaction which would necessitate a further equitable relief to one of the parties. The compromise is therefore not binding on any of the defendants 1 to 3 and the decree passed in accordance therewith must be set aside. The compromise relates to the properties obtained by defendant 1's father in 1880 or 1888 and the plaintiff's right to recover them has been held above not to exist.

In the result both the appeals must be allowed and the plaintiff's suit dismissed so far as these appeals are concerned except in respect of 6 acres 42 cents, in Appeal No. 309. Each party will pay and receive proportionate costs.

Appeal No. 310 *of* 1924.

Reilly, J.—In this case the appellants are defendants 1—3, the successors-in-title of Ammanna to whom Venkataramanamma gave up half the property standing in the name of her deceased husband Tiruppayya. In my opinion we should certainly not be justified in differing from the finding of the learned Subordinate Judge that the story that Ammanna was adopted as illatom son-in-law of Dorayya is untrue. Six witnesses for the plaintiff have given evidence that it was only after Dorayya's death that his daughter Ademma was married to Ammanna. On the other side we have the evidence of D. W's. 3, 4 and 9. D. W. 3 says that the marriage was before the death of Dorayya and his evidence implies that he was present at it though he does not say so explicitly. In examination-in-chief he states that Ammanna was taken as Dorayya's illatom son-in-law but in cross-examination it appears that he was only told of this by his father-in-law. He is under obligations to defendant 1, and the Subordinats Judge does not regard his evidence as of any value. D. W. 4 says that Dorayya brought Ammanna from his native village and that Ammanna lived with Dorayya both before and after his marriage but he gives no evidence that there was any illatom adoption. D. W. 9 speaks of Ammanna as illatom son-in-law of Dorayya but admits that he knows nothing personally about the adoption.

When this is the state of the oral evidence the facts that in Exs. 1, 1-B and 8-A there is no mention of Ammanna being illatom son-in-law of Dorayya and that on the contrary in Ex. 1 he is described as the adopted son of Venkamma and in Ex. 1-B as her foster son are ample basis for the finding that the story of an illatom adoption is an afterthought. .No reasonable explanation why Ammanna was not described as illatom son-in-law of Dorayya in those documents if he was so has been suggested. If that were the basis of his claim it would almost certainly have been put in the forefront instead of being altogether forgotten. And if the Subordinate Judge was right as, in my opinion, he was in rejecting the story of an illatom adoption he was clearly wrong in finding that Venkataramanamma gave half of Tiruppayya's property to Ammanna because Tiruppayya had directed her orally to do so. That Tiruppayya gave such a direction in respect of his property is recited in Ex. 8-A, which was executed eight years after Exs. 1 and 1-B; but it was not put forward by defendants 1—3 in their written statements as a basis for their claim.

Indeed they could not put it forward, as, if the story of an illatom adoption was true then Ammanna was entitled to half of the family property and that half was not Tiruppayya's to dispose of. I agree with Mr. Varadachariar that it was not open to the Subordinate Judge to set up a case for defendants 1—3, not only not set up by them but contradictory to and destructive of the case with which they came to Court.

But it was pleaded by defendants 1—3 that after Tiruppayya's death there were disputes between his widow Venkataramanamma and Ammanna and that those disputes were settled by mediators, in accordance with whose award the property in question in this appeal was allotted to Ammanna. I am not prepared to dissent from my learned brother's view that this can be regarded as a settlement of a bona fide family dispute which should not now be upset. I do not agree with the suggestion made at one stage of the arguments that because there was this dispute so long ago, there is a presumption that it was a bona fide dispute. In such a case the circumstances must be examined so far as evidence regarding them is available. When we find on the one side Tiruppayya's elderly aunt Venkamma, who had been managing the household for years and Ammanna, then a middle-aged man whom this aunt had brought up and who had been attending to the cultivation of the family land and on the other side Venkataramanamma a young widow whose husband had died two years after their marriage, there is certainly no presumption that any claim to the family property put forward by Venkamma and Ammanna who were in such a dominating position was made in good faith. It was an occasion on which a young widow might easily have been overborne and have been unable to assert her rights effectively. In such a case it is the duty of the Court to investigate the circumstances as carefully as possible and to beware lest an unrighteous claim is accepted as having been made in good faith merely because it is ancient history. But in his reply the learned Advocate-General has drawn our attention to evidence which makes it probable that Ammanna had an honest basis for his claim. P. W. 8 says that when Ammanna joined Dorayya's family with whom it is not now disputed he lived for many years, he left his own family property to his brothers. P. W. 2, Dorayya's niece, says that when Dorayya was divided from his brothers, he got 8 acres of land but when Tiruppayya died the extent of the family property had increased to about 44 acres. P. W. 2 also says that her aunt Venkamma managed the household and after Tiruppayya's death asserted that she had acquired most of the family property and insisted that some of it should be given to Ammanna which was the origin of the dispute between Venkataramanamma and Ammanna. P. W. 4 also says that Venkamma objected to Venkataramanamma conveying Tiruppayya's property to her daughter because Venkamma had acquired some of the property and so half was allotted to Venkamma and enjoyed by Ammanna. This is evidence given by the plaintiff's witnesses. It appears probable that the large increase in the family property was due to the good management of Venkamma assisted by Ammanna when we remember that Ammanna had left his own family and abandoned his claim to a share in their property and that the division recorded in Ex. 1 by which Ammanna got half the property standing in Tiruppayya's name was settled by mediators of other families. I think there is as much evidence as can reasonably be required at this distance of time to show that Ammanna had a moral claim which he and Venkamma urged in good faith and that the settlement of the dispute so caused was a proper and honest family settlement which should not now be disturbed.

In this appeal the only remaining question is whether the compromise between the plaintiff and defendants 1—3, on which the Subordinate Judge based his decree can be upheld to any extent. As it was not sanctioned by the Court it is ineffective against the minors defendants 2 and 3. It is urged for the plaintiff that the compromise is binding on defendant 1's share of the property in the possession of defendants 1—3, which share would not fall far short of the 8 acres to be given to the plaintiff under the compromise. But I agree that even in respect of the share of defendant 1 the compromise cannot be enforced by the plaintiff. If the compromise fails in part

then the whole contract falls through. Defendant 1 did not bargain to transfer the whole of his share of the property in dispute in order that the shares of defendants 2 and 3 should be saved. As my learned brother has pointed out this transaction is not similar to one in which an alienee from a manager of joint family property for valuable consideration not binding on the family is allowed to enforce his claim against the manager's share. That is done because the manager has received consideration and must make good his alienation so far as it is within his individual power. But here defendant 1 did not get the consideration for which he bargained. Indeed the compromise being invalid against the plaintiff who like defendants 2 and 3 was a minor cannot be regarded as any consideration at all. And the decision of the Privy Council in *Venkata Row* v. *Tuljaram Row* (6) is against the contention of the plaintiff.

I agree that the appeal must be allowed with costs in both Courts.

Appeal No. 309 *of* 1924.

This appeal relates to the other half of Tiruppayya's property which Venkataramanamma gave up to her daughter, Nagayya, by Ex. 8. I agree that that transaction must be regarded as a surrender of the widow's interest to her daughter. That the document is in the form of a deed of gift is of no importance. Nor does the reservation of 6·42 acres for her life appear to me to be more than a reservation for maintenance—and not an excessive reservation—though maintenance is not mentioned in the document. When we are examining what purports to be a surrender by a Hindu widow to the next male reversioner, we have to assure ourselves that it is real surrender and not a devise either to divide the property with him explicitly or by means of some undisclosed consideration or to insure the succession of a particular reversioner for reasons of partiality. But, when the surrender is to the widow's daughter, who in the great majority of cases is likely to outlive the widow and whose immediate succession is not likely to affect the ultimate devolution of the property to one male reversioner rather than another, it is unnecessary to scrutinize the surrender with suspicion so long as in effect the widow's estate is wiped out but for a reasonable provision for her maintenance. That appears to have been the effect of Ex. 8. Its language, which is that of an absolute gift, is not strictly suitable to a surrender. Nor is it suitable to a transfer of the widow's interest for the life of the daughter with a reversion to the widow if she survived the daughter. The only reasonable construction of its absolute terms, considering the person in whose favour it was executed, is, in my opinion, that the widow surrendered her widow's interest and stepping aside, let in her daughter. That being so, when, as it happened, the daughter, died before the widow, I cannot accept either of Mr. Varadachariar's suggestions for bringing the property back again to the widow that she succeeded her daughter as heir or that she again came in as the widow of Tiruppayya, the last male owner. Either suggestion is inconsistent with the theory of a widow's effacement. When once a widow has effaced herself, has stepped aside and has surrendered her widow's estate in favour of a male or female reversioner, I do not see how that widow's estate can ever be revived : see *Sartaji* v. *Ramjas* (5).

The right of the plaintiff's predecessor to possession began when Nagayya died, and for the property which went to her under Ex. 8, except the 6·42 acres reserved for Venkataramanamma, his claim is clearly time barred. But for possession of the 6·42 acres reserved for Venkataramanamma time did not begin to run against the plaintiff or his predecessor from Nagayya's death. Certainly, so long as Venkataramanamma was in possession, no reversioner had a right to possession, and so time could not begin to run against him. In respect of the 6·42 acres the plaintiff's suit is in time.

I agree therefore that this appeal must be allowed except in respect of the 6·42 acres and that the parties should pay and receive proportionate costs in both Courts.

P.R.S./V.B. *Appeals allowed.*

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A. I. R. 1931 Madras 225

PANDALAI, J.

Sambasiva Mudali and *others*—Accused—Petitioners.

v.

Emperor

Criminal Revn. No. 128 of 1930 and Criminal Revn. Petn. No. 120 of 1930, Decided on 19th September 1930.

(a) Criminal P. C. (1898), S. 239 (d)—Accused opening sluice of feeder channel of tank in spite of watchman's objections once in the evening and then next morning—Both these acts formed part of same transaction.

The accused wanted to open the sluice of a feeder channel of a certain tank in spite of the watchman's objections. With this object in view they opened it in the evening and when the work remained half-done as the watchman had again closed it, they again turned up the next morning and reopened it :

Held : that in the above circumstances these acts could not be regarded as distinct acts. The acts fell well within the description of " the same transaction " namely a number of acts for which there is community of purpose or design and continuity of action : 33 *Mad.* 502, *Rel. on. A. I. R.* and 1927 *Mad.* 177, *Dist.* [P 226 C 1, 2]

(b) Criminal P. C, (1898), Ss. 236 and 237—Evidence sufficient to establish charge for principal offence which is not framed—Conviction on such charge is allowed.

A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. The conviction under principal offence is not bad where the person is charged with abetment under S. 114, Criminal P. C., and there is evidence to establish it : 33 *Mad.* 264, *held overruled by A.I.R.* 1925 *P. C.*, 130. [P 227 C 1]

(c) Criminal P. C. (1898), S. 537—Charge—Defect in is curable in absence of prejudice—Criminal Trial.

Where the accused knows what he is being tried for and there is no failure of justice defects in form of charge are immaterial. [P 227 C 2]

V. L. Ethiraj and *T. S. Nagaswami Ayyar*—for Petitioners.

N. S. Mani—for the Crown.

Order.—The petitioners who are six in number were convicted and sentenced as follows : Petitioners 1 to 4 (accused 1 to 4) under S. 430, petitioners 5 and 6 (accused 7 and 8) under S. 430 read with S. 34; petitioners 2 and 3 (accused 2 and 3) also under S. 352. Petitioners 2 and 3 (accused 2 and 3) were fined Rs. 60 and all the others Rs. 50 each.

The conviction arose out of the act of the ryots of Theniluppai village, to which the petitioners belong, opening the sluice of the feeder channel from the Cheyyar anicut and also in removing a mud dam which had been temporarily put up across a vellavari also taking off water from the same anicut, but from the opposite bank. The object of the villagers was to take water to their own village tank fed by this sluice and by the vellavari, and these acts were done against the orders of the Public Works Department which has the duty of regulating the distribution of water of this irrigation system, in exercise of which duty the Sub-divisional Engineer had ordered that the sluice to the Theniluppai village should be closed so that the water may flow down to two other village tanks, i. e., Nemili and Venkodu lower down. On the night of 28th November 1928 the Public Works lascar, P. W. 1, and a number of ryots including P. W's. 6 and 7 from the village of Alathur were watching the sluice and mud dam. The allegation is that at 11 p. m. accused 1, 3, 4, 7 and 8 and some others arrived and at the instigation of accused 7 and 8 the others first removed the mud dam and then opened the sluice. The lascar and the ryots of Alathur protested but could not do anything. After the Theniluppai villagers had left, those who were watching repaired the damage first by restoring the dam across the vellavari and closing the sluice early next morning. At about 7 a. m. accused 2, 5 and 6 (of whom 5 and 6 have been acquitted) came and wanted to open the sluice again.

In spite of objection by the lascar they opened the sluice again and left. The lascar closed it again. Then at 11 a. m. on the 29th all the eight accused before the lower Court, including these petitioners appeared again and in the presence of accused 7 and 8, who are said to have told P. W. 5 that he might do what he liked, the other accused opened the sluice for the third time. These facts except that accused 5 and 6 took any part in these events, have been considered proved by the two Courts. The objection now raised by the petitioners is twofold; first, that the trial was illegal because the petitioners should not have been tried for the events of the night of the 28th and of the morning of 29th November at the same trial as they did not form parts of the same transaction; and second, that the conviction of accused 7 and 8 by the appellate Magistrate under S. 430 read with S. 34 is illegal because they were only charged under Ss. 430 and 114 with abetment. As to the first objection

it depends upon whether, upon a reasonable understanding of the facts the events of the 28th night and of the 29th morning can be said to have formed parts of the same transaction. Learned counsel at one point of the argument cited the decision in *In re. Samiullah Sahib* (1), which he later admitted was not applicable. That was a joint trial of several persons for fishing in a tank at the same time and it was held that, although they were fishing at the same time, they were not participants in the same transaction because each was fishing on his own account.

If in this case the petitioners, the villagers of Theniluppai, may reasonably be said to have been each opening the sluice for his own purpose, this case might be governed by that decision; but obviously the villagers were out on what was to them a common grievance, diversion of water from their tank and to attain a common benefit, namely, to get water to their tank. The objection therefore that this was a case of several individuals engaged each on his own personal account does not apply. But it is said that the acts of those who removed the mud dam and opened the sluice on the night of the 28th and the acts of those who twice on the morning of the 29th did the same thing were independent acts and not parts of the same transaction. I am unable to agree with this contention. Taking a reasonable and common sense view, the Theniluppai villagers wanted to open the sluice which cut the water away from their tank. It was with that object that several of them including five of these petitioners came and actually opened the sluice on the 28th. When it was found that that work was undone, some of them turned up again next morning and re-opened the sluice and when it was again closed, these petitioners turned up again later in the morning and opened the sluice for a third time within a period of 12 hours. I am unable, on a fair view of these facts to regard them as distinct acts or independent adventures by different bodies of men each acting independently of the other. The acts fall well within the description of a transaction given by a Bench of this Court in *Chorajudi Venkatadri* v. *Emperor* (2), namely that a number of acts for which there is community of purpose or design and continuity of action may be regarded as a transaction. There was here both community of purpose and continuity of action. The purpose was to take water to the Theniluppai tank and the action, repeated and continued at three different not very distant times, was to open the sluice. I am therefore unable to say that merely because the events of the 28th and the morning of the 29th were charged together, that was an irregularity. In my opinion the case is covered by S. 239, Cl. (d).

Another answer to the objection is that there really were no different charges in the case at all for different offences. A reading of the charge, with which I will deal presently shows that the whole matter, namely, what happened on the 28th and what happened on the 29th morning, was all put together as one offence. Therefore there is really no objection on the ground of different charges being joined which should not be joined. There was in fact only one charge.

The next point, as to the conversion by the appellate Magistrate of the conviction of accused 7 and 8 from one under Ss. 430 and 114 to one under S. 430 read with S. 34 is in my opinion equally groundless. The decision in *Padmanabha Panji Kannayya* v. *Emperor* (3) was relied upon to show that where a person who has been convicted of an offence has appealed, the appellate Court cannot, after acquitting him of such offence, convict him of the abetment of such offence. That decision was pronounced in 1909. The learned Judges who pronounced it say in the judgment that no authority was cited to them to show that the appellate Court had the power to convert a conviction for the principal offence to one for abetment. This is the converse case. But since then, the decision of the Privy Council in *Begu* v. *Emperor* (4) has given such wide application to the use of Ss. 236 and 237 that decisions pronounced before that date to a contrary purport have ceased to be binding.

(1) A. I. R. 1927 Mad. 177=98 I. C. 597=27 Cr. L. J. 1381=50 Mad 735.

(2) [1910] 33 Mad. 502=11 Cr. L. J. 258=5 I. C. 847.

(3) [1910] 33 Mad. 264=11 Cr. L. J. 49=5 I. C. 145.

(4) A. I. R. 1925 P. C. 130=88 I. C. 3=52 I. A. 191=6 Lah. 226 (P.C.).

In that case the charge was for murder. The conviction was for an offence under S. 201, which was not charged. Their Lordships rejected the argument that that conviction was wrong and founded their decision upon Ss. 236 and 237. They simply say that a man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.

In this case the facts before the Sub-Magistrate were that accused 7 and 8 had come along with the other accused and had instigated them on the night of the 28th to open the sluice and come again at 11 a. m. on the morning of the 29th and by their act shown that they were the principal persons who took the responsibility for the whole thing. On these facts the Sub-Magistrate thought that the offence committed by these petitioners (accused) was one under S. 430 read with S. 114. The appellate Magistrate thought S. 114 was not applicable to the case because there was no proof of previous abetment, but he held that the facts proved amounted to the principal offence. I think he was right on that point. I do not see what objection can be raised to this course in the face of S. 237 as interpreted by their Lordships of the Privy Council. It may be added that this was not a case of converting a bare abetment to a conviction for the principal offence but the so called abetment was as described in S. 114 itself by a man who is to be deemed to be the principal offender. The distinction between such a man and the principal offender, for this purpose, is one of such a shadowy character that the conversion of his conviction from one to the other cannot be said to offend against any reasonable construction of the powers given to the Court under Ss. 236 and 237. I therefore think that this objection has no substance.

The only other point which arises is one upon the form of the charge. I have already said that the charge was only for one offence under S. 430 although there is a reference in the charge to both dates in the words "on or about the 28th and 29th." It may be that, strictly speaking, there were two offences but the whole charge regarded the acts of the petitioners as one and the question is whether there has been any prejudice due to that. I have not been told, nor am I able to see, that any particular confusion in the minds of anybody has arisen from this particular matter. From the evidence it is quite clear what it was that the petitioners were being tried for. No point at any time seems to have been made of the fact that the petitioners did not know whether they had to answer for what they did on the 28th or what they did on the morning of the 29th. According to the Criminal Procedure Code defects in the form of charge are immaterial unless they lead to failure of justice. I am not convinced that there has been any failure of justice in the case and the petition therefore must be dismissed.

P.R.S./B.V. *Petition dismissed.*

A. I. R. 1931 Madras 227

JACKSON, J.

Dara Lakshmi Narasimham—Accused—Petitioner.

v.

Garine Satyanarayana — Complainant—Respondent.

Criminal Revn. No. 334 of 1930 and Criminal Revn. Petn. No. 313 of 1930, Decided on 7th November 1930.

Criminal P. C. (1898), S. 423—Retrial—Appellate Court cannot order retrial when prosecution has hopelessly broken down.

After reversing a conviction and sentence, an appellate Court cannot order an innocent man to be retried without formulating a charge. It must be careful not to usurp the function of the Public Prosecutor. In certain circumstances it can no doubt order a retrial, but hardly where the prosecution has hopelessly broken down in every respect so as to enable the prosecutor to substantiate some new charge against the accused, or to produce evidence which might easily have been produced at the first trial: 42 *All.* 522 and *A. I. R.* 1930 *Mad.* 189, *Ref.* [P 227 C 2; P 228 C 1]

V. L. Ethiraj and *G. K. Damodara Rao*—for Petitioner.

P. Satyanarayana Rao—for Respondent.

Public Prosecutor—for the Crown.

Order.—After reversing a conviction and sentence an appellate Court cannot order an innocent man to be retried without formulating a charge. In *Emperor* v. *Mohan Singh* (1), the learned Judge was careful to formulate a particular charge of forging a receipt; leaving it open to the lower Court to expand that charge if so advised. But the Court

(1) [1920] 42 All. 522=59 I. C. 372.

cannot simply say: "This man shall be charged," which ordering retrial amounts to. An appellate Court must also be careful not to usurp the function of a Public Prosecutor, a matter I discussed in *In re. V. M. Rathnavelu Mudaliar* (2):

"The learned Sessions Judge came to the same conclusion, observing quite correctly that upon the essential points of the case there is neither evidence nor finding, and he could not uphold the conviction. He considered however that the proper course was to order a retrial. Here it must be found that the learned Judge exceeded his proper function. In certain circumstances he can no doubt order a retrial under S. 423, Criminal P. C., but hardly where the prosecution has hopelessly broken in every respect, so as to enable the prosecutor to substantiate some new charge against the accused, or to produce evidence which might easily have been produced at the first trial. It is rather for supplying formal defects that an appellate Court orders retrial: see *Varadarajulu* v. *Emperor* (3)."

The petition is allowed and the case sent back to the appellate Court for disposal in the light of the above.

P.R.S./K.N. *Petition allowed.*

(2) A. I. R. 1930 Mad. 189=122 I. C. 497=31 Cr. L. J. 422.

(3) [1919] 42 Mad. 885=20 Cr. L. J. 455=61 I. C. 343.

A. I. R. 1931 Madras 228

PANDALAI, J.

Chairman, Municipal Council, Mangalore—Petitioner.

v.

Vasudeva Kamath—Respondent.

Criminal Revn. Case No. 999 of 1929 and Criminal Revn. Petn. No. 902 of 1929, Decided on 25th April 1930, for reversing the judgment of Sub-divisional First Class Magistrate, Mangalore, D/- 6th September 1929, in Civil Appeal No. 26 of 1929.

(a) Madras District Municipalities Act (5 of 1920), Ss. 199 and 202—*A* applying for permission to build latrine in north-eastern corner of his compound—Permission granted to erect one in north-western corner—*A* thinking it to be mistake requesting Chairman to correct it—No reply sent—*A* writing to Chairman informing that he would begin construction without permission by end of the next month if corrected permission was not sent and did so accordingly—Latrine was built without permission—S. 202 did not apply to this case.

The owner of a particular compound applied to the Municipality requesting permission to construct a latrine in the north-eastern corner of his compound. The Chairman of the Municipality under the advice of the Health Officer granted permission, but only to erect the latrine on a spot in the north-western corner. The owner however thinking that the word north-western was written through mistake requested the Chairman to correct the mistake and to send back the required permission. No reply having been received to this, the owner again wrote to the Municipality asking for the permission and informing that he would commence construction without permission if permission was not sent by the end of the next month; and began construction accordingly.

Held: that so far as permission was needed to the construction at the place where it was built, it was constructed without permission. [P 230 C 1]

Held further: that S. 202 which only applies on default of a decision by the Chairman had no application to this case. [P 230 C 2]

(b) Madras District Municipalities, Act (5 of 1920), S. 191 (1)—Rules under—R. 1 entitles Chairman to refuse permission to erect latrine on particular spot on ground that such erection would be insanitary.

Rule 1 applies to and prohibits the erection of buildings on lands insanitary or dangerous, both where the insanitary or dangerous character applies to all kinds of buildings or only to a particular case of buildings intended to be erected thereon. By reason of this rule the Chairman or the Council of a Municipality is entitled to refuse the approval of a particular site for the erection of a latrine on the ground that such erection would be insanitary. [P 231 C 1]

(c) Criminal Trial—Accused charged under one section, but should have been charged under another — Both offences summons cases—Magistrate should alter conviction to one under proper section.

Where the accused is charged under one section but should have been properly charged under another, and both the offences are summons cases, the Magistrate should not acquit the accused altogether, but should alter the conviction to one under proper section. [P 231 C 1]

M. A. T. Coelho and *T. R. Ramachandran*—for Petitioner.

B. Sitarama Rao—for Respondent.

K. Venkataraghavachari — for the Crown.

Order.—This is a petition by the Chairman of the Mangalore Municipality to revise the order of the Sub-divisional 1st Class Magistrate of Mangalore reversing the conviction of the respondent by the Stationary 2nd Class Magistrate of Mangalore for an offence under S. 199 read with S. 338, District Municipalities Act, and acquitting him.

The facts are short and practically not in dispute. The respondent is the owner of a compound, T. S. No 127, in the market ward of Mangalore town. He wanted to erect a new latrine in that compound and made an application to the Municipality on 14th March 1928, for permission to construct the latrine. The application was accompanied by a site plan and a plan of the building, Exs. A, A-1 and A-2. The place where the respondent wanted to construct the latrine was the north-

east corner of the property. It is in evidence that the Health Officer of the Municipality and the Sanitary Inspector inspected the spot when the respondent was present and they, finding that the proposed location of the latrine was unsuitable, pointed out to the respondent a spot at the north-western corner of the property where it might be constructed. The permission was accordingly granted and communicated to the respondent by the order of the Chairman, dated 26th March 1928, and a license of permission to erect the latrine at the north-western corner was granted in the usual form of a license with conditions: see Exs. D and D-1. On 10th April the respondent wrote Ex. C to the Municipal Health Officer stating that he had asked for permission to construct the latrine at the north-eastern corner, but was surprised to find that the permission was to construct the latrine at the north-western corner and suggested that the words "western" and "west" in the license were a clerical error for "eastern" and "east" and requested that the alleged error may be corrected and the license returned with its enclosures. It is admitted that the Municipality has not corrected the so called error or returned the license to the respondent permitting him to construct the latrine at any other place except that mentioned in the license returned by the respondent. The Municipality however moved in the matter by asking the Health Officer to again inspect the place. That officer did so and reported that the place already pointed out is the most suitable, but that the petitioners and his neighbours are objecting, and that there is no other site which is less objectionable.

The visit of the Health Officer and the Sanitary Inspector to the spot after the petition, Ex. C, is spoken to by P. W. 1, who also says that the respondent was then present and learnt the result of the visit, namely that there was no other site except the one already pointed out to him. This appears to have been on or about 28th April 1928. In this state of affairs the respondent wrote Ex. 1 to the Chairman of the Municipal Council on 19th September 1928, saying that the license had not been returned to him after correction and that unless the license for the place shown by him in his application namely the north-eastern corner, were granted to him before the end of October 1928, he would commence the construction without the permission. Upon this, one Mr. Madhava Rao, Councillor for the ward, at the request of the Chairman visited the property and made another suggestion as to the location of the latrine, and the Chairman requested the Health Officer to communicate to the respondent the site selected by Mr. Madhava Rao as suitable. But the Health Officer protested that the place selected by Mr. Madhava Rao was quite insanitary being only two feet from a place of worship used by the local people and that it is very close to the main road adjoining which there is a mutt as well as a temple. He insisted that the north-western corner which had been already pointed out and for which permission had already been given was the only site suitable from a sanitary point of view. Therefore the proposal of Mr. Madhava Rao was never communicated to the respondent, and the position was just the same as when the respondent returned the license for correction. The respondent thereupon began the construction of the latrine where he wanted, that is,.at the north-eastern corner. The Municipal Sanitary Inspector discovered this early in January 1929. Thereupon, on 2nd January 1929, a notice was issued to the respondent by the Health Officer to stop the work. He refused to do so. The Chairman sent another notice on 8th January. The respondent still persisted and justified himself on the ground that he had already by his letter of 19th September 1928, intimated his intention to commence the construction of the latrine, if no license was issued to him by the end of October 1928. He also informed the Chairman that the latrine had been completed "yesterday evening." Thereupon this prosecution was started against the respondent for constructing the latrine without permission.

The Stationary Sub-Magistrate held that the respondent was guilty under Ss. 199 and 338, District Municipalities Act, although in his view the respondent had been hardly treated by the Municipality by no reply being sent to him to his letter of 19th September 1928. He therefore fined the respondent Rs. 15. In appeal, the Subdivisional Magistrate set aside this conviction on two legal grounds: first according to the Magistrate, it was not a case of construction of a building without permission, because

permission had already been granted, although it was for a different site; and secondly, according to the Magistrate, the offence fell not under S. 338 of the Act, but under S. 317 of the Act.

It seems to me that the Magistrate's opinion is wrong on the first point. To say that where a Municipality gives permission for a building in a particular place, it amounts to a permission to build at another place is, in my opinion, not in keeping with either sense or law. The permission granted by the Municipality was a permission to erect the latrine at the north-western corner of the property. It was not a permission to erect it elsewhere and to say that the Municipality permitted the erection of the latrine and that the variation of the location is a matter covered by S. 205, District Municipalities Act, is to impute to the Municipality what it did not do and to make nonsense of the careful provisions of the District Municipalities Act, and the rules thereunder as to construction of buildings. I have not the least doubt that, so far as permission was needed to the construction at the place where it was built, the latrine was constructed without any permission whatever. The view on this point of the Sub-divisional Magistrate is clearly wrong

But the learned advocate for the respondent attempted to support the order of the Subdivisional Magistrate on two other grounds. His first point was that the case comes under Ss. 201 and 202, District Municipalities Act, which say that the Chairman shall within thirty days of the approval of the site under S. 200, grant or refuse permission for the construction; and on his failure to give or refuse his approval of a building site or his permission to execute any work, the Council shall be bound, on the written request of the applicant, to determine whether the approval or permission should be given or not, and that, if the Council does not, within one month from the receipt of such request, determine the question, such approval or permission shall be deemed to have been given. His second argument is that the Chairman or the Municipal Council could not refuse permission to erect the latrine at the spot pointed out by the respondent as the refusal could not fall within any of the grounds mentioned for such refusal in S. 203, District Municipalities Act.

Both these contentions are, in my opinion, incorrect. By S. 108 the Chairman is not empowered to grant permission to construct a building until the site has been approved, and by S. 199 the construction or reconstruction is not to be begun until the Chairman has granted permission for the execution of the work. What happened in this case was that the respondent was told in writing that he could have permission to construct his latrine on condition that he erected it at a place mentioned in the license. This had no other meaning, and was known by the respondent to have no other meaning than that the site proposed by him for the latrine was not approved. His own letters show that beyond possibility of doubt. Immediately after the receipt of the license he returned it to be corrected, thereby showing that he knew that the site proposed by him was not approved. Again, in his letter of 19th September he wrote to the Chairman saying that his license had not been corrected and intimated that, unless it was so returned before the end of October, he would proceed to construct the latrine without any permission. There is no warrant for the argument that there was any failure by the Chairman to intimate his refusal of the site proposed by him to the respondent. Therefore S. 202 which only applies on default of a decision by the Chairman, has no application to the case. It may also be added that, even if that section had any application, the respondent did not apply to the Municipal Council to make his own decision, nor wait for one month for the Council to do so. He has written no letter to the Municipal Council .throughout the correspondence. His letter of 19th September is addressed to the Chairman. The first argument therefore fails.

The argument based upon S. 203 is that the work proposed by the respondent would not contravene any provision of any law or some specified order, rule, declaration or by-law made under any law as required by S. 203, Cl. (1). In short the argument comes to this, that under the District Municipalities Act and the rules thereunder, there is no power in the Chairman or the Council of a Municipality to decide the location of a latrine proposed to be constructed by the owner of property in a municipal area and to refuse permission if the proposal is to

locate it in an insanitary or otherwise objectionable spot. I find myself unable to concur in this view. By S. 191 Cl. (1). the Governor-General in Council is enabled to make the rules, among other things, for the regulation or restriction of the use of sites for building. R. (1) of the rules made under this power says that

" no piece of land shall be used as a building site if the Council considers that the site is insanitary, or that it is dangerous to construct a building thereon. "

It is argued that this only applies to cases of sites being considered insanitary or dangerous for the construction of buildings thereon generally, such as the place being a bog or a marsh or a feverish area and that it does not apply to the selection or exclusion of sites on the ground of their being sanitary or insanitary for specific purposes such as erection of latrines. I do not find sufficient ground to restrict the generality of the language in the way suggested. I think the rule applies to and prohibits the erection of buildings on lands insanitary or dangerous, both where the insanitary or dangerous character applies to all kinds of buildings or only to a particular class of buildings intended to be erected thereon. By reason of this rule, the Chairman or the Council of a Municipality would, in my opinion, be entitled to refuse the approval of a particular site for the erection of a latrine on the ground that such erection would be insanitary. That was what happened in this case.

On the second ground on which the Sub-divisional Magistrate based his decision, namely that the offence was not one falling under S. 338, District Municipalities Act, but under S. 317, I think he was right. S. 338 applies to cases where no penalty has been specially provided by the Act, whereas this was a case of commencing the construction of a building without permission of the Chairman which is specifically provided for by S. 317 read with S. 199. But this was not enough to acquit the respondent as both the offences were summons cases. What the Subdivisional Magistrate should have done was, to alter the conviction to one under the proper section and pass such sentence as he thought fit in appeal. The result is that the order of the Sub-divisional Magistrate acquitting the respondent is set aside and the papers in the appeal will be sent back to him for hearing and disposal according to law.

P.R.S./S.N. *Order set aside.*

A. I. R. 1931 Madras 231

PANDALAI, J.

Chinna Venkatesu — Accused — Petitioner.

v.

Pedda Kesamma—Complainant—Respondent.

Criminal Revn. Case No. 979 of 1929 and Criminal Revn. Petn. No. 883 of 1929, Decided on 15th September 1930, against judgment of Sub-divisional First Class Magistrate, Gooty.

Penal Code (1860), S. 447 — Possessor's presence is not necessary for annoyance being caused by trespasser.

It is unnecessary for a possessor to be always present upon his property in order that he may be annoyed by a trespasser. The presence of possessor's wife, servant, agent, licensee or other person is sufficient for such annoyance. Even these persons' presence is not strictly necessary. Annoyance may be caused without anybody's actual presence on behalf of possessor, when trespass takes place : 41 *Mad.* 156 and 1 *Weir* 518, *Dist.*; *A.I.R.* 1925 *All.* 540, *Expl.* and *Ref.* [P 232 C 1]

S. Ranganadha Ayyar— for Petitioner.

T. R. Arunachala Ayyar—for Respondent.

A. Narasimha Ayyar—for the Crown.

Order.—This is a petition to revise the conviction of the petitioner under S. 447, I. P. C., for criminal trespass for entering upon and ploughing up a field called Tunga Chenu, 2 acres 75 cents in extent, belonging to P. W. 1 and leased by her in Fasli 1339 to P. W. 5. The petitioner seems to have set up that he was the person in possession. This was found against, the findings being that the petitioner and the husband of P. W. 1 were two out of five brothers who had once been joint, but had subsequently divided off; that these two brothers had divided from each other about four years prior to this occurrence and that the widow, P. W. 1, had been in possession of this property since her husband's death and had paid the kist for it and had also in Fasli 1339 leased it by a registered instrument to P. W. 5 for five years. The petitioner was convicted upon these facts upon the inference of the lower Courts that his intention in entering upon and ploughing up the field was to cause annoyance to P. W. 5. The petitioner now attacks this conviction upon two grounds:

In the first place he says that there is no distinct finding that there was any intention to annoy P. W. 5. In the second place he says that, even if there were, such a finding would be incorrect because P. W. 5, being admittedly the person in possession at the time when the petitioner entered upon the property, he being then absent and only P. W. 1 being present on the property, there could be no possible intention to annoy an absent person.

As to the first point, I think the language of the Magistrates is clear and they expressly found that the petitioner's intention was to annoy P. W. 5. As to the next point, reliance is placed upon three decisions to show that, where a person in possession is absent, there cannot really or fairly be said to be any intention to annoy him, and the intention, whatever it may be, is not to annoy but may be to assert a right or something else. The first decision relied upon is *In re. Chinna Thoyi* (1). In that case a woman had entered the compound of the Assistant Superintendent of Police in his absence for the purpose of meeting her paramour and not for the purpose of stealing as was alleged. On those facts the Court held that there was no reason for supposing that the woman's entry into the compound was made with the object of intimidating, insulting or annoying the absent Superintendent of Police or any other person. I consider that to be a decision upon those facts and not a general decision that in no circumstances can an absent possessor be annoyed even if facts exist from which such an inference may be drawn. On the contrary, another of the decisions cited to support of this proposition, *Emperor* v. *Moti Lal* (2) contains observations which are to the opposite effect. In that case there were two rival claimants, *A* and *B*, to some immovable property, including a certain shop. *A* had let the shop to a tenant who had left it. On the same day, before the lessor *A* could himself take possession, *B* entered the shop ; and the question was whether that was criminal trespass. In the course of their judgment the learned Judges say:

"First of all it is to be remarked that intimidation, insult or annoyance can in most cases arise only if the premises are in fact in the actual physical possession of somebody, as, for instance, the actual owner, his wife, servant, agent, licensee or other person. They are at all events results which more naturally follow when premises are occupied than when vacant."

The actual result of the case was that the Court held that the entry was a bona fide one for the purpose of asserting his title. But the observations above set forth show that it is unnecessary for a possessor to be always present upon his property in order that he may be annoyed by a trespasser ; on the contrary it was recognized that the actual owner need not be there : his wife, servant, agent, licensee or other person may be there. If so, why should any human being be actually present ? Indeed, if that were the case, no person in possession of property could leave the property without the risk of some trespasser or intruder entering upon his premises and going scot-free upon the allegation that there was nobody to annoy. The learned Judges in the case cited merely observed :

"They (intimidation, insult and annoyance) are at all events results which more naturally follow when premises are occupied than when vacant."

In my opinion that stands to reason. Can it be pretended, if a man in Madras locks his house and goes for a walk to the beach, and comes back a few hours or minutes later, that anyone who enters his house in his absence in circumstances from which intention to annoy may be otherwise drawn, cannot be guilty of criminal trespass because he was absent ? The proposition has only to be so stated to show how absurd the result will be if that were the law. The only other case relied upon was the Full Bench decision in *Vellappa* v. *Bheema Row* (3). That was not a decision on this point at all. All that was decided there was that the essence of an offence under S. 441 is the intention to commit an offence : to intimidate, insult or annoy. It was held that it was not sufficient to prove that the offender knew that his act was calculated or likely to cause annoyance, insult or intimidation. That is not the question here, that question as stated having been actually found. I therefore think that the fact that P. W. 5 was absent when the petitioner entered upon the land, and that only the lessor came to the spot on hearing of the petitioner's acts in order to prevent his doing so, is not enough to exonerate the petitioner from the in-

(1) 1 Weir 518.
(2) A. I. R. 1925 All. 540=88 I. C. 1049=47 All. 855.
(3) [1918] 41 Mad. 156=19 Cr. L. J. 162=43 I. C. 578 (F.B.).

tention to annoy the lessee. The conviction therefore was right.

In deciding as to the sentence, in my opinion, a fine of Rs. 100 is far too excessive in a case of this kind. The dispute was between a person and his brother's widow ; and there was no necessity to visit this petty offence with such a heavy fine. The sentence will be reduced to a fine of Rs. 20; in default, one week's simple imprisonment. The rest of the fine, if paid, will be refunded.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 233 (1)

JACKSON, J.

Subramania Maistry and *another*—Accused—Petitioners.

v.

Nachiar Ammal—Complainant—Respondent.

Criminal Revn. Case No. 580 of 1930, and Criminal Revn. Petn. No.539 of 1930, Decided on 27th November 1930, against the judgment of Joint Magistrate, Sermadevi, D/- 1st April 1930.

Criminal P. C. (1898), S. 264 (1)—Court has discretion in mode of recording evidence—Case hotly contested—Magistrate should not try it summarily.

As the Court is not required under S. 264 (1) to record any evidence at all, therefore there is no test by which the substantiality of its record can be gauged, and hence, whether the substance of evidence in S. 264 (1) must be such a complete summary of the evidence as to afford material for appeal, or merely a statement of the evidence which the Court thinks substantial, is a matter that rests with the Court. Where a case is hotly contested it is questionable whether a Magistrate is well advised to try it summarily : *A. I. R.* 1928 *Mad.* 597 and *A. I. R.* 1928 *Bom.* 433, *Ref.* [P 233 C 1]

K. V. Ramachandra Ayyar—for Petitioners.

T. M. Ramaswami Ayyar—for Respondent.

Public Prosecutor—for the Crown.

Order.—The point raised in this petition is whether the substance of the evidence in S. 264(1), Criminal P.C., must be such a complete summary of the evidence as to afford material for appeal or merely a statement of the evidence which the Court thinks substantial. Considering that the Court is not required to record any evidence at all, and that therefore there is no test by which the substantiality of its record can be gauged, I think it is right to assume that the matter rests with the Court. This is the view taken by Devadoss, J., in *In re Chockalinga Pandaram* (1). In *Nurudin Sheikh Adam* v. *Emperor* (2) the substance of the defence evidence was not even attempted to be given. In the circumstances I am not prepared to interfere. Where a case is hotly contested it is questionable whether a Magistrate is well advised to try it summarily.

The petition is dismissed.

P.R.S./B.V. *Petition dismissed.*

(1) A. I. R. 1928 Mad. 597=109 I. C. 897=29 Cr. L. J. 625.

(2) A. I. R. 1928 Bom. 433=112 I. C. 221=29 Cr. L. J. 1005.

A. I. R. 1931 Madras 233 (2)

WALLACE AND JACKSON, JJ.

Kappinaiah and *another*—Prisoners—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 36 of 1930, Decided on 26th March 1930, against sentence passed by Addl. Sess. Judge, Coimbatore Division, in Case No. 145 of 1929.

(a) Evidence Act (1872), S. 32—S. 32 refers to actual cause or transaction resulting in death—Woman ravished committing suicide three days later—Her statement is not admissible under S. 32.

Section 32 refers to actual cause of death, or to the transaction resulting in death. If a woman is raped and decides three days later to commit suicide, the rape is not the cause of her death or transaction resulting in death, though it may be the contingent motive. A statement made by the woman to her mother-in-law immediately after the rape does not become admissible under S. 32. [P 234 C 1]

(b) Evidence Act (1872), S. 6—Statement by woman immediately after she is ravished is not admissible under S. 6.

A statement made by a woman immediately after she had been ravished does not form part of the res gestae and is inadmissible in evidence under S. 6. A mere narrative of past cannot explain an act. [P 234 C 1]

(c) Evidence Act (1872), S. 8—S. 8 covers relevancy of conduct—Complaint by woman ravished—Terms in which complaint is made are relevant as conduct but not relevant as direct proof of the act.

Section 8 covers the relevancy of conduct. If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant and the terms in which the complaint was made are relevant as conduct but they are not relevant as direct proof of the act. The particulars of the complaint may so far as they relate to the charge against the prisoner, be given in evidence not as being evidence of facts complained of but as evidence of the consistency of the conduct of the woman with the story told by her in the witness box and as negativing consent on her part. [P 234 C 1, 2]

Statement made by a woman immediately after she has been ravished is not admissible in evidence under S. 8 when the statement cannot be proved due to the woman not going into the witness-box. [P 234 C 2]

K. S. Jayarama Aiyer and *G. Gopalaswami*—for Appellants.

Public Prosecutor—for the Crown.

Judgment.—The two appellants have been sentenced to five years rigorous imprisonment and to 12 stripes each for committing rape. Basuvi, the woman whom they are said to have raped on 26th August 1929, was found drowned on 30th August 1929 in a neighbouring canal.

Therefore she has not given evidence and a preliminary question of law arises whether her statement to her mother-in-law P. W. 2, made shortly after the alleged departure of the two accused from her bedroom on 26th August 1929 is admissible in evidence. The learned Judge holds that it is admissible

"not only under S.32 (1), Evidence Act, as relating to the cause of her death; but also under Ss. 6and 8 of the Act,"

an observation which argues little attention either to fact or law.

The woman is said to have been raped on Monday and was alive on Thursday morning and so S. 32 can have no applicability. That section refers to the actual cause of death, or to the transaction resulting in death. If a woman is raped, and decides three days later to commit suicide the rape is not the cause of her death or transaction resulting in her death, though it may be the contingent motive. Then her statement could only be relevant under S. 6, if it is so connected with her rape as to form part of the same transaction is one of what are known as the res gestae. Taylor offers as the best general idea of what is meant by res gastae everything that may fairly be considered an incident of the event under discussion and proceeds to lay down that a mere narrative of a past occurrence cannot explain an act. The leading case upon statements made after ravishment is *Regina* v. *Lillyman* (1), and there it is assumed at the very outset that such a statement is no part of the res gestae: p. 170.

As regards S. 8, it must be borne in mind that section covers the relevancy of conduct. If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant and the terms in which the complaint was made are relevant as conduct but they are not relevant as direct proof of the act. There is no reason to suppose that here the statutory law of India departs from the Common Law of England and the point is clearly stated in *Regina* v. *Lillyman* (1):

"the particulars of the complaint may so far as they relate to the charge against the prisoner, be given in evidence, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part."

Therefore if she does not go into the witnessbox there is nothing to confirm or corroborate and the statement or complaint cannot be proved. S. 8 does not render it admissible.

Mukkadi Gowda, P. W. 1, had often told his master D. W. 1, that his wife was a loose woman and he wanted to get rid of her. He was even saying this in August 1929. On 26th August he was away from home leaving only women in the house, his wife Basuvi, his mother Rachi, P. W. 2. and his aunt Sidhi, P. W. 4.

Rachi heard Basuvi cry out' "Ayyo, appa" at about midnight and taking a light went out and talked with one Chikkamalla P. W. 6, whom she found waiting outside. Chikkamalla told her that he had been hired by the two accused to cut firewood and they had left him outside while they went into her house. Rachi says that she herself saw the accused running away; probably at most she saw persons running away and concluded from what Chikkamalla told her that she had seen the accused. She then went to Basuvi whom she found quite naked. She does not say that she noticed any kind of injury upon her. Then she went back to bed and slept soundly. The aunt, P. W. 4, tells the same story.

At sunset on the 28th, Makkai Gowda returned home and heard from his wife that she had been raped. He went to two leaders of the caste but found them out and spent that night with his wife leaving her early next morning. He returned at 9 a. m. to find her gone. On the 30th her body was found in the canal. He reported this to the headman but said nothing of the rape. The Sub-Inspector P. W. 11. came to the place at 2 p. m.

(1) [1896] 2 Q. B. 167=65 L. J. M. C. 195=74 L. T. 780=18 Cox. C. C. 346=44 W.R. 654 =60 J. P. 536.

on the 30th receiving the headman's report Ex. D that a body had been found. Apparenly the story of the rape first came out at the inquest but he has been asked nothing about it and there is no first information report.

The doctor, P. W. 3, held the post mortem on the morning of the 31st. The body was badly decomposed and he thinks decomposition must have set in on the 27th or 28th or even earlier. If Basuvi died on the 29th the medical evidence is at variance with the fact. The lips of the vagina were scratched and the vulva badly contused which might have been caused by rape. There were bruises on the left cheek and temple and the eye was inflamed. He could not give the cause of death.

Accused 2 was found to have some scratches on his penis, but that is not evidentiary.

This evidence does not warrant a conviction. If Basuvi was lacerated and bruised on the 26th, the other woman would presumably have heard of it. When they were roused they were more interested in learning from Chikkamalla what persons had been visiting Basuvi that night than in going to her assistance. As they both went back to bed and to sleep they evidently did not think much of it nor did Makkadi Gowda regard it as a matter for public complaint. But this was a flagrant instance of his wife's misconduct and he probably beat her which would account for her black eye. If as suggested the accused were stifling the cries of a virtuous woman the injuries should have been nearer the mouth. After encountering her husband she may have drowned herself or she may have been killed and thrown into the water. The only reliable evidence against the accused is that of the one man who says that they left him outside and his story is quite consistent with the theory that they visited Basuvi with her consent and were not raping her. They may have treated her with more violence than she relished but there was nothing she thought worth showing to the other women. In fact the evidence is that when they came in she was careful to conceal her private parts (P. W. 2). If the learned Judge had seen the significance of this circumstance combined with the fact that the other women were not upset, and the husband thought it no matter for public complaint, and if he had not misdirected himself on the law, he would probably have agreed with the assessors who were unanimous for an acquittal. Their opinion must be upheld. The accused are acquitted.

R.M./R.K. *Accused acquitted.*

A. I. R. 1931 Madras 235

PANDALAI, J.

Ramaswami Reddy — Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 822 of 1929, (Criminal Revn. Petn, No. 736 of 1929), Decided on 18th February 1930, against order of Sub-divisional Magistrate, Koilpatti, D/- 23rd September 1929.

Penal Code (1860), S. 406—Property in respect of which criminal breach of trust can be committed must be property of some person other than accused.

Where the accused is the legal owner of a pronote, though the proceeds of the note are agreed to be used by him in a particular way there can be no entrustment and therefore no breach of trust, merely because, the owner of the property repudiates his obligation or commits other breach of contract in respect of it. It is no more than a breach of contract.

The property in respect of which criminal breach of trust can be committed must be the property of some person other than the accused or the beneficial interest in or ownership of it must be in some other person and the offender must hold such property on trust for such other person or in some way for his benefit : Per *Fox, C. J.*, 17 *I. C.* 824, *Rel. on.* [P 235 C 2,P 236 C 1]

V. K. John—for Petitioner.

Public Prosecutor—for the Crown.

V. L. Ethiraj—for Complainant.

Order.—From the facts stated by the Subdivisional Magistrate, it is clear that the appellant was not, as indeed he could not be, entrusted with the promissory note in question, because he was upon the arrangement, in pursuance of which the note was taken in his name and given to him, not a mere name-lender but the holder of the note entitled to sue on it, and realize the amount due under it subject, of course, to the obligation to pay off the lessees before or after such realization. In short the appellant was the legal owner of the note, though the proceeds of the note were to be used by him, in a particular way to pay off the lessees or reimburse himself if he had previously paid the lessees.

There can be no entrustment and therefore no breach of trust in such cases merely because the owner of the property repudiates his obligations or commits other breach of contract in respect of them. The property, in respect of which criminal breach of trust can be committed, must be the property of some person other than the accused or the beneficial interest in or, ownership of it must be in some other person, and the offender must hold such property on trust for such other person or in some way for his benefit : per Fox, C. J., *Nga Po Seik* v. *Emperor* (1). In this case the note was taken in the appellant's name because he offered to indemnify the lessees against demands by the lessor Valliammal and in order to secure himself against personal loss he took a promissory note from Valliammal's relatives, the intention being of course that in case Valliammal proceeded against the lessees on the lease, the appellant could proceed against the maker of the note on the note and recover the amount and with it indemnify the lessees or repay himself if he had already paid them.

The appellant's denial of the existence of the note or statement that he had returned it to the maker or his repudiation of his liabilities under the contract of indemnity were thus no more than a breach of contract, but not a criminal offence of breach of trust.

The conviction is set aside and the fine, if paid, will be refunded.

P.R.S./B.V. *Conviction set aside.*

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(1) [1912] 13 Cr. L. J. 888=17 I. C. 824 (F.B.).

A. I. R. 1931 Madras 236

PANDALAI, J.

(*Kolli*) *Satyanarayana Choudhari* — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 458 of 1930, Criminal Revn. Petn. No. 425 of 1930, Decided on 11th August 1930, against order of Dist. Magistrate, D/- 10th July 1930.

Criminal P. C. (1898), S. 144—In passing order under S. 144, it should be shown that it was necessary in interests of public peace — Likelihood of disturbance must be reasonable and proximate.

It is quite legal to prohibit the wearing of Gandhi caps or the carrying of any symbols by an order under S. 144, if they amount to participation in or encouragement of revolutionary propaganda or any movement, e. g. civil disobedience movement, calculated to paralyze the administration. But before such an order is passed, it should be shown by evidence which a reasonable mind may accept as satisfactory that it was necessary to pass such an order in the interests of the public peace. A reasonable connexion must be established between the act prohibited and the apprehended danger which, it is feared, will lead to disturbance of public peace. The likelihood of such disturbance owing to the act prohibited must be a reasonable and proximate one, and the connexion between them must not be merely speculative or distant. [P 335 C 2 ; P 336 C 2]

When an ex parte order under S. 144 is called in question under Cl. 4 of that section the normal procedure should be for evidence to be recorded in the usual way by examination and cross-examination of witness in open Court. Such a proceeding is a judicial proceeding : *A. I. R.* 1930 *Mad.* 242, *Ref.* [P 238 C 1]

T. Rangachariar, V. Govindarajachari, A. Lakshmayya and *B. T. M. Raghavachari*—for Petitioner.

Advocate-General and *Public Prosecutor*—for the Crown.

Order.—This is a petition to revise an ex parte order under S. 144, Criminal P. C., made by the District Magistrate of Guntur on 20th June 1930, prohibiting the public from wearing Gandhi caps in any place frequented by the public within the limits of the Guntur Municipality and a radius of five miles therefrom for a period of two months and an order passed by the same Magistrate on 10th July refusing to rescind the first order on a petition by the present petitioner dated 2nd July 1930.

The circumstances in which the ex parte order came to be passed are as follows: On 14th June the District Magistrate passed two orders under S. 144, in view of the civil disobedience movement, one prohibiting processions of more than four persons and public meetings in Guntur and the other directing the volunteers to leave the Sibiram. On the 15th, as the volunteers did not leave the Sibiram, it was raided and captured and the volunteers dispersed. During the next two days the police were patrolling the streets to see that the orders were obeyed and that the volunteers, who were mostly not natives of Guntur, left the place. Complaints arose that the police on those days tried to prevent people wearing khaddar dress and Gandhi caps on the roads and were molesting those that did so. On the 18th ten inhabitants of Guntur including the President of the District Board, the present and former Chairman

of the Municipality and other respectable persons, presented to the District Magistrate a written representation complaining of molestation by the police of people wearing Gandhi caps and khaddar and asking for protection. At their request they were granted an interview by the District Magistrate on 18th. As the record in this case did not contain an authoritative account of what transpired at this interview I called for a report from the District Magistrate. He has submitted a confidential communication. One only of the deputationists was able to vouch for the accuracy of the complaints from his own knowledge. Another member of the deputation (apparently on behalf of all) asked whether the people might wear khaddar and Gandhi caps. The District Magistrate said they might but must take the risk of being confused with the volunteers who were going about with their usual badges, and that the volunteers would not be allowed to remain in the town any longer. The deputationists requested the District Magistrate to speak to the District Superintendent of Police to which the District Magistrate said he had already done so. In fact the District Magistrate had already urged the District Superintendent of Police to see that his men kept within the law. The deputation naturally understood that there was nothing illegal in merely wearing khaddar or the Gandhi cap and that the District Magistrate had already taken steps to prevent molestation by the police for wearing such dress. The only practical inconvenience for people so dressed was of being mistaken by the police for volunteers who were required to leave the place as most of them were strangers at Guntur.

The deputation having got the District Magistrate's assurance of protection from unlawful molestation thought it proper in order to allay public excitement to intimate the fact to the people who were making complaints of molestation and ordered a handbill in the following terms to be printed in a local press :

"When we went to the Collector today and told him about the conduct of the police, he told us that he would take proper steps to see that the police do not molest volunteers or other residents of the town for merely wearing khaddar or the Gandhi caps."

Then follows the names of the deputationists. The police came to know that this handbill was beingprinted with a view to its circulation. They thereupon went to the press and seized all the copies before any could be circulated and immediately made an application to the District Magistrate stating as follows:

"There was information that about nine people of Guntur approached the District Magistrate, Guntur, and made allegations against the police and that the District Magistrate did not believe them. To incite the public to gradually defy the orders under S. 144, Criminal P. C., issued by him on 15th instant, these people sent a notice to the Vani Press for printing and to give them a number of copies for publication in Guntur town. These notices contain falsehood carefully and cunningly worded. The publication of these notices in Guntur town may lead to breach of peace and public tranquillity. I produce a copy of the notice. I want an order under S. 144, Criminal P. C., issued prohibiting the wearing of Gandhi caps by the public in general in Guntur town and within five miles of its boundary."

Thereupon the District Magistrate passed the order in question which is as follows :

"Whereas the public tranquillity has been disturbed by the civil disobedience movement and wearing of the Gandhi cap is a symbol of sympathy with that movement and whereas information has been laid before me that a notice is about to be issued to the public in general which will have the effect of inciting them to wear Gandhi caps and (so) disturb the public tranquillity, I . . . . District Magistrate, consider that immediate prevention is desirable and direct every member of the public in general do abstain from wearing a Gandhi cap when in any place frequented by the public within the limits of Guntur Municipality and a radius of five miles therefrom for a period of two months from this date."

The petitioner, an advocate and Secretary of the Bar Association of Guntur, purporting to act in pursuance of a resolution of that body, petitioned the District Magistrate on 2nd July under S. 144 (4) to rescind the above order, stating that the handbill mentioned in the order was not an incitement to commit any illegalities at all, but only intimation of the fact that the District Magistrate himself had promised to protect the people against molestation for wearing Gandhi caps and khaddar, that there was neither imminent nor in fact any danger of any breach of the peace or of the public tranquillity by reason of the people wearing Gandhi caps; that the public had a right to wear what dress they liked and that the order was an unwarranted interference and not being justified by any interest of the public peace should be rescinded. When the petition came on for hearing, no witnesses were examined at all, but the petitioner was al-

lowed to file on 8th July an affidavit setting out more fully the contents of his petition. It referred to the representation of the deputation and the petition put in by them and asked that it might be exhibited in the case. It denied the allegation in the first information report by the police that the District Magistrate, in the interview the deputationists had withhim, said that their representations were all false; it denied the allegation of secret meetings in the houses of people to concert measures to throw obstacles in the way of the police and concluded by stating that the handbill proposed to be circulated only stated the fact which was true, that the District Magistrate had assured the deputation of protection from illegal molestation for wearing Gandhi caps and khaddar dress. On the other side the police through the Public Prosecutor contented themselves by filing a memorandum of objections. Not even an affidavit was filed. The memorandum of objections stated that the petitioner had no locus standi to move the Court as he was not a person aggrieved by the order and it ended by the surprising statement that:

"on the merits of the case it is not proposed to make any reply as the application is manifestly unsustainable."

On these materials, the District Magistrate passed his order of 10th July declining to interfere.

Before proceeding further, I think that when an ex parte order under S. 144 is called in question under Cl. (4) of that section, the normal procedure should be for evidence to be recorded in the usual way by examination and cross-examination of witnesses in open Court. The proceeding is a judicial one: *Muthuswami* v. *Thangammal* (1); and though I am not aware of any provision in the Criminal Procedure Code prescribing the mode of taking evidence in such an enquiry it is desirable whenever possible to adopt the normal procedure. The learned Advocate General conceded that the normal procedure of recording evidence in open Court should ordinarily be adopted. But he stated that in this case no evidence had been shut out. The difficulty in this part of the case, is that on the crucial point, namely whether the wearing of Gandhi caps has any reasonable connexion with disturbance of the peace or public tranquillity, the order entirely rests on statements contained in itself which there is no means of testing by the evidence. The main point is whether there was any such urgent apprehended danger as called for action under the section and, if there was, whether the act prohibited, namely the wearing of Gandhi caps, was such as was likely to prevent or tended to prevent the threatened disturbance of public tranquillity. The Magistrate first considers as the main question whether the Gandhi cap is part of the ordinary dress of the people. He may have been misled into thinking that this was the main question by the contention of the petitioner before him that the Gandhi cap was the ordinary dress of the people. The Magistrate came to the conclusion that in that part of the country the Gandhi cap was not the ordinary dress of the people but had become general among the followers of Mr. Gandhi for about ten years. As he puts it, it showed that the wearer was interested in something in which Mr. Gandhi was interested. To that extent I agree with him but when he goes on to say that because the Gandhi cap shows sympathy with something in which Mr. Gandhi is interested, and because Mr. Gandhi is now interested in the civil disobedience movement, the wearers of Gandhi caps are also sympathisers with the civil disobedience movement, I must with respect disagree. The question is really one of general knowledge and this Court is as much in a position to know matters of general knowledge as the lower Court.

It is impossible for me to say that at the present day people who wear Gandhi caps may be inferred therefrom to be supporters of the civil disobedience movement. Such an inference would be an injustice to those numerous persons who have been wearing that cap as a mark of sympathy with Mr. Gandhi's views from a time long anterior to the civil disobedience movement. For, it is well known that Mr. Gandhi is interested in several other things than the civil disobedience movement which have or ought to have no connexion with it, for instance, elevation of the depressed classes, prohibition of child marriage, encouragement of Indian industries and temperance. It is unjust to those who take an interest in Mr. Gandhi's harmless activities to impute to them sympathy

(1) A. I. R. 1930 Mad. 242=121 I. C. 833=31 Cr. L. J. 824=58 Mad. 820.

with the civil disobedience movement because they wear Gandhi caps. Finally the representation by the deputation of ill usage by the police of wearers of Gandhi caps and the District Magistrate's opinion that people might wear such caps provided that they did not mind the risk of being mistaken for volunteers and his warning to the police to keep within the law, all show that on 18th June the Gandhi cap was not in the opinion of the District Magistrate an emblem of the civil disobedience movement.

What then was the urgently apprehended danger? From the order as first issued, it would appear as though the apprehended danger was the wearing of Gandhi caps by the people of Guntur. Obviously the danger intended by the section is a danger to the public tranquillity. It is difficult to see how the wearing of caps was in the circumstances in itself a danger to public tranquillity. The Magistrate explains that in the order originally issued the word "so" was by a clerical error omitted before the word "disturbed." When the omission is supplied he says that the intention of the order is clear. I do not see how the addition of the word "so" supplies the missing link unless we are to suppose, as apparently the Magistrate was of opinion, that the wearing of Gandhi caps was itself a disturbance of the public tranquillity. It seems to me that the order discloses confusion of thought by identifying disturbances of the peace or tranquillity which is the apprehended danger, with the act or acts which are to be forbidden as a means of preventing the danger. In short, the order does not disclose any danger to the public peace itself unless we are to suppose that the wearing of caps became on 20th June an indication of danger to public peace or tranquillity. If on the 18th the wearing of these caps was permissible and the only danger was to the cap wearers themselves of the police mistaking them for volunteers, how did the caps become on the 20th a danger to the public peace?

The most important point in the case is whether the prohibition of the cap was necessary in the interests of peace in the sense that it was likely to prevent or tend to prevent the disturbance of the public tranquillity. On this point, I adopt the learned Advocate-General's words when he said that the real test to see whether the present order was justified or not is to find out whether the act, be it lawful or unlawful, was likely to lead to a breach of the public tranquillity. On this point, the learned advocate for the petitioner has subjected para. 5 of the Magistrate's order of 10th July to a searching and rigorous criticism. He argues that instead of founding himself on probabilities the Magistrate has relied on surmises in trying to establish a connexion between the Gandhi caps and public tranquillity. I do not agree with the advocate's criticism that the object of the order was political. There is no reason to regard the object of the order as otherwise than what it should be, but that is not enough. It must be supported on substantial grounds. The substance of the criticism is that an act prohibited under S. 144 must only be so prohibited if it is likely to prevent obstruction, etc., or disturbance of the public tranquillity etc. Now this likelihood or tendency must in my opinion be a reasonable or proximate one. It is not enough to say that by stretching several possibilities one after the other it is possible to establish a connexion of cause and effect between the act prohibited and disturbance of the public tranquillity. That connexion must not be merely speculative or distant. The question whether in each particular case the case falls on one side or the other is one eminently of sound judgment and no rules can be laid down for its exercise. Where there are special facts relating to a particular locality as to which the local authority is the best judge the opinion of that authority will not easily be disturbed; but where there are no special circumstances and the matter is one of general impression the absence of any near or reasonable connexion between the prohibited act and the supposed danger to public tranquillity will be a ground upon which this Court is bound to act. The order of the Magistrate shows that the connexion between the Gandhi caps and the civil disobedience movement which disturbs public tranquillity is only a distant and possible one and not a near and probable one. He says that "a sudden increase in symbols of sympathy," by which he means caps

> "with a movement which had just had a serious set back could have no other effect than to assist the movement."

If the so called increase in cap wearers was due to the alleged interference by the police, which had temporarily diminished the number, becoming known to be unauthorized, there would be really no increase at all, but those people who had been accustomed to wear the caps before the interference would again do so as if they had not been interfered with. Then the Magistrate refers to the general features of the civil disobedience movement throughout India as being very upsetting to the public tranquillity. I think the petitioner's criticism is just that this has little to do with the case because the state of affairs at a distant place like Peshawar can have very little effect upon what is done at Guntur. Then the Magistrate says that

"the ways are numerous and it is impossible to say exactly in what way it would have worked if this order had not been passed."

It was argued for the petitioner that, if the Magistrate was unable to say what the consequences would be, ipso facto it showed that there was no need to act because it has to be shown that a disturbance of the public tranquillity was imminent; but understanding the Magistrate to mean that unknown dangers which it was impossible to define were looming ahead, that again leaves the matter so uncertain that it can hardly be made the occasion for a general order like the present preventing people from wearing caps of a particular kind. Then the Magistrate refers to offences in pursuance of the movement by which he means no doubt offences committed throughout India. This is open to the same remarks as above. Then he refers to the demolition of a temple in the town of Guntur on 15th June. This is rather an embarrassing reference because there is nothing whatever in the case to show that this was a part of the civil disobedience movement. On the contrary, I was informed and this was not denied on the part of the Crown that it was the act of a certain section of Mahomedans who destroyed the temple in consequence of communal ill feeling. Reading that portion of the order which relates to this subject as a whole I have come to the conclusion that the Magistrate was dealing with, as he himself calls, possibilities and that no reasonable connexion was established between the act prohibited and any apprehended danger.

It is of course quite legal to prohibit the wearing of caps or the carrying of any other symbols if they amount to participation in or encouragement of revolutionary propaganda or any movement such as the civil disobedience movement calculated to paralyze the administration. But before such an order is passed it should be shown by evidence which a reasonable mind may accept as satisfactory, that it was necessary to pass such an order in the interests of the public peace. In my opinion that has not been done in the case. Where that is so, an order like the present is more likely by its necessarily irritating effect to adversely affect the public peace than if it had not been passed. In such circumstances it is the duty of this Court in the interests of public peace to set matters right. The order of the District Magistrate is set aside.

P.R.S./B.V. *Revision allowed.*

A. I. R. 1931 Madras 240

JACKSON, J.

(*Nandipati*) *Ramireddi* and *another* — Petitioners—Accused.

Criminal Revn. Case No. 914 of 1930, and Criminal Revn. Petn. No. 848 of 1930. Decided on 17th December 1930.

Criminal P. C. (1898), Ss. 439 and 435—Accused person must wait for his defence till he is charged—If convicted his first remedy is by way of appeal and not revision.

An accused person must wait till he is charged before he defends himself and if he is convicted his first remedy in most cases is by way of appeal and not by way of revision. He should not anticipate his defence by a petition over which a trial Court should not write orders, which orders also should not be allowed to be brought upon revision. [P 240 C 2]

Judgment.—It seems that an entirely wrong system of procedure is developing in the lower Courts. Accused persons before they are charged and put upon their defence, anticipate their defence by petitions on which the trial Court writes written orders, and these are then brought up on revision. The procedure is quite misconceived. An accused person must wait till he is charged before he defends himself, and if he is convicted his first remedy is in most cases by way of appeal. At this stage there is no room for revision. The criminal revision petition is dismissed.

P.R.S./B.V. *Revision dismissed.*

A. I. R. 1931 Madras 241

SUNDARAM CHETTY, J.

Nataraja Mudaliar—Accused—Petitioner.

v,

Devasigamani Mudaliar—Complainant—Respondent.

Criminal Revn. Case No. 72 of 1930 and Criminal Revn. Petn. No. 68 of 1930, Decided on 24th July 1930, against judgment of Sub-divisional Magistrate, Saidapet, in Cr. Appeal No. 73 of 1929.

(a) Criminal P. C. (1898), S. 342—Provisions of S. 342 are mandatory and non-compliance with them vitiates trial.

The provision under S. 342 as to the questioning of the accused after the close of the prosecution evidence is mandatory, and non-compliance with it vitiates the whole trial. A strict compliance with this provision should be made after the close of the prosecution evidence and the accused is called on to enter on his defence.

Where the accused is questioned after the examination of three prosecution witnesses, after which again a fourth prosecution witness is examined and a charge is framed without again questioning the accused, the trial is vitiated, as there is no proper compliance with the aforesaid provision. Such irregularity cannot be cured under S. 537. If a fresh witness for prosecution is called in and examined, the accused must again be questioned according to S. 342. What S. 342 contemplates is the oral statement of the accused, and a filing of a written statement after the close of the prosecution evidence is not tantamount to the examination of the accused under S. 342: *A. I. R.* 1923 *Mad.* 609, *Rel. on.* [P 241 C 2 P 242 C 1]

(b) Penal Code (1860), S. 379—Owner cannot accuse person removing trees from tenant's possession, of theft.

An owner of a house cannot accuse a person removing trees from the tenant's possession, of committing theft, because a lease generally implies a transfer of an interest in immovable property which is possession, and hence the trees cannot be said to have been removed from the owner's possession. [P 242 C 4]

V. L. Ethiraj—for Petitioner.

K. B. Vasudevan for *Public Prosecutor*—for the Crown.

N. K. Mohanarangam Pillai — for Respondent.

Order.—This is a criminal revision petition filed by the accused against the conviction and sentence of fine imposed on him for an offence under Ss. 379 or 424, I. P. C. The case against the petitioner is that he dishonestly cut and removed two trees which stood at the backyard of the house belonging to the complainant.

The main contention of the learned counsel for the petitioner is, that the failure of the Magistrate to examine the accused under S. 342, Criminal P. C., after all the prosecution witnesses were examined, is an illegality which vitiates the whole trial. There is no doubt as to the facts which have to be taken into consideration in deciding this technical objection. After the examination of P. W's. 1 to 3 a charge was framed on 4th May 1929 and then an additional witness, namely. P. W. 4, was examined on 28th June 1929. After the examination of this additional witness the Court did not question the accused in accordance with S. 342, Criminal P. C. According to Cl. (1) of this section, it is obligatory on the Magistrate to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him after all the witnesses for the prosecution have been examined and before the accused is called on for his defence. This provision has been held in several decisions to be mandatory, and there is no doubt that a strict compliance with this provision should be made after the close of the prosecution evidence and before the accused enters on his defence. That being so, the fact that the accused was questioned under the aforesaid section after the examination of three witnesses for the prosecution cannot be deemed to be a proper compliance with the mandatory provision laid down in the aforesaid section. Reliance has been placed on the petitioner's side on the Full Bench decision of this High Court reported in *Varisai Rowther* v. *Emperor* (1). The question has been considered at great length, and the decision of the Full Bench is to the effect that the provision in the latter part of S. 342, Cl. 1, Criminal P. C., directing the Court to question the accused generally on the case is mandatory, and failure to comply with the terms of the section is an illegality vitiating the trial and not a mere irregularity which can be cured under S. 537 of the Code. The question whether the non-compliance with the strict provision of the aforesaid section has caused any prejudice to the accused or not does not arise, as would appear from the decision of the Full Bench.

It is also clearly laid down in this decision that the accused should be ex-

(1) A. I. R. 1923 Mad. 609=73 I. C. 163=24 Cr. L. J. 547 (F. B.).

amined in the aforesaid manner when the prosecution has finished calling the evidence, though he need not be so examined once again after the cross-examination and re-examination of the prosecution witnesses recalled. There is no doubt that, if a fresh witness is called in and examined, the accused must again be questioned according to S. 342. The learned Subdivisional Magistrate, in dealing with this objection, seems to be of opinion that the written statement filed by the accused on 1st July 1929, after the close of the whole trial may be taken to be a substantial compliance with the provisions of S. 342, Criminal P. C. It seems to me that this view is not in consonance with the express provisions of the Code. As far as I could see, there is no provision in the Code except in S. 256, Cl. 2, for the accused to put in any written statement. What S. 342 contemplates is the oral examination of the accused by the Magistrate who should put questions generally on the case and elicit answers from the accused. There is nothing in the Full Bench decision referred to above to indicate that the filing of a written statement tantamounts to the examination of the accused as required by S. 342. The omission in the present case of complying with the mandatory provision of S. 342, Cl. (1), Criminal P. C., must be taken to vitiate the trial, on the authority of the Full Bench decision of this Court. It is not necessary to refer to the decisions of the other High Courts, some of which seem to be in conflict with the view taken by the Full Bench of this Court. Following the Full Bench decison, I must hold that the trial is vitiated by the illegality referred to above. On this ground, the conviction and sentence have to be set aside.

Even on the merits, it seems to me that a clear case of theft under S. 379, I. P. C., has not been made out. It has been admitted by the complainant, P. W. 1, that the house and trees were in Murugesa Mudaliar's possession as tenant till his death and subsequently in his wife's possession. The actual possession on the date of the commission of the alleged offence was with the wife of Murugesa Mudaliar who was occupying it in a tenant's capacity. The complainant having granted a lease of the house and the trees to Murugesa Mudaliar, and the lessee's heir having been in actual possession on the strength of the lease, it cannot be argued with any degree of force that possession of the trees in question was with P. W. 1, on account of his ownership. Lease generally implies a transfer of an interest in immovable property, which is possession. P. W. 1 not having been in actual possession of the trees in question, it is difficult to understand how it can be said that the trees were cut and removed from his possession. Whatever right P. W. 1 may have for damages against the person who cut and removed the trees, it is clear that no offence of theft was committed under the Indian Penal Code. If there was no theft it is still more difficult to understand how there could have been a dishonest concealment or removal of the timber. Even on the merits the conviction seems to be unsustainable.

In the result this petition is allowed and the conviction and sentence of the accused are set aside, and the fine, if levied, will be refunded to him.

P.R.S./B.V. *Revision allowed.*
Conviction and *sentence set aside.*

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* A. I. R. 1931 Madras 242

PANDALAI, J.

(*Devatha*) *Sriramamurty* — Petitioner.

Criminal Revn. Case No. 437 of 1930, (Criminal Revn. Petn. No. 404 of 1930). Decided on 11th August 1930, against order of Stationary Sub-Magistrate, Rajahmundry, D/- 14th July 1930.

(a) Criminal P.C., (1898), S. 144—Revision—Proceedings under S. 144 are subject to revision by High Court.

Proceedings under S. 144 are judicial and are subject to revision by High Court. The person against whom they are instituted has a right to know what the information was on which the Magistrate acted in order to show that it was unfounded or insufficient and he is entitled to get a copy of the information on which the Magistrate acted: 31 *L.W.* 16, *Ref.* [P 244 C 1]

(b) Criminal P. C. (1898), S. 439—Powers of revision are general and cannot be cut down by any decision.

The duty of the High Court is to satisfy itself as to the correctness, legality or propriety of the order of the lower Court and to pass such orders as may be necessary. The powers of the High Court in revision as described in S. 439 are general and their generality cannot be cut down by any decision: 28 *Bom.* 533, *Ref.* [P 244 C 2]

(c) Criminal P. C. (1898), S. 144 — High Court will interfere in revision where

grounds for action under S. 144 by Magistrate are unfounded or insufficient.

Where the elements essential to action under S. 144 do not upon a fair view of the evidence exist, the High Court will not blindly uphold the order of the local Magistrate because he has chosen to say that they do exist. If it is the case that the grounds for action as stated in the order are either unfounded in fact or insufficient in law or if it is shown that the order against the public as framed violates the conditions laid down by S. 141 it is the duty of the High Court to interfere. [P 244 C 2, P 245 C 1]

*** (d) Criminal P. C. (1898), S. 144—When order under S. 144 may be addressed to public generally stated — Public cannot be prohibited from putting flags on private houses.**

An order under S. 144 may be addressed to the public generally when frequenting or visiting a particular place. No order can be passed against the public without that limitation as to place namely, that it must be one, whether publicly or privately owned, which at the time when the prohibition operates, the public frequent or visit. They may have a right to frequent the place as in highways and places of public resort or they may be allowed or invited to visit it as at a public meeting held in private premises. But the place must be one which is open to the public as such. And this involves that the public cannot be prohibited from putting up flags in private houses, first because those who put up the flags are owners or occupants of such houses and second because the public as such neither frequent nor visit private houses. It is a misuse of language to call house owners who use their houses, members of the public for the purpose of this section. [P 245 C 1]

T. R. Ramachandra Ayyar, G. Lakshmanna, P. V. Vallabhacharyulu, T. V. Srinivasachari and *G. Chandrasekhara Sastri*—for Petitioner.

Advocate-General—for the Crown.

Order.—This is a petition to revise an ex parte order dated 14th June 1930 made under S. 144, Criminal P. C., by the Stationary Sub-Magistrate, Rajahmundry which on application dated 16th June by the petitioner that the Magistrate by his order dated 14th July declined to rescind. The order of 14th June is as follows:

"Order under S. 144, Criminal P. C: Whereas from information given by the police it has been made to appear to me that in Rajahmundry the hoisting of tricoloured flags called national flags on the residential and other buildings is giving room to certain rowdies and men of bad character to think that they can safely molest them under a wrong belief that no notice would be taken by those responsible for law and order and that for the preservation of peace and tranquillity the removal of such flags is necessary and emergent, I. P. Mallikharjuna Row, B. A., Second Class Magistrate, Rajahmundry, hereby prohibit under S. 144, Criminal P. C., the placing or hoisting of such flags or continuing to keep them on any building in general and on the building of Messrs. (1) Devatha Sreeramamurthi, (2) Dr. Veerbhadraswami, (3) Burra Suryaprakasa Row. (4) Uppala Satyama and (5) Polayya Naidu of Rajahmundry in particular for a period of two months from today, 14th June 1930, and strictly warn and enjoin the public of Rajahmundry including individual members of Congress organization and Satyagraha volunteers residing in Rajahmundry not to take part in any such demonstrations or keeping such flags on their buildings during the said period."

"The order is issued under Cl. (2), S. 144, Criminal P. C., as the circumstances do not admit of the service of notices on the persons concerned in due time."

The circumstances in which this order came to be passed were these. On 10th June the District Magistrate of East Godaveri made two orders under S. 144, one prohibiting the public including certain named persons and other officers and members of Congress organizations from holding meetings and processions in any public place or thoroughfare or other place frequented by the public within the town of Rajahmundry and within a radius of seven miles from Rajahmundry, the other prohibiting one Mallikharjuna Row and other Congress volunteers residing in particular premises from residing there. These orders were passed in view of the campaign of civil disobedience movement, which had broken out in Rajahmundry and they broke up the base of operations of the Congress volunteers and stopped demonstrations in public places in sympathy with them. They did not and could not interfere with anything done in private houses and buildings, for example, the flying of the national flags in them. The authorities had no power to interfere with such flags but were naturally dissatisfied with their being flaunted from housetops after they were driven away from the streets. On 13th June the police went about and succeeded in getting a great many of these flags removed. As no Police Officer gave evidence in these proceedings we have no means of knowing their own version of how this was done. But witness 3 for the counter-petitioners who was examined in support of the police and who appears to be a respectable man having been an Honorary Magistrate speaks of the police pulling down the flags and of himself closing his shop door when the police were pursuing the people assembled in crowds. However that may be, on the morning of 14th June, the police went to the house of the petitioner, a pleader and asked him to remove the flag from his house. He refused and the police not having legal authority to enforce their demand with-

drew for the time. Later in the day on this becoming known, many of those whose flags had been removed the previous day put them up again and therefore most of the work of the previous day was undone. In these circumstances the Deputy Superintendent of Police applied to the Magistrate for an order under S.144 prohibiting these flags, stating as the ground for action under that section that they gave room for certain rowdies and men of bad character to think that they can safely molest or attack the places where the flags were flying under a wrong belief that no notice would be taken by those responsible for law and order and that in the interests of peace and tranquillity it was necessary to remove the flags. Thereupon the Magistrate made an ex parte order as above.

The order is addressed to five named persons including petitioner and the police. On 16th June the petitioner applied to the Magistrate to cancel his order stating that the ground for action as stated in the order was both untrue in fact and insufficient in law to justify action; that the flag in the petitioner's house had been there several months and there never was any attack nor apprehension of any attacks by rowdies on his or any other house by reason of the flag; in short that there was no urgent or in fact any apprehension of danger to the public peace such as to justify the order and that so far as the order on the public was concerned, it was invalid as it purported to prohibit them from hoisting flags on private houses where they do not frequent.

The Magistrate held an enquiry for the purpose of S. 144 (4) in which 11 witnesses were examined on the petitioner's side and three on that of the police. No Police Officer went into the witness box. Before going further I ought to say that the Sub-Magistrate was wrong in having refused to the petitioner a copy of the information given to him on 14th June and on which his order of that date was based. Proceedings under this section are judicial: *Muthuswami* v. *Thangammal* (1), and are subject to revision by this Court. The petitioner had a right to know what the information was on which the Magistrate acted in order to show that it was unfounded or insufficient. The petitioner's advocate was therefore allowed access to the original by me. On a consideration of the evidence the Magistrate declined to rescind his order. Hence this petition.

The duty of this Court is to satisfy itself as to the correctness, legality or propriety of the order of the lower Court and to pass such orders as may be necessary. The powers of this Court in revision as described in S. 439 are general and their generality cannot be cut down by any decision. On this point I would respectfully adopt the words of Sir Lawrence Jenkins in *Emperor* v. *Bankatram Lachiram* (2) at p. 566 where that learned Judge quoting another eminent English Judge said:

> "This controlling power of the Court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself I say emphatically that this discretion ought not to be crystallized as it would become in course of time by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the legislature has committed to them. This discretion, like all other judicial discretions, ought, as far as practicable, to be left untrammelled and free so as to be fairly exercised according to the exigencies of each case."

I have ventured to refer to what may be considered common knowledge in this Court, because the learned Advocate-General at more than one point of his address stressed the point that in considering the propriety of orders under S. 144 this Court will not substitute its judgment on the facts for that of the lower Court which alone is responsible for the peace of the locality. The element of validity in this contention is that where the elements essential to action under the section are shown to exist upon materials legally before the Court, this Court, will in exercising its powers, respect the opinion of the local authorities both as to the gravity of the danger and as to the steps necessary for maintenance of peace. But this does not mean that, where those essential elements do not, upon a fair view of the evidence exist, this Court will blindly uphold the order of the local Magistrate because he has chosen to say that they do exist. That would be for this Court to relinquish its function into the hands of the lower Courts, a course which will be as dangerous to the public peace. Instances

(1) A. I. R. 1930 Mad. 242=121 I. C. 833 = 31 M. L. J. 324=53 Mad.203

(2) [1904] 28 Bom. 533=6 Bom. L. R. 379.

of such interference abound in the reports. If it is the case that the grounds for action, as stated in the order, are either unfounded in fact or insufficient in law, or if it is shown that the order against the public as framed violates the conditions laid down by S. 144, it is the duty of this Court to interfere.

To take the second point first: the order consists of two parts, one addressed to five individuals, the other to the public generally. So far as it is addressed to the public generally, it is clearly a violation of the express terms of S. 144 (3), which states that an order under this section may be addressed to the public generally when frequenting or visiting a particular place. No order can be passed against the public without that limitation as to place, namely that it must be one, whether publicly or privately owned, which at the time, when the prohibition operates, the public frequent or visit. They may have a right to frequent the place as in highways and places of public resort or they may be allowed or invited to visit it as at a public meeting held in private premises. But the place must be one which is open to the public as such. And this involves that the public cannot be prohibited from putting up flags in private houses, first because those who put up the flags are owners or occupants of such houses, and second because the public as such neither frequent nor visit private houses. It is a misuse of language to call house-owners who use their houses members of the public for the purpose of this section, and I have not been shown any instance of such a use of the section. The learned Advocate-General attempted to argue that an order to the public may be valid without the limitation above mentioned. I consider that the words of the statute are clearly against this contention. The only authority to which he referred was a decision, *Abdul Gafur* v. *Emperor* (3), which is not only no authority in this Court, but did not really decide the point as contended. I must hold that the order, so far as it is directed to the public, was misconceived and must be set aside.

So far as the order is directed to the petitioner himself, the objection of substance is that on the materials before the Magistrate there was no evidence of urgent or indeed any apprehension of danger of breach of the peace or disturbance of the public tranquillity to justify the order. I have referred to the circumstances that judging from the order of events, the application for the order appears to have been prompted by the fact that, owing to the petitioner's refusal to remove his flag, even those who had been induced to remove it on 13th reinstated the flags on 14th June and the authorities had no power to enforce their wish to see the flags removed. But the ground stated to the Magistrate, and stated by him in the order, was that hoisting of flags gave room to rowdies and men of bad character to think that they may safely molest the buildings carrying them under a wrong belief that no notice would be taken by those responsible for law and order. A great deal of argument was devoted on the petitioner's side to the proposition that if there were really such a situation at Rajahmundry it was the duty of the police and the magistracy to protect the law-abiding persons who had flags and to restrain the rowdies, and not as the Magistrate has done to restrain law-abiding persons and give encouragement to rowdies and men of bad character. On the other side it was argued by the learned Advocate-General that under this section it was quite legal to restrain legal acts in the interests of public safety and therefore that, if the authorities had not enough resources to restrain the rowdies and men of bad character, it was proper to prohibit the provocative flags. I do not think it profitable to enter into the abstract discussion to what extent and in what circumstances perfectly legal and innocent acts may have to be restrained in the interests of the public safety. For I have come to the definite conclusion that there is nothing in the evidence to support the allegation of a threatened attack on flag-bearing buildings by rowdies and men of bad character.

I have examined the evidence with care. If there were any such apprehension as alleged it is strange that no officer of the police who knew of it cared to go into the witness box. The petitioner P. W. 1 stated that the flag had been in his house from 1921 and that rowdies and bad characters had never done any mischief.

(3) [1915] 18 O. C. 70=16 Cr. L. J. 190=27 I. C. 670.

He spoke to the demand of the police in the morning of the 14th that the flag should be removed and his refusal and to its subsequent removal after the order was passed. P. W. 2 one of the persons prohibited by the order from hoisting a flag, is a doctor with European qualifications and a man who had served in the Great War as temporary Captain in the I. M. S. He swore that he never had a flag either in his house or in his dispensary and therefore of course had none to remove. P. W. 3 the brother of one of the persons, prohibited by the order says that at 6 p. m. on 13th June eight members of the Reserve Police came with lathies and bamboo sticks to their house where there was a flag for five or six months and threatened him and climbed to the flag and broke it and removed it and that no one else had molested them for having the flag. P. W's. 4 to 9 give similar evidence about the removal of the flag from their houses by the police on 13th June and about there having been never any molestations from rowdies or bad characters on account of the flags. P. W. 10 is a stamp vendor who speaks to having received lathi blows when standing on a pial during the flag removing operations by the police on 13th June and to his being under treatment for his injuries. The evidence on the side of the counter-petitioner is of three witnesses. C. P. W. 1 gives rather confused evidence about what happened before and after the order under S. 144. From his evidence it is clear that he heard the proclamation of this order on 14th June by beat of tom-tom. But he says that after it no one removed the flags though in another place he said that in the evening after the tom-tom he did not see any flags. About the theory of molestation by rowdies and men of bad character, his attempt was to show that these were hungry coolies who were incensed at the frequent hartals with closing of shops whenever any congressman was arrested and who therefore might attack the buildings with flags which they would connect with the hartals. But the evidence of this and the other two witnesses for the counter-petitioner broke down hopelessly on this point. Although in one place he said he heard coolies and others say that shops are always closed on account of these flags and that they would remove them if the police did not remove them, he admitted he did not know anyone who said so or even know their caste. Evidence of this character is worthless in view of the admitted fact that there is no evidence whatever of any looting of shops in Rajahmundry, owing to hartals or flags. C. P. W. 2, a Mahomedan shopkeeper says that he had been seeing the flags ever since April and the only connexion he can suggest between them and attacks by rowdies is that some Madiga shoemakers who work in front of his shop said that if the shops are closed on account of the advent of Swaraj they would loot the shops for which the witness reprimanded them. The witness swore that he is not aware of any looting on account of the hoisting of the flag. He was unable to name any of the Madigas who are supposed to have spoken as above. They were among the sightseers in the street. C. P. W. 3 was an Honorary Magistrate and is a respectable witness. His evidence affords probably the best proof in the case as to the real reason why the flag was sought to be removed by the authorities and the clearest refutation of the theory of looting by rowdies and bad characters now described as hungry coolies. Not only does he not say anything about any apprehension by anybody that the flags were liable to attack by bad characters or hungry coolies, but he describes the meaning of the flag in vivid terms when he says that the hoisting of the flag is itself revolution. That is an intelligible attitude. But it is not the case on which the order was passed and which had to be met. The learned Advocate-General did not, as well he could not, on the present state of the record support the order on the ground that the flag is a revolutionary emblem. It is sufficient to say that the evidence of this witness taken as a whole shows that the apprehension of danger stated in the order of the Magistrate did not in fact exist.

The evidence before the Magistrate did not show the existence of any urgency of apprehended danger and therefore the order against the petitioner was unauthorized.

In the result, the order of the Magistrate of 14th June is set aside so far as it is directed against the petitioner and the public generally. As the Magistrate's order will normally expire on the 14th instant this order cannot in any case

have any adverse effect on the peace of Rajahmundry.

P.R.S./K.N. *Order accordingly.*

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PANDALAI, J.

(*K. Syed*) *Muhammad Levvai*—Complainant—Petitioner.

Criminal Revn. Case No. 193 of 1930, (Criminal Revn. Petn. No. 181 of 1930), Decided on 5th March 1930.

(a) Criminal P. C. (1898), S. 198—Complaint by hereditary priest of portion of Muslim community against persons for having undergone or participated in marriage void according to Mahomedan law and for depriving him of his fees by celebrating marriage in another village—Complainant is not person aggrieved—Penal Code, S. 496.

Where a complaint under Ss. 493—496 is filed by a hereditary Katheef Levvai, (priest) for a particular portion of Muslim community against certain persons for having undergone or participated in a marriage, which according to the Mahomedan law of the community is void and also for depriving him of his fees by reason of having the marriage celebrated in another village, the complainant is not a "person aggrieved" within the meaning of S. 198. The loss of fee is too insufficient and too remote.

[P 248 C 1, 2]

(b) Penal Code (1860), S. 114—S. 114 is evidentiary and not punitive—It establishes irrebuttable presumption that presence plus prior abetment amounts to participation—Complaint is therefore necessary even where person is charged under Ss. 496 and 114, I. P. C.—Criminal P. C., S. 198.

Section 114 is evidentiary and not punitive because it establishes a presumption which is irrebuttable that actual presence plus prior abetment can mean nothing else but participation. Where therefore certain persons are charged for an offence under S. 496, I. P. C. and others for abetment of the same under S. 114, a complaint under S. 198, Criminal P. C. against the latter is as much necessary as against the former.

[P 248 C 2]

(c) Penal Code (1860), S. 496—Marriage between Mahomedans within prohibited degrees — Marriage being civil contract in Mahomedan law, offence under S. 496 is not constituted (*obiter*) — Mahomedan law, Marriage.

(*Obiter*)—Where a Mahomedan priest files a complaint under S. 496 against certain persons for having effected a marriage within prohibited degrees and getting the marriage celebrated in another village, thus depriving him of his fees, the parties being Mahomedans, among whom marriage is a civil contract, an offence under S. 496 is not constituted. [P 248 C 2]

K. Bhashyam Ayyangar—for Petitioner.

Order.—This is a petition to revise the order of the learned Sessions Judge of Ramnad refusing to interfere with an order of discharge under S. 203, Criminal P. C., passed by the Sub-divisional Magistrate of Ramnad. The complainant styles himself as the hereditary Katheef Levvai for the Ramnad big Mahalla Muslim Jamath and of the Sankarankottai Muslims. He preferred a complaint against five persons. Accused 1 was the bridegroom at a marriage. Accused 2 was the bride. Accused 3 was the father of the bride. Accused 4 is described as a teacher in Thinaikulam village, where the marriage took place, and accused 5 is the elder brother of the bridegroom. The charge in substance was that on 8th December 1929 accused 4, teacher, being only a layman, purporting to act as the Levvai, celebrated in Thinaikulam mosque a marriage between accused 1 and 2; that accused 1, bridegroom, being the grand-uncle in the maternal line of the bride, marriage between them is prohibited according to Mahomedan law and therefore void, and that an entry of the marriage was made by accused 4 in the Marriage Register of Thinaikulam mosque without the knowledge and consent of the Levvai of that mosque. On these facts the complainant charged accused 1 and 2 under 496, I. P. C., accused 3 and 5 with the same offence by reason of abetment and presence under S. 114, and accused 4 under S. 197 with making a false certificate. The Sub-divisional Magistrate took the sworn deposition of the complainant in which he said that the bride belonged to Sankarankottai, that he was filing the complaint because it was his duty as Levvai to prevent such a marriage among Mahomedans in his spiritual jurisdiction, and that he had also been deprived of his fees by the marriage being celebrated in another village. He admitted that there was no law by which a girl should not be married in another village, but it was not the custom to do so. The Sub-divisional Magistrate held that the complainant was the Levvai of Sankarankottai, that he was not related either to accused 1 or 2, who are said to have undergone the marriage ceremony at Thinaikulam; that he was therefore not a person aggrieved within the meaning of S. 198, Criminal P. C. and that the complainant, simply because he was a priest who might have earned some fees if the marriage had taken place in his jurisdiction, could not be considered to have sufficient interest to make him an

aggrieved person. He thereupon dismissed the complaint under S. 496, but issued process against accused 4 alone for the alleged offence under S. 197, I. P. C. The case being now pending under S. 197, I. P. C., I do not wish to to say anything about that matter except to remark that the question whether there is in the case any certificate which could by law be received in evidence of the fact certified, would require consideration. Coming to the present point, the learned Sessions Judge upheld the view of the Subdivisional Magistrate that the complainant had no grievance to support a complaint or, in other words, that he was not a person aggrieved within the meaning of S. 198, Criminal P. C. Mr. Bhashyam Ayyangar, on behalf of the petitioner, has drawn my attention to the decision in *Daem Sardar* v. *Batu Dhali* (1), and to the one in *Chhotalal* v. *Nathabai* (2). In the first case a young lady, whose husband was a lunatic and who was living with her father-in-law, was defamed. It was held that, in those circumstances, the father-in-law was a person aggrieved so as to enable him to file a complaint of defamation. In the second case the husband of a lady who was defamed was held a person aggrieved. Futher than that Mr. Bhashyam Iyengar has not been able to take me. He urges that in the words of the section, "some person aggrieved," his client might be included. I cannot agree. Assuming that the complainant was the priest of either of the parties, which itself is not a matter now for decision, his interest in the marriages among his flock is certainly not sufficient to enable him to complain of offences under Ss. 493 to 496. S. 493 relates to the offence of sexual intercourse by a person who deceitfully induces a woman to believe that he is her husband: S. 494 is bigamy : S. 495 is bigamy of an aggravated character and S. 496 is going through the ceremony of marriage with a fraudulent intention. The interest of a Levvai, however much the spiritual interest of his community may be entrusted to him, as the complainant says, it is not in the matter of marriages among his people such as would entitle him to come forward and say that he is aggrieved. As to loss of fees, in my opinion, that is also insufficient and too remote to make him aggrieved ; and in this case the complainant could not have lost any fees as ex hypothesi the marriage was void and he himself had refused to perform it. On that point I consider that the Courts below were correct.

But Mr. Bhashyam Ayyangar has another point, namely that, although a complaint by an aggrieved person may be necessary under S. 198, Criminal P. C., for the principal offence under S. 496, I. P. C., yet no such complaint is needed as against those whom he has charged with abetment. I cannot agree with this. In this particular case the charge is that accused 3 and 5 abetted and were present, thereby bringing themselves under S. 114, I. P. C., being deemed to have committed such act or offence. This section has been explained by the Privy Council as being evidentiary and not punitive because it establishes a presumption, which is irrebuttable that actual presence plus prior abetment can mean nothing else but participation. This was what accused 3 and 5 were charged with in the complaint. They were not charged with abetment alone. In this view it was as much necessary for a complaint to be made as against accused 3 and 5 under S. 198 as against accused 1 and 2.

There is one matter which, though not referred to by the lower Courts, I think I must refer to. On the facts it seems to have been assumed that the complaint discloses an offence under S. 496. All that was alleged was that the complainant objected to the marriage on account of its being within prohibited degrees, and that the parties still persisting in their desire to be united in marriage had gone away from Sankarankottai, the bride's village, where the complainant is the Levvai, to Thinaikulam, where the bridegroom's brother was resident and there got themselves married with the assistance of accused 4. Assuming all that to be true, at present I fail to see how the parties being Mahomedans, among whom marriage is a purely civil contract, an offence under S. 496 is constituted. But it is unnecessary to go further into that matter. The petition must be dismissed.

P.R.S./R.M. *Petition dismissed.*

(1) [1906] 3 C. L. J. 38=3 Cr. L. J. 187.
(2) [1901] 25 Bom. 151=2 Bom. L. R. 665 (F.B.)

A. I. R. 1931 Madras 249

RAMESAM AND CORNISH, JJ.

Elumalai Naicker and *another (minors)* —Plaintiffs —Appellants.

v.

Kuppammal and *others*—Defendants—Respondents.

Original Side Appeal No. 53 of 1928, Decided on 8th November 1929, against judgment and decree of Venkatasubba Rao, J., D/- 1st November 1927.

Civil P. C. (5 of 1908), O. 33, R. 11—Court can order next friend to pay court-fee in pauper suits in place of minor—Civil P. C. O. 32, R. 14.

Rule 11, O. 33, should be read with S. 35 which gives a very wide discretion to the Court to make any order relating to costs. Court has jurisdiction to direct the next friend or guardian to pay the costs of the proceeding in the place of a minor. Although court-fee is paid to Government as revenue and not as costs yet the plaintiff who pays it incurs it as costs of the suit. *A.I.R.* 1929 *Mad.* 782, *Foll.*; *A.I.R.* 1929 *All.* 18 and 23 *Mad.* 73, *Ref.* [P 250 C 2, P 251 C 1]

V. V. Devanathan—for Appellants.

V. S. Govindachariar and *V. Krishnamachariar*—for Respondents.

Judgment.—This appeal arises out of a suit for partition of the estate of one Munuswami Naicker. The facts out of which this suit arises may be shortly stated. One Veerasami Naicker, a resident of Teynampet, was the common ancestor of the parties. He was carrying on business of supplying milk to European houses and he died about 1867 or 1868. He left four sons namely Deva Naicker, Govinda Naicker, Logappa Naicker and Narayanaswami Naicker. The milk business was carried on for some time and then Deva Naicker took to abkari or toddy business. He seems to have prospered in this business. He died in 1893 leaving two sons, Munisami Naicker and Parthasarathy Naicker. The former died on 16th February 1924, possessed of properties worth nearly 3 lakhs. His widow is defendant 1, the daughter defendant 2, and the son-in-law defendant 3. He left a will and the defendants have taken out probate. Narayanasami Naicker's son is Kuppuswami Naicker, defendant 4. His son Elumalai is plaintiff 1. Logappa Naicker left no issue but left only his widow Kanniammal, who is P.W. 4. Govinda Naicker left a son Munusami Naicker, who is P.W. 5. The plaintiffs' case is that Deva Naicker and his three brothers were all members of a joint family for some time and that Govinda Naicker and Logappa Naicker gave up their shares in the family, but Deva Naicker and Narayanasami Naicker continued to be members of a joint family. Some time in 1904 Narayanasami Naicker left Teynampet on account of some misunderstandings for Royapuram but Kuppusami defendant 4 continued to be joint with Munusami. The plaintiff brings the suit for a partition and division of property and recovery of his half share: the other half share belonging to his father defendant 4. Obviously defendant 4 supports the plaintiff and has probably instigated the suit. The other members of the family, P.W's. 4 and 5 also support the plaintiff. It is clear that they have all got the feeling that the property of Munusami Naicker has gone out to strangers without benefiting themselves. The learned trial Judge dismissed the suit and the plaintiff appeals.

When Deva Naicker changed the business from milk to toddy and abkari, the other members were following their own professions; Govinda Naicker was a jutka driver under P.W. 2, Logappa Naicker was a gardener in the house of an European Judge and Narayanasami Naicker was keeping a petty shop selling snuff, coffee seeds, jaggery, etc., and after leaving Teynampet for Royapuram, he was for some time selling drugs. Finally, he became a broker in straw carts. It is unlikely that all the four brothers could have been members of a joint family, Deva Naicker being very prosperous in his business while the other three brothers were following such low professions as those just now described. However, it is conceded that Govinda Naicker became separate being content with a few cows and buffaloes. This concession shows that at the time when Govinda Naicker separated from the family, the property of the family consisted of a few cows and the toddy business had not yet begun: see also P.W. 4. As to Logappa Naicker, it was said that he did not care to claim a share in the family property because he had no issue. Their mother was living by selling cakes in the street. These concessions had to be made because

the plaintiff had to explain in Ex. D, a partition-deed dated 8th December 1897, between Munusami Naicker and his brother Parthasarathi Naicker. This partition deed proceeded on the footing that these two brothers were the only members of the joint family. It is conceded that Munusami Naicker is younger than his three uncles. This shows that the uncles could not have been members of the joint family at that time. The suggestion that the share allotted to Munusami Naicker represented his and his uncle's is falsified by the document and there is nothing to show that Munusami Naicker and Parthasarathi Naicker did not get equal shares. A partition of that kind between brothers is practically indicative of an adverse right to all the other branches. At the end of 12 years after such a deed the other members' right would be barred by limitation. It is, however, contended that Kuppusami Naicker defendant 4, remained with Munusami Naicker and was participating in the enjoyment of the family properties. The suit was filed by the plaintiff as a minor with his maternal grandfather as his next friend. There is afterwards a change in the next friend, the original next friend dropping out of the suit and his brother Raju Naicker continuing it. Raju Naicker and his brothers are persons occupying wealthy positions, they being labour suppliers to the Madras Port Trust and to a number of European mercantile firms and it is said that at the time of the negotiations for the marriage of Kuppusami Naicker, Munusami Naicker said that Kuppusami Naicker had equal shares with Munusami Naicker. This evidence was discredited by the learned trial Judge. We entirely agree with him. Some time in 1915 or 1916 Munusami Naicker had a bakery business and in this business, he seems to have taken Kuppusami Naicker as a partner. In connexion with that business they were having dealings in flour with one Narayanasami Naicker, whose gumastah is examined as P.W. 3. He says that Munusami Naicker and Kuppusami Naicker were partners. The account books stand in the name of both. But towards the end Munusami wanted to close the business because it was a losing concern. Finally, it was handed over first to Kuppusami Naicker. He leased it to one Madurai Pillai and finally it was sold for a small sum of Rs. 250. A part of this sum went towards the payment of a promissory note executed by both of them. Though some of these transactions appear in the names of both, they are explained by the fact that they were partners and are not inconsistent with there being no joint family. Again in 1922 there are a number of documents executed by Munusami. One is a gift deed of a house to Kuppusami Naicker. This recites the partition deed of 1897 and Kuppusami Naicker had to deny the knowledge of this gift deed to avoid the inference that has necessarily to be drawn against him. But it is conclusively shown that he knew the gift deed and that he offered the deed as security to the Collector of Madras for the abkari business which he continued. Another document is the will of Munusami attested by defendant 4 and Parthasarathi. We entirely agree with the conclusion drawn by the trial Judge. We also agree with the trial Judge in the estimate of the oral evidence in the case. We think that there was no joint family from the time when Deva Naicker started the toddy business and that there was scarcely any nucleus for the acquisition of joint family property and the subject-matter of the suit was the self-acquisition of Munusami Naicker. The appeal fails and is dismissed with costs of respondents 1 to 3.

The learned advocate for the appellant raised a question as to the propriety of the order made by the trial Judge relating to payment of court-fees by the next friend of the plaintiff, the suit being filed in forma pauperis in the lower Court. He contended that under O. 33, R. 11, Sch. 1, Civil P. C., it is only the plaintiff that is liable for the court-fee and no order can be made against the next friend. But we think that O. 33, R. 11 should be read along with S. 35 of the Code. S. 35 gives a very wide discretion to the Court to make any order relating to costs. In a recent decision of myself and my brother Jackson, J., we held that the Court had jurisdiction to direct the next friend or guardian to pay the costs of the proceeding in the place of a minor. In that decision we referred to other decisions of this Court and also to an English decision. It is true that the Allahabad High Court has taken a different view in *Sibt Ahmad* v. *Amina Khatoon* (1). But we adhere to

(1) A. I. R. 1929 All. 18=113 I. C. 434=50 All. 733.

the decision in *Yellamma* v. *Suryanarayanamurthy* (2). But it is contended by the learned advocate for the appellant that even if S. 35 applies, it cannot help the present case as the order relates to court-fee and not to costs. He relies on the observations in *Collector of Trichinopoly* v. *Sivaramakrishna Sastrigal* (3), where it was said that court-fee when paid to Government is revenue and not costs. It is true that when court-fee is paid to Government, it is paid to Government as revenue and not as costs. But this consideration is not enough to dispose of the matter. The plaintiff who pays court-fees, incurs them as expenses or costs of the suit. In ordinary cases the plaintiff incurs these costs in the beginning while in pauper suits these costs are incurred at the end of the suit. If the plaintiff fails, he bears his own costs, that is, he is to pay court-fees to Government. But if he succeeds, the defendant should pay the court-fees to Government. This is merely another way of saying that the plaintiff pays the court-fees in the first instance but recovers them from the defendant. This can be only on the footing that court-fees are included in the costs payable by the defendant. Again, after a pauper plaintiff loses the suit and has paid court-fees to Government under O. 33, R. 11, Sch. 1 Civil P. C., suppose he files an appeal and succeeds in it. He will then recover the amount of court-fees from the defendant. This can be so only on the footing that it is part of his costs. It is therefore clear that though when the Government takes the amount, it takes it as revenue so far as the person who pays the amount is concerned, he incurs it as costs of the suit and S. 35, Civil P. C., which refers to the costs of and incident to all suits is wide enough to cover even court-fees.

We may also refer to R. 14, O. 33, Cl. (2), Sch. 1, Civil P. C., which provides that when a minor on attaining majority wishes that a suit instituted in his name by his next friend should not continue, the Court may order the next friend to pay costs of all the parties in respect of the application. This we take it to mean that the Court may order the next friend to pay costs of the minor including the court-fees, seeing that between the next friend and the minor the court-fee is regarded as the costs of the suit. As to the argument based on the literal wording of O. 33, R. 11, Sch. 1, Civil P. C., the reply is that the rule was intended to lay down that the defendant is not liable but the plaintiff's next friend is liable. Which person is liable whether the minor or the next friend is a matter governed by the general discretion given to the Court under S. 35, Civil P. C. We, therefore disallow the argument of the learned advocate and confirm the order of the learned trial Judge. The appellant will pay the costs of the Government which is fixed at Rs. 175. The respondents will be at liberty to recover the costs from the next friend or from the minor appellant as they choose.

There is one other matter to be dealt with. Defendant 5 is a mortgagee of Munusami Naicker. He was impleaded on certain allegations which are found in para 3 of the plaint. The validity of the mortgage was not questioned. In the schedule to the plaint the value is given as Rs. 19,000. In the written statement defendant 5 said that Rs. 30,000. was due on the mortgage. The plaintiff made the statement in para 3 probably as a conjecture and not with a view to question the validity of the mortgage. After issue 10 was framed, it does not appear that the plaintiff at any time raised any contention regarding either the validity of the mortgage or the amount due on it. But he has chosen to implead defendant 5 in the Court below as in an undefended suit. To this extent we modify the decree regarding costs of defendant 5 in the Court below. In appeal there is really no ground raised against him except as to costs. It is unnecessary for him to appear so far as the merits of the appeal are concerned. We direct him to bear his own costs.

K.N./R.K. *Order accordingly.*

(2) A. I. R. 1929 Mad. 782=123 I.C. 805.
(3) [1900] 23 Mad. 73=9 M.L.J. 265.

A. I. R. 1931 Madras 251

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

(*P. L. N. K. M.*) *Nagappa Chettiar*—Appellant.

v.

Official Assignee of Madras—Respondent.

Original Second Appeal No. 104 of 1929, Decided on 21st August 1930, against judgment and order of Waller, J. D/- 15th October 1929.

(a) Provincial Insolvency Act (1920) S. 61, —Trust money handed over to trustee or another person to use in his business, subject to payment of interest—Relationship of debtor and creditor is set up—Promise to pay an equal sum takes place of the money—Trustee being adjudicated insolvent trust has no charge or preferential right on the general assets and ranks with ordinary creditors.

When a trust money is handed over to any person, whether he be trustee or not, to use in his business subject to the payment of interest, a relationship of creditor and debtor is set up. The circumstance that he can use the money as his own and that he has to pay interest has the effect of engrafting a contract upon the trust whereby title to the money is transferred and the trust can no longer look to that sum of money as its res or subject matter but to a premise to pay an equal sum. [P 254 C 1, 2]

Where therefore a certain trust has been constituted on the footing that its funds could be invested and used by the insolvent trustee in his own name in consideration of his paying nadappu interest he becomes when he invests the amount in his business only a debtor to the trust and the trust can have no charge on or preferential right in his general assets in insolvency but must only rank with ordinary creditors. [P 258 C 1]

(b) Trusts Act (1882), S. 83—Trustee adjudicated insolvent—Trust money can be recovered from assets with Official Assignee only by doctrine of "tracing".

Per *Curgenven, J.*—Where a trustee becomes an insolvent and the trust money has to be recovered in full from the assets in the Official Assignee's hands it must be by the application of the doctrine of tracing or following. [P 254 C 2]

(c) Trusts Act (1882) S. 83—Doctrine of tracing—*Quære.*

Quære.—Whether the doctrine of "tracing" applies to authorized conversion. [P 254 C 2]

(d) Trusts Act (1882), S. 83—Original subject matter of trust may be traced in another form—Right only ceases when means of ascertainment fail — When money is shown to be other than trust money claim fails.

The original subject matter of the trust money may be traced into what other form different from the original it may have passed. The right only ceases when the means of ascertainment fail. If it is money and has been mixed with other money, equity will follow it and create a charge upon the whole for the satisfaction of the claim. But once the competing claimants can show that the money wholly or in part is other than the trust money, the claim fails.

[P 255 C 1, 2]

(e) Trusts Act (1882), S. 83—Following trust property — To follow trust property there must be continuing identity and traceable continuity.

If the trust property is to be followed within the meaning of S. 83, Trusts Act, it must be shown that there is a continuing identity from one transformation to another, there must be a traceable continuity; it must be shown with reasonable certainty that the trust property has been transformed by successive transactions into the substitute which the beneficiary claims or into something embracing it on which he is entitled to a charge. [P 256 C 2]

(f) Trusts Act (1882), S. 83—Trust money put into business is traceable to eventual assets—But it can be shown that the money could not form part of them.

Trust money, if put into business, is traceable to eventual assets. But it is open to the persons interested in the distribution of the assets that the money could not possibly form part of them. [P 256 C 2]

(g) Trust—Right to follow trust money is a right in rem.

The right to follow the trust money is strictly a right in rem, i.e., to the thing itself. [P 259 C 1]

(h) Trusts Act (1882), S. 83—Right to follow trust money arises only on breach of trust by trustee.

Per *Bhashyam Iyengar, J.*—The right to follow the trust property arises only where the trustee deals with it inconsistently with the trust, i.e. when he commits a breach of trust. So long as the trustee keeps the trust property apart or disposes of it by sale or otherwise as directed or authorized by the terms of the trust there can be no question of following the trust property, whatever the trustee obtains in lieu of the trust property. [P 258 C 1]

(i) Accounts—Adjustment—Adjustment is only payment and repayment without formality of passing cash.

Adjustment is truly and strictly only a payment and a repayment without the formality, unnecessary in such a case of passing cash from either transaction. It will have the same effect on the cash balance of either party as if cash had passed for each entry. There is the same legal consequence or right with reference to each item of the adjustment as in the case of actual payment. [P 259 C 2]

(j) Trusts Act (1882), S. 83 — Following trust money into another fund—It must be shown that former came into latter.

For following trust money into another fund it is absolutely necessary to make out that the former came into the latter or into something of which the latter can be said to be a substitution, immediate or mediate: (*English cases referred*). [P 260 C 1]

V. V. Srinivasa Iyengar instructed by *V. Varadaraja Mudaliar*—for Appellant.

K. V. Krishnaswami Iyer and *C. A. Seshagiri Sastri*—for Respondent.

Curgenven, J.—This is an appeal from an order of Waller, J. passed in the insolvency of P. L. N. K. Subramaniam Chetty. The applicant, now appellant was one P. L. N. K. M. Nagappa Chetty, son of a brother of the insolvent, and he claimed a preferential right to certain trust moneys said to be included in the funds in the Official Assignee's hands. At a partition in 1916 between the insolvent on the one hand, and the appellant and his brother Lakshmanan Chetty on the other, two sums each of Rs. 10,000 subscribed to as to 3/8ths by the insolvent and as to 5/8ths by the brothers, were set apart for two charities, with the parties

to the partition as co-trustees. In respect of his own and his brothers' share in these trust funds the appellant, on 1st December 1916, drew two hundies in favour of the insolvent on a firm at Madras known as the O. R. M. O. M. S. P. firm (I will refer to it for short as the O. R. M. firm). The insolvent kept the amounts of hundis in deposit with this firm until 1920. It is common ground that he was at liberty to use the money in his business, undertaking to credit the trusts with interest at the nadappu rates; acting under this authorization, he then carried out an adjustment with the O. R. M. firm whereby the sums representing the appellant's contributions amounting with interest to Rs. 15,732-15-9, were appropriated to discharge the outstanding liability of his own firm, which stood at the approximately equal figure of Rs. 15,700. His insolvency ensued in 1925 and it is in respect of two sums, one of Rs. 5,000 and the other of about Rs. 40,000 the sources of which I will mention later, and which form the only assets available, that the claim is made. It is to be noted that arguments have proceeded on the assumption that there was a perfected trust, no challenge to that position having been raised before by the respondent's learned advocate.

Upon these facts the learned Judge has decided against the Official Assignee in regard to the contention that, as soon as the insolvent used the money in his business, a relationship of creditor and debtor was created between the trustees and himself in respect of it; and in favour of the Official Assignee that the money although remaining trust money, cannot be traced. His conclusions upon this latter point are (a) that utilization of the trust money to pay his own debt to the bankers was merely a book adjustment, which put an end to the process of "following", (b) that, assuming that the process could be carried over that adjustment, the money in the Official Assignee's hands was demonstrably not part of the trust funds. The respondent endeavours to show that all these questions should be answered in his favour.

His contention on the first point, which as I have said, has been decided against him, is that, so soon as the money was authorizedly invested in the business, it ceased to be subject to the trust, which became impressed upon a corresponding debt due from the insolvent to the trustees. We have to look very carefully at the subject matter of the trust, and consider whether, as soon as the insolvent permissively obtained control of it for his own purposes, it did not undergo a transformation in character. As an illustration of such a transformation may be given the case where a trustee is authorized to invest trust money in ordinary joint stock securities. Clearly the trust passes away from the money and attaches itself to the scrip representing a right to dividends or interest; and the trustee is no longer responsible for anything more than the value of the securities, whether when the time comes to realize, it be greater or less than the original sum. Similarly, if in the present case the money had been invested not in the insolvent's firm but in a third party firm, it is conceded that, as between the trustees and that firm, the relationship would be merely one of debtor and creditor; in other words, the trust would be impressed not upon the money but upon the debt.

It has been urged that the present is really a case of that description, because there are two trustees and the money was only invested with one of them; and it cannot therefore be said that the two parties to the transaction are indistinguishably one and the same. Apart from this point Mr. V. V. Srinivasa Iyengar's argument for the appellant is that where a trustee is permitted to make use of the trust funds, his obligation as trustee so far overrides the mere liability as debtor which he would otherwise be under that he must account for the money, as trust money, just as much as if the user had never been in contemplation and, in fact, was in breach of the trust. No English case has been cited in support of this proposition, but one or two cases of this Court have had to consider it. The earliest of these cases arose out of the Arbuthnot insolvency: *Official Assignee of Madras* v. *Krishnaswami Naidu* (1). The trust deed which there came under consideration appointed the then members of the firm as trustees, and directed that the trust moneys should be placed in deposit, bearing 5 per cent interest, with Arbuthnot & Co. Munro, J., came to the conclusion that the trustees and the banking firm

(1) [1910] 33 Mad. 154=5 I.C. 331.

could be regarded as two distinct and separate entities, when, of course, the liability of the bank would be only that of a debtor. But he held further that, even regarding them as identical, there could be no difference in principle:

"When, as trustees under the deed, they, as directed, invested the money in their own firm, their liability in their capacity as trustees appointed by the deed was reduced in the same manner as if they had not been members of the firm. When the money was invested with them as bankers, the same result must, there being no reason to the contrary, have followed as would have followed, had the money been invested with another bank with which they had no connexion."

Abdur Rahim, J., took the same view, observing that the effect of the directions to invest the money was that Arbuthnot & Co., were authorized to use the money as their own and to that extent they became debtors to the beneficiaries. The position of course would have been totally different if the investment had been in breach of the terms of the trust. This decision was dissented from by Kumaraswami Sastri, J., in *Krishnaji Bhat* v. *Sadasiva Tawker* (2), where a father had left Rs. 10,000 with Messrs. Tawker and Sons to be invested in the business, as trust money for the benefit of his minor son. He held that the firm of Tawker and Sons were trustees in respect of that sum of money, not debtors, so that upon their insolvency the Official Assignee had to give priority to that claim over the claims of creditors.

But the argument for which the *Arbuthnot* case was cited as authority was that since Tawker & Sons were allowed to use the money there was no trust, that the trust was ipso facto destroyed. That I agree is an untenable position, and with all respect, I think that the reasoning which I have abstracted from the case shows that that was not the view of the learned Judges who decided it. It may be that the practical result is the same, but that is due, not to the destruction of the trust, but to the decision of the trustees to expose the trust funds to ordinary trading risks. I find it very hard to see how when trust money is handed over to any person, he be or he be not a trustee, to to use in his business, and subject to the payment of interest, no relationship of creditor or debtor is set up. The circumstances that he may use the money as his own, and that he has to pay interest, seem to me to point clearly to the engrafting of a contract upon the trust, whereby title to the money is transferred, and the trust no longer can look to that particular sum of money, as its res or subject-matter, but to a promise to pay an equal sum.

If he holds it purely as trust money he is debarred by S. 51, Trusts Act 2 of 1882, from dealing with it for his own profit, and the veto so imposed seems to be absolute, and not subject to modification by the terms of the trust. It will be seen that, whereas Ss. 46 to 48 and 50 of the Act all contain some such phrase as "except where the instrument of trust otherwise provides," there is no qualification of this kind to S. 51. The true principle seems to be that the terms of the trust permit the conversion of the money into something other than money, —here the obligation to repay the debt incurred—so that when the money comes to be used, it ceases to be trust money. The same case of Tawker & Sons came on appeal before Reilly and Cornish, JJ., in *Official Assignee of Madras* v. *Krishnaji* (3) and Reilly, J., disposed of this argument in the same manner, holding, no doubt quite rightly, that a relationship of debtor and creditor had not superseded, overwhelmed and obliterated "Tawker & Sons" trusteeship. Both the trusteeship and the relationship of debtor and creditor were there, though they may have been combined in the same individuals, and we have been referred to no authority for the proposition that, when so combined the legal effect is different from what it would be when the individuals are separate.

To the best of my judgment therefore this contention avails to dispose of the appellant's case, but I confess that, although it persuades me, it is with some relief that I find another ground, not equally open to the charge of fine-drawn reasoning, or to the same extent the subject of differing judgments, upon which to arrive at the same conclusion. It is admitted that if the trust money is to be recovered in full from the assets in the Official Assignee's hands, it must be by application of the doctrine of "tracing" or "following." I am in some doubt whether that doctrine applies at all to cases of authorized conversion, and cer-

(2) A.I.R. 1927 Mad. 249=99 I.C. 713.

(3) A. I. R. 1930 Mad. 693=125 I. C. 533.

tainly the English cases cited deal I think exclusively with disposal by the trustee in violation of the terms of the trust. But it has not been suggested that, if it so be that you can follow money used as it was used in this case, any greater latitude of principle or of inference is permissible than if the conversion involved a breach of trust. The arguments have been largely based upon cases in which, as I have said, the conversion has been of this latter kind, and I think that the appellant's claim must stand or fall according to the legal principles to be derived from them.

The earlier English cases bear witness to the evolution of the equitable doctrine of tracing, as applied to trust funds mixed with the trustee's own funds in his private banking account. It appears that in Lord Harwicke's time, 1745 to 1755 A. D., trust money could not be followed unless it was definitely earmarked. Then in 1850 it was held, in *Pennell* v. *Deffell* (4) that trust money may be followed into a private account in which it is mixed with personal funds, though the rule in *Clayton's* case (5), that drawings must be allocated to deposits in order of time, was held to apply. There was clear observance in this case of the principle that the presence of a definite sum of trust money in the account must be ascertained before it can be claimed. In the matter of the applicability of the rule in *Clayton's* case (5) as between trust and private funds, *In re Hallett's Estate Knatchbull* v. *Hallett* (6) marks an advance, that rule being held only to apply as between competing cesti que trustent, as between trust funds and private funds, a trustee must be presumed to have drawn upon the latter until they are exhausted. In this case, Jessel, M. R., has reviewed at length the progress of the equitable theory of tracing, concluding with a statement of the law as it then stood and for all that we have been shown, now stands. The original subject matter of the trust may be traced into what other form different from the original it may have passed, the right only ceases when the means of ascertainment fail. If it is money, and has become mixed with other money, equity will follow it and create a charge upon the whole for the satisfaction of the claim. The principles of *In re Hallett's Estate* (6) as to following were applied by Lord Haldane, L. C., in circumstances of a different kind in *Sinclair* v. *Brougham* (7). Certain persons had deposited money in a Building Society not authorized to receive such deposits, so that the title remained vested in the depositors. That being so, they would not succeed unless they were able to trace their money into the hands of the Society or its agents as actually existing assets.

> "Their claim cannot be in personam and must be in rem, a claim to follow and recover property with which, in equity at all events, they had never really parted."

If this distinction between a right in personam and a right in rem is kept clearly in view, it affords, I think, index to the necessary limits of the doctrine of tracing. There is only one other English case which, I think, requires notice. It was a case of the mixing of trust funds with private funds in a private banking account, which was afterwards drawn upon by the trustee down to a certain minimum figure. Although it was subsequently replenished with private funds, Sargent, J., in *James Roscoe* [*Bothon Ltd.* v. *Winder* (8)] held that the trust could not avail itself of this circumstance, but was confined to the minimum figure as all that was left of the trust money. This case again marks the limits which have been set to the theory of tracing in England. Once the competing claimants can show that the money, wholly or in part, is other than the trust money the claim fails.

Before considering two cases, which have been decided by this Court, reference may be made to an English decision upon a special feature which is said to be present here. It has been already noted that on 10th February 1920, the insolvent adjusted virtually the whole amount of the trust funds in the hands of the O. R. M. firm against his own liability to that firm, and there can be no doubt that this was a book adjustment, no money passing. Following the deci-

(4) [1850] 43 E. R. 551.
(5) [1816] 1 Meriwale 572=15 R. R. 161.
(6) [1880] 13 Ch. D. 696=49 L. J. Ch. 415=42 L. T. 421=28 W. R. 732.
(7) [1914] A. C. 398=83 L. J. Ch. 465=111 L. T. 1=58 S. J. 302=30 T. L. R. 315.
(8) [1915] 1 Ch. 62.

sion *In re Hellett & Co ex parte Blane* (9) the learned trial Judge has held that "a settlement of account cannot be followed," so that the quest fails at this early stage and for this reason. I think that, if the facts of *Ex parte Blane* are closely considered, it will be seen that Lord Esher's dictum that "a settlement of account cannot be followed" must be read in the light of the special circumstances, and that the case is really only an exemplification of the necessity clearly stated by Lopes and Davey, L. J's., of being able to follow certain specific property. It was clear in that case that the trust money never came into the hands of the defaulters' bankers, but reached another destination by means of the settlement of account referred to.

In the present case it is, I think, quite immaterial whether we regard what happened as a mere settlement of account between the insolvent and the O. R. M. firm, or whether we take it that that firm paid Rs. 15,000 odd trust money in cash, and the insolvent thereupon paid it back in discharge of his overdraft. There is no doubt that, on either supposition, he used the money for the purposes of his firm, as he was free to do, and that it was disposed of in this particular way. The appellant contends that that is really all he need show —that it went into the assets, to give him a first claim upon any subsisting assets for the whole amount. For this purpose we must regard the trade assets, he says as a single entity, with an identity enduring throughout every phase and transformation and taking its latest form in the sums now in the Official Assignee's hands. Now an assumption of this kind is to be found in two cases of this Court *Official Assignee of Madras* v. *Minakshi Vidyasali Sangam* (10) dicided by Coutts-Trotter, C. J., and Anantakrishna Iyer, J. and the already cited case, *The Official Assignee of Madras* v. *Krishnaji Bhat* (3). I think it is clear, from the English cases cited before us and which I have made some attempt to abstract, that this would take the theory of tracing a good deal further than any actual English decision would warrant, and in fact in both instances reliance was placed, not upon an actual decision, but upon an illustration employed by Turner, L. J. in *Pennell* v. *Deffell* (4), the case of an executor of a deceased partner leaving the latter's capital with the surviving partner to trade with and the persisting identity of the partnership share through all its fluctuations. Whether or not this would afford a valid parallel to such a process of tracing as we have now to deal with is not an easy question to answer, and I do not think that I need try to answer it because it appears to me possible to accept the general proposition while attaching to it certain seemingly necessary qualifications. The general argument is most fully set out in the judgment of Reilly, J and he adopts as his premises that:

> "if you are to trace and follow trust property within the meaning of S. 83, Trusts Act, you must be sure that there is a continuing identity from one transformation to another, there must be traceable continuity—you must be able to assure yourself with reasonable certainty that the trust property has been transformed by successive transactions into the substitute which the beneficiary claims or into something embracing it on which he is entitled to a charge."

That is, if I may say so with respect, an unexceptionable statement of the law. It may, too, be not stretching it too far to adopt, as a general presumption, the position, whether you can prove it by evidence or not, that trust money put into a business is traceable to the eventual assets. This is, I think, all that these two decisions lay down. But such a presumption, if the principles of tracing are not to be given the go by altogether, must be rebuttable, and it must be open to persons interested in the distribution of the assets to show that the money could not possibly form part of them. This is recognized by Cornish, J. in *Official Assignee of Madras* v. *Krishnaji Bhat* (3) where he says that no evidence had been called to show that the stock which became vested in the Official Assignee "was in no wise or could not be the produce of the original investment of the Rs. 10,000." Now in the present case there are two sums in the Official Assignee s hands: one of Rs. 5,000 not at all derived from the business in which the trust money was invested; the other of some Rs. 40,000 being income-tax levied on 27th July 1918 while the trust money was still on deposit, and refunded after that money had been disposed of, and, in fact, after the adjudication. By

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(9) [1894] 2 Q. B. D. 237=63 L. T. Q. B. 573=9 R. 278=70 L. T. 831=1 Manson 25=42 W. R. 305.

(10) A. I. R. 1930 Mad. 24=121 I. C. 603=52 Mad. 919.

no fiction or assumption is it possible to say that any part of the trust money enters into the composition of those sums. They are shown to be wholly otherwise composed. That being so, no doctrine of tracing, no claim in rem can avail to get the trust money out of them.

In the result therefore the appeal fails and is dismissed with costs.

Bhashyam Ayyangar, J.—I agree with the judgment just pronounced by my learned brother. The facts are fully stated therein and need not be repeated. I shall only add a few words on the questions of law which were argued before us.

Three chief points were raised before the learned trial Judge. The first was that, as the charities had been constituted on the footing that their funds could be invested and used by the insolvent trustee in his own business, in consideration of his paying nadappu interest, he became, when he accordingly invested and used them in his own business, only a debtor to the trust with reference to those amounts and consequently the trust can have no charge on, or preferential right in, his general assets in insolvency, but must only rank along with the ordinary creditors. The second proceeded on the assumption that what took place between the O. R. M. and the insolvent on 8th February 1920 was a mere book adjustment and that there was no passing of money into the hands of the insolvent, and it was to the effect that, as no money actually passed, there was nothing to follow. The last point was that the two specific sums of money now in the hands of the Official Assignee have no connexion whatsoever with the trust moneys and therefore no preferential right can, in any event, be claimed with reference to them on behalf of the trust. The learned trial Judge has answered the first point against the Official Assignee, but the other two points are in his favour.

Now, taking the first point, there is direct authority on it in favour of the Official Assignee in the case of *Official Assignee of Madras* v. *Krishnaswami Naidu* (1) decided by Munro and Abdur Rahim, JJ., the facts of which are practically indistinguishable from those of the present. But the learned trial Judge has decided the point against the Official Assignee on the strength of a later and a recent judgment of Kumaraswami Sastri, J., in *Krishnaji Bhat* v. *Sadasiv Tawker* (2), which has since been confirmed on appeal by Reilly and Cornish, JJ., in *Official Assignee of Madras* v. *Krishnaji Bhat* (3). The earlier case is referred to in the judgment of Kumaraswami Sastri, J., who distinguished the judgment of Munro, J., and differed from that of Abdur Rahim, J., therein, but not in the judgment on appeal. The later case was one of private trust but, otherwise similar to the present. There the plaintiff's father had entrusted a sum of Rs. 10,000 with Messrs. Tawker & Sons for the benefit of the plaintiff and authorized them to invest the said sum for interest at 9 per cent in their own business or in any other firm as they might deem fit. The plaintiff was a minor. The document which evidenced the trust provided that the firm should pay the interest from time to time and the principal to the plaintiff on his attaining the age of 21 years. The firm invested the amount in their own business and some time later became insolvent. The question then arose whether the cesti que trust, the plaintiff, was entitled to a preferential right in the general assets of the firm to the extent of the said sum and it was decided in the affirmative in the trial Court as well as on appeal. The point was raised and considered whether the plaintiff can claim the right of tracing in the face of the authority which had been given to the trustees by the settlor to invest the money in their own business and it was answered in the affirmative.

This answer, if correct, would apply to the present case also, and the decision of the learned trial Judge on the point under consideration must be upheld. But, with the greatest respect, I have found myself unable to agree with it. Now, let us consider in what cases the right to follow trust property can arise to the cesti que trust. Here it is essential to keep in mind the true nature of the right. It is strictly a right in rem, that is to the thing itself. No doubt equity has given a somewhat wider scope to this conception when dealing with money which gets mixed up with other money, but it is quite a natural and proper extension and in no way opposed to the basic principle of the conception. Thus, if a sum of Rs. 100 belonging to a trust is mixed up by the trustee with another sum of Rs. 100

of his own, either in his cash chest or in his account, with a banker, it may no doubt be impossible to separate the identical coins which belonged to the trust, but it does not make the least difference which sum of Rs. 100 is taken back for the trust out of the mixed fund, so long as the amount is identical. This, indeed, is the principle recognized and laid down by Courts of equity in the series of cases beginning with *Pennell* v. *Deffell* (4). Now, the right to follow the trust property can obviously arise only where the trustee deals with it inconsistently with the trust; in other words, when he commits a breach of trust. So long as the trustee keeps the trust property apart or disposes of it by sale or otherwise, as directed or authorized by the terms of the trust, it is clear that there can be no question of following the trust property. When it is disposed of in pursuance of the trust, title validly passes and the cesti que trust has no further right in respect of it. Whatever the trustee obtains in lieu of the trust property in such a case belongs to the trust, and the cesti que trust, ipso facto becomes entitled to it and there is no scope at all here for any following. When a trustee wrongfully sells the trust property, the cestui que trust cannot merely disregard the sale and follow the property in the hands of the alienee (except where the alienee is a bona fide purchaser for value), but he can also "in a sense" adopt the sale and seize the proceeds, if possible, in the hands of the trustee. The rights of the cestui que trust are thus only either: (1) to follow the trust property where the trustee has dealt with it in breach of the trust; or (2) to have the proceeds brought into the trust by way of substitution, where there has been a disposition in accordance with the terms of the trust or in election by the cestui que trust to abide by the disposition. This second right is spoken of by Jessel, M. R., in *In re Hallett's Estate, Knatchbull* v. *Hallett* (6) "as a right to follow the proceeds" (see p. 709). It will avoid confusion here to confine the application of the word "follow" to trust property only.

Coming now to the present case, the trustee was, as observed already, authorised to invest the trust money in his own business in consideration of his paying nadappu interest. Therefore when he collected trust moneys from the O. R. M. firm and put them in his own business, he was acting within his rights and there was no breach of trust. The moneys having thus left the trust and rightfully gone into the trustee's own business, it is difficult to see how those moneys can be followed, that is, made the object of pursuit. Suppose a trustee lends out trust moneys to a third person in pursuance of a direction to that effect, can it be contended that the cestui que trust has a right in rem to the moneys so lent out, such as would enable him to follow them in the debtor's hands? The contractual obligation of the debtor having taken the place of the trust moneys and thus become the *res*, it is clear that the moneys which became the debtor's property could not be followed. Why then should it make a difference if the loan was to the trustee's own business instead of to a third person? When the settlor authorizes the trustee to invest the trust money in his own business, does he contemplate anything more than the liability of the trustee in his personal capacity should form the object-matter of the trust? Suppose a person had lent money to another for his business, is there anything to prevent the former from settling that debt on trust and constituting the debtor himself a trustee? In such a case, can the cestqui que trust claim a righ in rem over the money which had been lent? If not, it should, I think, follow that no such right is available even where the trustee invests the trust money in his own business for interest, under an authority provided by the settlor.

In his judgment in *Krishnaji Bhat* v. *Sadasiv Tawker* (2) Kumaraswami Sastri, J., observes:

> "If the author of the trust deed agrees that the trustee can use the money for his own benefit, there seems to be no reason for saying that the trust goes and it cannot be trust property in any sense of the term because of this authority (liberty) given to the trustee."

The contention is not that "the trust goes" in such a case, but only that when the trustee is authorized to use and accordingly uses the trust money in his own business for interest, the object-matter of the trust is no longer the money but the personal obligation of the trustee which alone fetches the interest. Subject only to this modifica-

tion, the trust will subsist and its administration will have to be carried on by the trustee according to law and the other terms of the trust. If thus the personal obligation of the trustee becomes the object-matter of the trust in cases in which he is authorized to use the trust money for his own benefit in consideration of his paying interest, there can be no difference between the claim of the trust as creditor and the claims of the other creditors over the personal assets of the trustee. The trust can have no preferential right or charge but only rank along with the other ordinary creditors.

In this connexion, reference may, I think, be usefully made to S. 52, Cl. (2) (c), Presidency Towns Insolvency Act, Act 3 of 1909. Under that clause goods "in the possesson or order of disposition of the insolvent in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof,"

are declared to be the property of the insolvent, divisible among his creditors. The case of trust money which the trustee is authorized to use for his own benefit must, it seems to me, be a fortiori so divisible.

I think for these reasons that the answer to the first point must be in favour of the Official Assignee.

As regards the second point, the learned trial Judge has held that what took place between the O. R. M. firm and the insolvent on 8th February 1920 was a mere book adjustment and there was no passing of trust money between them, and consequently there was nothing to follow. I regret I am unable to take the view that there was no passing of trust money from the O. R. M. firm to the insolvent. As the accounts stand, it does not appear possible to assert affirmatively that the entries of the payment of Rs. 8,740-8-9 of the water pandal charity and Rs. 6,992-7-0 of the'Kalaiyarkoil charity by the O. R. M. firm to the insolvent as trustee, or of the sum of Rs. 15,700 by the insolvent to the O. R. M. firm to the credit of his personal account represent transactions in which no cash passed. On the other hand, the fact that the total of the charity funds is not identical with the amount of the personal credit indicates that cash should have passed. Let us however assume that no hard cash actually passed and there was only an adjustment. But how does it matter? The adjustment is truly and strictly only a payment and a repayment, without the formality, unnecessary in such a case, of passing cash for either transaction. It will have the same effect on the cash balance of either party as if cash had passed for each entry. Therefore there should be the same legal consequence or right with reference to each item of the adjustment, as in the case of an actual payment. It cannot be, and is not, denied in this case, that, if the O. R. M. firm had paid the charity funds to the insolvent in cash, they could be followed in the hands of the latter. If so, there appears to be no reason to deny such a right merely because such payment was dispensed with in whole or in part as the insolvent was making another payment in his personal capacity to the same firm on the same day. To say that there was no passing of trust money from the O. R. M. firm to the insolvent trustee would imply that it is still with the former which is admittedly not the case.

The decision relied on by the Official Assignee in support of his contention on this point, namely *In re Hallett & Co. Ex parte Blane* (9), does not in my opinion apply to the facts of this case. I do not think it is an authority for the proposition that a book adjustment has different legal consequences from what would have followed had actual payment been made for each of the entries going to make up the adjustment. On the other hand, the decision therein seems to have proceeded on the ground that the book adjustment in that case did not make out that the trust money had passed into the fund into which it was sought to be traced. This appears from the observation of Davey, L. J., that even if Hallett & Co., the fiduciaries, had received the trust money, namely £1,600, in cash, there would have been no right to follow it as it was not lent to Cocks, Biddulph & Co., into whose possession it was sought to be traced but only applied by Hallett & Co., in paying on behalf of other customers £1,600 to Hewitt & Co., for which they got a credit from their other customers. Lord Esher, M. R,, also says the same thing in the following passage in his judgment :

"Had there been anything in existence representing that which the bankers were authorized to collect, Colonel Blane might have followed it. But he cannot show that. He can only show a transaction between Hallett & Co., and other persons."

As in the present case, the trust moneys in question cannot but be held to have passed into the hands of the insolvent trustee by what took place on 8th February 1920, there is no question of their being untraceable. The insolvent trustee having at once invested them in his own business as authorized by the terms of the trust and thereby rightfully converted them into a debt due by himself, they became free of the trust and incapable of being followed. That however is a different point and it has been dealt with already.

We are now left with the third point. It does not arise in the view which has been taken on the first point. I may however state that, even if I am wrong on that point, the contention of the Official Assignee must be upheld and the application must fail on the point under consideration as held by the learned trial Judge. Now, it cannot be doubted that, for following trust money into another fund, it is absolutely necessary to make out that the former came into the latter or into something of which the latter can be said to be a substitution, either immediate or mediate. This principle is recognized in all the cases relating to the question of following trust moneys : see *Pennell* v. *Deffell* (4), *Frith* v. *Cartland* (11), *In re Hallett's Estates, Knatchbull* v. *Hallett* (6), *Sinclair* v. *Brougham* (7), and *James Roscoe (Bolton Ltd.)* v. *Winder* (8). In the present case, out of the two sums of money in the hands of the Official Assignee, one, namely the sum of Rs. 5,000, was admittedly not derived from the business in which the trust moneys were invested; and the other, that is, the sum of Rs. 40,000, is a rebate from an amount paid for income-tax long before the trust moneys came into the hands of the insolvent trustee from the firms of O. R. M. and no attempt was made to show any manner of connexion between that sum and the trust moneys. It is therefore perfectly clear that the trust cannot claim any charge or preferential right over the specific funds in question.

On the conclusions arrived at on the first and third points the decision of the learned trial Judge must be upheld and the appeal dismissed with costs.

P.R.S./R.K. *Appeal dismissed.*

(11) 71 E. R. 525.

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* A. I. R. 1931 Madras 260

PANDALAI, J.

Yerramilli Satyanarayana Rao and *another*—Petitioners.

v.

Kandukuri Purnayya and *others*—Respondents.

Civil Revn. Petn. No. 982 of 1927, Decided on 10th November 1930, against order of Sub-Judge, Narsapur, D/- 9th November 1926.

*** Civil P. C. (5 of 1908), S. 152—Description in deed of mortgaged property through mistake wrong—Mistake passing in plaint and decree—Plaintiff can apply to have description corrected.**

The object of empowering the Court to correct decrees and orders is to correct errors, and if it may be shown that an alleged mistake falls within the class of errors dealt with by S. 152, it seems to put an unnecessary hindrance upon the power to do justice which the section, gives to say that the only mistakes of which the Court can take cognizance are those made either in the plaint or in subsequent documents in Court. [P 262 C 1]

There is nothing which limits the power of the Court under S. 152 to correcting errors, mistakes and omissions, which arise in the suit. Nothing prevents the Court from doing justice in an appropriate case where such mistakes arose by reason of copying an erroneous document into the plaint. A suit for rectification of the instrument and decree is not the only remedy; an application for review may be appropriate, but that is no obstacle under S. 152 to an application. [P 263 C 2]

Where wrong description of the mortgaged property is given through mistake or inadvertence in the mortgage deed, and it is copied in plaint and decree based on the mortgage, it is open to the plaintiff to apply under S. 152 to have the description corrected : 10 *Cal.* 538; *A. I. R.* 1926 *Mad.* 516; 12 *M. L. J.* 96, *Dist.*; 16 *Mad.* 424; 22 *I. C.* 704; 62 *I. C.* 652; *A. I. R.* 1927 *Mad.* 1144; 8 *C. W. N.* 473; 40 *Cal.* 541; 8 *N. L. R.* 13; 51 *I. C.* 35 and *A. I. R.* 1924 *Rang.* 104, *Ref.* [P 263 C 2]

P. Somasundaram—for Petitioners.

G. Lakshmanna, K. Kameswara Rao and *V. Suryanarayana*—for Respondents.

Judgment—This is a petition to revise the order of the Subordinate Judge of Narsapur dismissing an application under S. 152, Civil P. C., to amend a preliminary decree obtained by the petitioners as plaintiffs in a suit upon a mortgage executed by the ancestors of defendants 1 to 5. The only other person whom it is necessary to refer to is

defendant 7, the only contesting respondent to this petition, who was added as defendant because he had purchased some of the mortgaged properties subject to the mortgage sued upon. Defences were raised on the merits by defendants 1 to 5. Defendant 7 pleaded that the properties purchased by him should not be proceeded against until the other mortgaged properties had been sold. There was an issue arising from the plaintiffs' allegations that the survey numbers of two of the properties, items 6 and 8 in the plaint schedule, were wrongly entered in the mortgage deed. All these contentions were disposed of by the findings of the learned Judge. On the last question he found that there had been an error in the mortgage deed and he ordered that the right survey numbers should be put into the decree. The present petition arose because the petitioners discovered after the preliminary decree was passed that erroneous survey numbers had crept into the plaint schedule in respect of five other properties, namely items 2, 3, 9, 11 and 12. To take only one as an instance: for item 2 the survey number given in the mortgage deed was 187. It was so copied into the plaint and therefore it was copied into the preliminary decree. The right number it appears is 187/1. The other errors are alleged to be similar.

The plaintiffs thereupon filed a petition to correct these errors in the decree. Their ground was that the errors were due to mistake or inadvertence, that they were strangers to the village in which the properties lay and that the numbers as stated in the mortgage deed were furnished by the mortgagor and the karnam. They therefore asked that the mistake should be rectified. The only opposing party appears to have been defendant 7. His objections were: (1) that the petition was incompetent because a suit for rectification was the only remedy open to the petitioners in the circumstance; (2) that the mistake was neither due to inadvertence, nor recently discovered, as the petitioners alleged; (3) that the alleged mistakes were not mistakes at all; and (4) that his interest as bona fide purchaser would be prejudiced by the proposed corrections. The learned Judge did not go into the merits of the application. He dismissed it on the ground that it was incompetent. The present petition is concerned only with that opinion.

For the purpose of this petition it has to be assumed that the petitioners will be able to establish their allegations that the wrong survey numbers were entered because of mistake or inadvertence, that they became aware of the errors after the preliminary decree, and lastly that the errors are really errors by which is meant that there is or can be no dispute as to the identity of the properties mortgaged. It does not now arise whether in that case defendant 7's plea of bona fide purchaser will avail to defeat a mortgage subject to which he brought. The question is whether, if these facts can be established, the petitioners could have their remedy by way of amendment or were bound to resort to a suit for rectification, or, as the learned Judge puts it, to a petition for review. In coming to his conclusion the learned Judge has relied upon three cases: *Farkaruddin Mahomed Khan* v. *The Official Trustee of Bengal* (1), *Munuswami Pillai* v. *Mahdi Hussain Khan Sahib* (2), and *Pathambi* v. *Mytheen Bibi* (3). I have referred to them. They have no application to the case. The learned advocate for the respondents also does not place much reliance upon them.

In all these cases what was decided was that a decree could not be amended after satisfaction of it had been entered up and it had consequently become dead. That is not the case here. The preliminary decree in this case is not only fully in force, but the final decree has not even been passed. But the learned advocate for the respondent has urged that a petition for amendment under S. 152 is only available in cases where the mistake or error arose for the first time in the plaint or after the institution of the suit and that it is not available where the mistake originates in a document which has been copied into the plaint or at some date anterior to the plaint. S. 152 itself says nothing about the time when mistakes or errors that may be corrected under it arose.

All it says is that clerical or arithmetical mistakes in judgments, decrees

(1) [1884] 10 Cal. 538.
(2) A. I. R. 1926 Mad. 516=94 I. C. 453.
(3) [1902] 12 M. L. J. 96.

or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties. On the words of the section it is difficult to see why this limit of time as to the origin of the error should nave any significance. The words generally are "any accidental slip or omission." The practical working of the distinction urged by the respondent will be that if a vakil's clerk wrongly copies a mortgage deed into a plaint and the mistake by inadvertence goes from there up to the decree, such a mistake may be corrected. But if that clerk correctly copies the mortgage deed into the plaint and the writer of the mortgage deed had carelessly committed the error of writing a wrong survey number and that mistake is repeated in the plaint and onwards to the decree, such a mistake cannot be corrected by the Court. Why there should be such a distinction according to the sense of the thing I fail to see. The object of empowering the Court to correct decrees and orders is to correct errors, and if it may be shown that an alleged mistake falls within the class of errors dealt with by S. 152 it seems to put an unnecessary hindrance upon the power to do justice which the section gives, to say that the only mistakes of which the Court can take cognizance are those made either in the plaint or in subsequent documents in Court; but, of course, if such a distinction has been upheld by decisions which are binding on me, I am undoubtedly bound to follow them.

The learned advocates have referred to a large number of decisions on this point, but it is curious that there is none which directly decides it although there are a number of cases which have a more or less indirect bearing on it. In our own Court, in *Narayanaswami* v. *Natesa* (4) when the old Civil Procedure Code was in force, a decree-holder applied for amendment of the description of the hypothecated property in order to bring it into conformity with that contained in the hypothecation bond. Apparently that case was one where the vakil's clerk had wrongly copied the hypothecation bond into the plaint. The District Munsif allowed the amendment. Parker, J., set aside the order of the Munsif as made without jurisdiction under the then S. 206 which limited the power of amendment to cases where there was a discrepancy between the judgment and the decree. On appeal from Parker, J., Best and Muthswami Iyer, JJ., set aside that decision although on different grounds. Best, J. said :

"It is thus seen that the alteration ordered was necessary to recitify a palpable error, without which correction, the decree was unexecutable. The error is in fact in the plaint, but it is so palpable that to disallow its correction would be simply to put an obstacle in the way of plaintiff executing his decree."

Muthusawmi Iyer, J., on the same point referred to the decision of the Privy Council in *Bissessur* v. *Luchmissur* (5) to the effect that in execution proceedings the Court will look at the substance of the transaction and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right.

"It seems to me that this principle should be kept in view in the exercise of the discretionary power conferred upon the High Court by S. 622, especially when the order revised . . . . . rendered the decree which would otherwise be incapable of execution capable of execution."

In *Somasundaram Chettiar* v. *Veluswamy Naicker* (6) there were errors in the description of the boundaries of the properties which made the whole description palpably erroneous and, if allowed to stand, would have made the decree absolutely useless and unexecutable. Their Lordships after referring to the case in *Narayanaswami* v. *Natesa* (4) said :

"Following the ruling in *Narayanaswami* v. *Natesa* (4) we hold that the time when the clerical errors (provided they are in this case palpably clerical errors) were first introduced in the transactions or proceedings between the parties is immaterial and that the Court has got power to amend such clerical errors if they are found in the decree without the necessity of having the prior pleadings, in which the same errors had formerly appeared, themselves amended as a preliminary requisite to the amendment of the decree."

If the statement of their Lordships that

"the time when the clerical errors were first introduced in the transactions between the parties is immaterial"

is to be strictly understood and applied, it amply covers this case. But it has to be noted that it does not appear from the report whether the mistakes in that

(4) [1893] 16 Mad. 424.

(5) [1881] 6 I. A. 233=5 C. L. R. 477.

(6) [1914] 22 I. C. 774.

case were mistakes first introduced into the plaint or they were copied from the document sued on. These cases were followed by another Bench in *Mahaboo Begum Sahiba* v. *Lal Begum Saheba* (7). The only other cases that were cited to me were upon the question that it is possible for plaintiffs, situated as the petitioners are to bring a suit for rectification. The cases cited are *A. I. R.* 1927 *Mad.* 1144, *Jogeswara Atha* v. *Ganga Bishnu* (8), *Srish Chandra Lal* v. *Triguna Prasad Lal* (9) and *Balaprasad* v. *Kanoo* (10). The decision in these cases only go as far as to say that even after a decree is passed with wrong descriptions of the properties, a suit for rectification may be brought to correct the error. They do not touch the question whether such a suit is the only remedy. There are however two remarks in two of these cases to which attention has been drawn. In *Balaprasad* v. *Kanoo* (10), which was a case before the Nagpur Judicial Commissioner's Court, a suit was brought for rectification in which the defendants raised the question that no such suit would lie and that the plaintiff's remedy was by way of application for amendment under S. 152. In view of the numerous other decisions to which reference has been made that contention was of course untenable ; but in addition to saying so, the Acting Judicial Commissioner said that S. 152, Civil P. C., applies to mistakes which had an origin not anterior to the filing of the suit. This remark was obviously not necessary for the case. Similarly in *Ram Chander Sarup* v. *Mahazar Hussain* (11) a creditor against whom an adjudication had been made in the insolvency of his debtor that the amount of the debt was only Rs. 3,000 odd attempted to get the decree on which his claim was based amended by altering it into one for Rs. 6,000 and based his application on the ground that he was applying for the amendment of the decree. Their Lordships spoke of the application as a hopeless case, because no decree could be amended after the claim under it had been adjudicated upon and limited to the amount fixed by the insolvency proceedings. But at the end of the judgment there is this sentence :

> " Section 152 deals with amendments of clerical errors in orders or decrees of the Court itself which are drawn up not properly representing what the Court decides. "

That again was a remark which was not necessary for the decision, if from it is intended to be drawn the inference, which I think does not strictly follow therefrom, that S. 152 does not apply to errors caused by copying into a plaint documents which are themselves incorrect. There is thus no decision which supports the respondent's contention ; on the contrary there is a decision of the Rangoon High Court, which, goes a long way to support the petitioners' contention. In *Maung Chit Hlaing* v. *N. A. R. M. Chettty*, *A. I. R.* 1924 *Rang.* 104, a mortgage deed had been so carelessly drawn as to omit the most important of the mortgaged properties. A decree was obtained upon the defective document and after decree an application to correct it was made. Duckworth, J., upheld the order of the District Court granting the application. He described the omission as " an error arising in the decree from an accidental omission " which in the first instance was due to the mortgagor himself. He went on to observe :

> " There never was, apparently, any dispute as to the actual property mortgaged. In these circumstances, I consider that the District Court was right in making use of the Court's inherent power under S. 152. "

After referring to the cases cited to him he wound up by saying that it would cause great hardship to the respondent if the amendment in this instance was disallowed, as it would probably necessitate a suit to rectify the decree. The net result of the authorities appears to me to be that there is nothing which limits the power of the Court under S. 152 to correcting errors, mistakes and omissions, which arose in the suit and there is nothing which prevents the Court from doing justice in an appropriate case where such mistakes arose by reason of copying an erroneous document into the plaint. In my opinion, a suit for rectification although it may have been possible is not the only remedy. As for the suggestion of the Judge that a petition for review is appropriate, I fail to see that that is an obstacle to the present application. The order of the Judge dismissing the petition must be set aside and the petition will be remitted to the lower Court for being dealt with on the merits.

(7) [1921] 62 I. C. 652.
(8) [1904] 8 C. W. N. 473
(9) [1913] 40 Cal. 541=18 I. C. 444.
(10) [1912] 8 N. L. R. 13=14 I. C. 407.
(11) [1919] 51 I. C.55.

Costs of this petition will abide and be provided for for by the learned Judge in the order to be passed by him.

P.R.S./K.N *Petition allowed.*

** A. I. R. 1931 Madras 264

SUNDARAM CHETTY, J.

(*Minor*) *Nagammal* and *another*—Appellants.

v.

Sankarappa Naidu alias Muthalagiri Naidu and *others*—Respondents.

Second Appeal No. 204 of 1928, Decided on 7th November 1930, against decree of Sub-Judge, Dindigul, in A. S. No. 103 of 1925.

(a) Evidence Act (1872), S. 32 (3) and (7) —Statement in adoption deed that adoptor's sons were suffering from leprosy is admissible to decide validity of adoption and attestation by sons being against their interest is admissible.

The statement contained in a deed of adoption that two sons of the adoptor were suffering from a virulent and incurable form of leprosy at the time of the adoption is a relevant fact for deciding whether plaintiff's adoption during the lifetime of those sons was valid or not, and is admissible under S. 32 (7); and where the two sons suffering from leprosy have attested that deed they may be deemed to have acquiesced in the truth of that statement which is against their pecuniary interest, and the statement is therefore admissible under S. 32 (3) also. [P 264 C 2]

**** (b) Hindu Law—Adoption—Object of, stated—Natural son suffering from virulent leprosy—Another son can be adopted.**

The main purpose or object of adoption is to secure the due performance of obsequial ceremonies, and oblations of food and water given in sradhas and such other ceremonies for the benefit of the adoptor's soul. The perpetuation of lineage is also another object for making an adoption. So far as the funeral ceremonies and sradhas are concerned, virulent and loathsome form of ulcerous leprosy is a disqualification and therefore the existence of such a son cannot serve one of the main purposes for which an adoption is prescribed under the Hindu law. If for the sake of those ceremonies adoption is necessary, a son incapable of performing those ceremonies can only bear the semblance of a son whose existence can be ignored and an adoption made: 22 *Cal.* 843; 28 *Cal.* 168; 4 *B. H. C. R.* 135, *Ref.*; *A. I. R.* 1922 *Bom.* 173, *Diss. from.* [P 265 C 2, P 263 C 1, 2, P 268 C 1, 2]

T. A. Ananta Aiyer—for Appellants.

S. C. Sampath Ayyangar—for Respondents.

Judgment.—The dispute in the suit, out of which this second appeal has arisen, relates to the succession to the properties of one Muthukrishna Naidu who died a minor possessed of the suit properties. Defendants 1 and 2 are the sisters. The plaintiff claims to be the nearest heir to the deceased as he is the adopted son of Pappi Naidu who was the brother of the deceased's paternal grandfather. Both the Courts below have held that the plaintiff was the adopted son of Pappi Naidu and that the adoption is also legal and valid. If these findings are correct, there is no doubt that the plaintiff is entitled to succeed to the properties in question in preference to defendants 1 and 2.

The only question argued in this second appeal relates to the validity of the plaintiff's adoption. The circumstances in which the plaintiff was taken in adoption have been set forth in the registered deed of adoption, Ex. A, executed by Pappi Naidu. It is recited in that deed that the adoption was necessitated by reason of his two aurasa sons being lepers from birth. It is stated that, as both the natural born sons were suffering from leprosy for over 10 or 12 years, and as he despaired of having any lineal descendant even from his sons to perpetuate the lineage, he had recourse to adoption. That deed is attested by both the sons. It is argued that the recital in Ex. A is not legally admissible in evidence in the present case. The fact that the two sons of Pappi Naidu were suffering from a virulent and incurable form of leprosy at the time of the aforesaid adoption is a relevant fact for deciding in this case whether that adoption is valid or not. It seems to me that S. 32, Cl. 7, Evidence Act, may apply. That clause makes a statement contained in any deed, will or other document which relates to any such transaction as is mentioned in S. 13, Cl. (a) of the Act admissible in evidence. Ex. A. relates to the transaction of plaintiff's adoption whereby his alleged right has been created. The statement contained in Ex. A, as the basic ground for the adoption is therefore admissible in evidence. Moreover, the two sons of Pappi Naidu having attested that deed, they may be deemed to have acquiesced in the truth of that statement which is against their pecuniary interest. That being so it may even be admissible under Cl. 3, S. 32. There is however evidence also in proof of the leprosy of the sons of Pappi Naidu. It is clear from Exs. D and E, the extracts from the death register relating to those two sons, that they died of leprosy. P. W. 2 also

says that they were suffering from ulcerous leprosy and had no chance of getting any issue. The finding of the lower appellate Court that the two sons of Pappi Naidu were suffering from an incurable form of leprosy seems to me to be unassailable and it must be accepted as correct.

There is no doubt that these two sons were disqualified for inheritance on account of their having been afflicted with such a virulent form of leprosy. According to the text of Manu:

"Eunuchs and outcastes, persons born blind or deaf, the dumb and such as have lost the use of a limb are excluded from heritage."

To this enumeration Yaijnavalkya adds:

"A person afflicted with an incurable disease: (vide para. 592 of Mayne's Hindu Law. Edn. 9)."

It is also thus laid down in the Mitakshara:

"An impotent person or outcaste and his sons, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease and others similarly disqualified, must be maintained, excluding them however from participation: (vide S. 10, v. 1 of Mitakshara at p. 53 of Hindu Law Books on Inheritance by Setlur)."

By a man destitute of male issue, that is, by one to whom no son may have been born, or whose son may have died, an adoption can be made. It is clear that only in the absence of a son, grandson or great-grandson that an adoption can be made. The point that arises for decision in this case is, whether the existence of the aforesaid two sons of Pappi Naidu who were excluded from inheritance on account of virulent leprosy was a legal bar to his making an adoption. The question is not free from difficulty. In support of the contention on behalf of plaintiff-respondent 1, his learned advocate, Mr. Sampath Ayyangar, referred me to several ancient texts of Hindu law and also to the opinions of the modern text-writers on Hindu law.

In order to understand the reason for the rule that a sonless man may adopt, we have to see what the real purpose or purposes of adoption are. On this subject Devanda Bhatta in his treatise "Dattaka Chandrika" which is a recognized authority in the Dravida School of Hindu law, quotes the texts of Manu and Atri as authorities for stating the reasons for an adoption. Manu says:

"A son of any description must be anxiously adopted by a man destitute of male issue, for the sake of funeral cake, water and solemn rites and for the celebrity of his name."

Atri says:

"By a man destitute of male issue only must a substitute for a son of some one description always be anxiously made for the sake of funeral cake, water and solemn rites: (Dattaka Chandrika in Setlur's book, p. 423)."

In Dattaka Mimamsa, the same prominence is given to the obsequial ceremonies which would fail if no adoption is made. In S. 1, verse 42, relying on the text of Manu, it is stated that an adoption is necessary, for otherwise the obsequies would fail. The obsequies are stated to be funeral rites consisting in presenting oblations of food and water and so forth: vide Dattaka Mimamsa in Setlur's Book, p. 361, and also verses 54 to 56 at p. 363. In the aforesaid treatise, Nanda Pandita says in S. 2, verse 62, that participation in the obsequies and estate has been declared to be the result of filial relation. As to the presentation of funeral oblations, disqualified heirs like the impotent person and the rest who merely bear the semblance of being a son would be of no use: p. 374 of Setlur's Book. The text of Manu, namely:

"a given son must never claim the gotra and estate of the natural father; the funeral cake follows the gotra and estate, but of him who has given away his son the obsequies fail,"

is referred to in S. 3, verse 25, of Dattaka Chandrika (p. 440 of Setlur' Book). In Colebrooke's Digest, Vol. 11, p. 417, the following text of Manu is quoted, namely:

"Those eleven sons (the son of the wife and the rest is enumerated) are allowed by wise legislators to be substitutes in order for the sons of the body for the sake of preventing a failure of obsequies."

From these authorities there can be no room to doubt that the main purpose or object of adoption is to secure the due performance of obsequial ceremonies and oblations of food and water given in sradhas and such other ceremonies for the benefit of the adoptor's soul. The perpetuation of lineage is also another object for making an adoption.

If a son is afflicted with a virulent and loathsome form of ulcerous leprosy, and on that account he is unfit to perform the funeral rites and such other ceremonies for his father, can it be deemed that the existence of such a son is bar to an adoption? Several texts have been relied on by Mr. Sampath Ayyangar for respondent 1, in support of the position that a leper of the aforesaid type

is not qualified to perform the obsequies and sradhas, etc. In Yajnavalkya Samhitha, verses 222 to 224, of the persons who are censured, i. e. considered unqualified to perform the sradh, is mentioned a diseased person suffering from leprosy: vide p. 37 of the Dharma Sastras translated by Dutt. In Yama Samhita (verses 29 to 31) a person suffering from leprosy is stated to be one of the persons who should be carefully shunned at a sradh : vide p. 280 of the same book. In Vyavahara Mayukha, relying on Sanka and Likhita, it is stated that the heritable right of him who has been formally degraded and his competence to offer oblations of food and libations of water are extinct : p. 116 of Setlur's Book. It is observed by Mr. Ghose in his Hindu Law (Edn. 3) at p. 59 that in ancient times the competence to perform sradh corresponded with right to take the inheritance, and the rule was that he who takes the inheritance gives the pinda. Among the persons competent to perform the sradh, a disqualified heir, such as one suffering from leprosy, is not mentioned. There is no doubt that, so far as the funeral ceremonies and sradhs are concerned, leprosy of the aforesaid type is a disqualification and therefore the existence of such a son cannot serve one of the main purposes for which an adoption is prescribed under the Hindu law. If for the sake of those ceremonies adoption is necessary, a son incapable of performing those ceremonies can only bear the semblance of a son whose existence can be ignored and an adoption made. It is argued that such a disqualified son may be eligible for marriage: vide Dr. Jolly's Hindu Law, p. 280 but participation in the marriage ceremonies though permissible for such a disqualified heir, his eligibility to perform his father's obsequial ceremonies and sradhs stands on a different footing and is negatived by several texts bearing on ancient Hindu law. That one who is suffering from a virulent form of leprosy is disqualified for performing even the ceremonies of adoption has been held in judicial decisions. That is the dictum of the Privy Council in the decision reported in *Bhagaban Ramanuja Das* v. *Ram Praparna Ramanuja Das* (1) at p. 858 : vide also the decision in *Sukumari Dewa* v. *Ananta Malia* (2). If the disease of leprosy is virulent and inexpiable, it undoubtedly disqualifies him from participating in the adoption ceremonies. In the case of a Sudra, as no religious ceremonies are necessary for making an adoption, it has been held that even a leper may adopt.

The opinions of almost all the modern text-writers on Hindu law appear to be that the father of a disqualified heir can make an adoption. In the Hindu Law of Adoption by Sarkar (Edn. 2) at p. 196 the learned author, after, referring to a text of Yajnavalkya, relies on the opinion of Nanda Panditha in respect of that passage. It is as follows :

> "It declares that the capacity to present oblations and to participate in heritage constitutes sonship for, if that be wanting, the mere existence of filial relationship as of an impotent or the like disqualified son does not constitute it."

The author says that the disqualified sons can neither render spiritual service nor inherit the estate ; in fact they do not possess the legal character of a son. Therefore a man having such a son is deemed in contemplation of law to be sonless for the purpose of adoption. In the opinion of the said author, the existence of a disqualified son is no bar to an adoption by the father. In his Treatise on Hindu Law (Edn. 5), the same author reiterates that opinion at p. 182. He says that the status of sonship is constituted by the capacity to confer spiritual benefit and by the capacity to inherit and a child who is destitute of these capacities has not the status of a son in the eye of the Hindu law and the existence of such a son is no bar to an adoption.It is observed by Sir Thomas Strange in his Hindu Law, Vol. 1. at p. 77 thus:

> "The right of inheriting and that of performing for the ancestor his funeral obsequies being correlative, if by any of the legal disabilities, as by degradation from caste, by insanity, by incurable disease or otherwise, living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches."

According to the opinion of Mr. Ghose in his book on Hindu Law, Edn. 3, Vol. 1 at p. 669, a man having a disqualified son or a son who is a patita on account of heinous offence or change of religion can adopt. and as long as a man has no son capable of inheriting his property, there is no reason who he should not be able

(1) [1895] 22 Cal. 843=22 I. A. 94=6 Sar. 536 (P. C.).

(2) [1901] 28 Cal. 168.

to adopt. The learned author refers to the observations in Dattaka Mimamsa, S. 2, verse 62, as supporting this view. The following passage is found at p. 124 in Trevelyan's Book on Hindu Law (Edn. 2) :

"If the son be permanently incapable of performing religious rites by reason of congenital blindness, deafness, dumbness, impotency, lameness, virulent leprosy, insanity, idiocy, or from any other reason which involves an incapacity to inherit, he may be treated for this purpose as non-existent."

In his Hindu Code, Edn. 3, Sir H. S. Gour has expressed his opinion at p. 357, as follows :

"Since the primary purpose of adoption, as now understood, is to provide for the adoptor's spiritual advancement by having some one legally qualified to perform his obsequies, and since such qualification must be judged by Hindu law which disqualifies the son who is impotent, an idiot or insane, blind, deaf, dumb, lame, congenitally suffering from leprosy or from any infirmity of disease which disqualifies him for inheritance or one who was become a convert to an alien faith or has turned a hermit, sanyasi or fakir and thereby snapped the natural tie by which he was bound to his father, the latter may make an adoption as such disqualified son is as good as civilly dead to him."

In West and Buhler's Hindu Law Edn. 3, Vol. 1-11 reference is made to Sir Thomas Strange's opinion that in such cases adoption was competent to the father who could not derive spiritual benefit from the incapable son. But, so far as Bombay is concerned, it is stated that by the customary law prevailing in the Presidency, the insanity of a son by birth is not generally a valid cause for an adoption. The learned authors further say that it is consistent with this that the blindness or dumbness of a son should not justify an adoption : see pp. 907 and 908. That being so, it is only so far as Bombay is concerned, we must take it that the customary law overrides the general rule of Hindu law, which however should apply to the other parts of India. In Bhattacharya's Hindu Law Edn. 3, Vol. 1 at p. 342, it is stated that the criterion of sonship as given by Nanda Panditha in one place may throw some light on this subject. The learned author quotes the opinions of Nanda Panditha and of Sir Thomas Strange and leaves the matter there, without expressing any opinion of his own, after stating that the question whether the father of a disqualified son can adopt or not is one about which there is no decision one way or the other. Some reliance is placed by the learned advocate for the appellants on one of the special rules relating to construction of texts mentioned in this book. R. 10 is :

"A clause in a text which seems like a reason for the rule of law enjoined by it, has, generally speaking, no significance whatever: vide p. 135."

I fail to see how this rule of construction has any application in the present case, nor has he shown with any definiteness the applicability of this rule to any particular text relied on by the other side.

Much reliance has been placed by the learned advocate for the appellants on the decision in *Bharmappa* v. *Ujjan Gauda* (3), wherein a similar question arose for determination. It was a case of dumbness, congenital and incurable. A person affected by such dumbness was held to be disqualified for inheritance according to the Hindu law prevailing in the Bombay Presidency. On the further question as to the validity of an adoption made during the existence of such a dumb grandson, it has been held that the adoptor cannot be deemed to be sonless so as to make the adoption made by him during the lifetime of such a grandson valid. At p. 458, Shah, J., observes as follows :

"But it is urged that the existence of a grandson, disqualified as in the present case, is no bar to an adoption by the grandfather. There is no decided case on this point, and, so far as I have been able to see, there is nothing in the Mitakshara or the Vyavahara Mayukha to lend support to this view. The basic principle of adoption, as I understand it to have been laid by the Smrithi writers, does not support the contention. The opinions expressed by writers on Hindu law are conflicting ; and, treating it as a point of first impression, at least so far as this Presidency is concerned, I have come to the conclusion that the fact of the grandson suffering from dumbness by birth does not render the adoption valid which would be otherwise invalid on account of its having been made during his lifetime."

The learned Judge refers to the hardship and obsolete nature of some of the grounds of exclusion from inheritance and says that each defect must be considered on its merits. Following the decision in *Vallabharam Shivanarayana* v. *Bai Hariganga* (4), he held that a person born dumb was incapable of inheriting according to the Hindu law prevailing in Bombay. Referring to Vyavahara Mayukha the learned Judge

(3) A. I. R. 1922 Bom. 173=65 I. C. 216=46 Bom. 455.
(4) 4 B. H. C. R. 135.

says that there is no indication in the chapter relating to adoption that a son subject to any defect which would exclude him from inheritance was no son at all. The learned Judge further says that the Dattaka Mimamsa does not in his opinion afford any indication to the contrary. As to the passage in S. 2, verse 62, in the Dattaka Mimamsa, which I have already referred to, the learned Judge does not accept the interpretation placed upon it by some writers on Hindu law. That is one of the passages found in the chapter relating to the subject : "Who is to be adopted?" It seems to me that the qualification or eligibility of the boy for adoption is a pertinent matter for consideration in that chapter. If in the aforesaid verse it is stated that impotent persons and the rest merely bear the semblance of being a son and would be of no use, it amounts to saying that such a person does not fulfil the capacity of sonship. Such a person is not only ineligible for adoption but his father can be deemed to be sonless, for the purpose of making an adoption.

With great respect I would state that the opinion of Nanda Panditha so expressed, does not lose its value by the statement of it in the chapter on the subject "Who is to be adopted," instead of in the first section where he deals with the question as to who can adopt. Moreover, the main purpose of adoption, according to authoritative texts on Hindu law, being the due performance of obsequial ceremonies and the oblations of food and water given in sradhas and such other rites for the benefit of the adoptor's soul and the perpetuation of his lineage, if the existence of a son incompetent to perform such religious ceremonies and sacrifices is treated as a bar to an adoption, one of the aforesaid main purposes which necessitate an adoption becomes frustrated. This aspect does not seem to have been given due weight in the reasoning adopted by the learned Judge in that decision. There is almost a consensus of opinion among the modern text-writers on this question as I have already pointed out. Some of the persons who are excluded from inheritance as disqualified heirs may be competent to perform obsequial and other ceremonies. Perhaps the existence of such a son may be held to be a bar to an adoption ; but I am clear that the existence of a son who is not only disqualified for inheritance, but also incompetent to perform the aforesaid ceremonies should be deemed to bear only the semblance of a son, and his father can be very well treated as sonless for the purpose of enabling him to make an adoption. With due deference I am unable to follow the decision of the Bombay High Court and apply it to the present case.

For all the foregoing reasons I hold that the plaintiff's adoption is legal and valid.

In the result the second appeal fails and is dismissed with costs.

The court-fee payable to Government on the memorandum of appeal should be paid by the appellants.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 268

CURGENVEN, J.

Krishnaswami Mudaliar—Defendant—Petitioner.

v.

Manikka Mudali—Plaintiff—Respondent.

Civil Revn. Petn. No. 293 of 1929, Decided on 28th April 1930, from decree of Sub-Judge, Coimbatore, in Appeal Suit No. 128 of 1928.

Civil P. C. (1908), S. 11—Previous suit dismissed—Subsequent suit on same cause of action is not maintainable—Alternative reliefs, even if any, should have been pleaded in previous suit.

The subsequent suit was brought against a defendant who was one of the defendants against whom the previous suit, based on the same cause of action as the subsequent suit, was brought and dismissed.

Held : that the subsequent suit is not maintainable. Even if the plaintiff had alternative claims arising out of the same cause of action, he might and ought to have set up his alternative claims : *A. I. R.* 1923 *Mad.* 257 ; *A. I. R.* 1926 *Mad.* 234, *Rel. on.* ; *A. I. R.* 1922 *Bom.* 29 ; and *A. I. R.* 1925 *Mad.* 1172, *Dist.* [P 269 C 2]

Watrap S. Subramania Iyer — for Petitioner.

Salem S. Ramaswami Iyer—for Respondent.

Judgment.—The defendant has filed this revision petition against the decision of the Subordinate Judge of Coimbatore remanding the suit which was dismissed by the District Munsif of Udamalpet. The only question which arises is whether the judgment in S. C. S. No. 688 of 1925 on the file of the same District Munsif's Court operated as res judicata. The facts were in brief that the plaintiff's father had

been in partnership with the defendant, and that on 16th June 1924 they agreed to dissolve, the defendant taking over some of the assets and the plaintiff's father some of the outstandings in settlement of their mutual claims. The earlier suit was brought against a debtor of the firm and against the defendant here, and it is necessary to look into the terms of the plaint in order to ascertain what exactly the nature of that suit was. After reciting the dissolution of the partnership and what took place on 16th June 1924 the plaint said:

"As per the above list (i. e., a list given by the defendant to the plaintiff's father) it is just that a sum of Rs. 152-14-0 together with interest, should be paid by defendant 1 (the debtor). In case the Court is of the opinion that it is not just that defendant 1 should pay the amount, it is just that the said amount should be recovered from defendant 2 (defendant here)."

The substance therefore of the claim was that if the money was found due from the debtor, the Court was to decree it from him; if not due, then from defendant 2 in that suit, now the defendant here, in consequence of some arangement between the parties. In the written statement which this defendant filed he denied that if the money was not paid by the debtor he had undertaken to pay it himself. As it was a small cause suit, there were of course no express issues, but the judgment makes it clear that the first point for decision was whether the debtor owed the money. The District Munsif found on this that he had had no dealings with the firm and he did not owe the amount. He then turned to decide the second point whether defendant 2 (defendant here) was liable to pay the amount, and his conclusion is expressed thus:

"If the suit claim is found not to be really due, defendant will not be liable for it unless he agreed to make good the amount if it was not recovered from defendant 1,"

and he concludes by finding defendant 2, not liable. Between these two passages there appear two other sentences relating to the plaintiff's competence to bring another suit against this defendant. However let us first look at the plaint in the present case. It recites again that a list was given by the defendant to the plaintiff on 16th June 1924 of the amounts outstanding, including the plaint debt. It then goes on to describe the previous suit and how it ended, and para. 7 is as follows:

"At the time when the defendant gave up the list and the receipts it was agreed that the above-mentioned amounts were really due to the partnership and that the defendants was responsible for the said amounts and on that agreement the partnership was dissolved. As the suit amount has been lost from the amounts due to the plaintiff's share and as the defendant is anyhow bound to make it good, the defendant is bound to pay the amount to the plaintiff's father."

The cause of action for this suit is dated 22nd December 1925. No description of how it arose is given but I am informed that it is the date on which the previous suit was decided. It goes without saying that no cause of action can have arisen from that circumstance, and the remainder of the plaint shows that the only cause of action there can have been would consist in an agreement by the defendant entered into on 16th June 1924.

I am therefore totally unable to see as indeed the learned District Munsif was unable to see, that the plaintiff had any new grounds for bringing this second suit. Even however assuming that to obtain a decree for such sum of money from the defendant he had more than one alternative basis of claim, I think it is abundantly clear from such decisions as *Muhammad Rowther* v. *Abdul Rahiman Rowther* (1) at p. 138 (of 46 *Mad.*) *Ramiah* v. *Lakshmi Narayanan* (2), *Marimuthu Goundan* v. *Muniammal* (3) that he must have included both alternative claims in his original plaint. It was not a case of incompatibility of statement as was dealt with in *Dolakhataji* v. *Balya Knoo* (4). Nor can I find that the authority which the learned Subordinate Judge has relied upon *Katrivi* v. *Kannan*, *A. I. R.* 1925, *Mad.* 1172, has any bearing because that related to claims based upon two distinct marupata dated 1902 and 1876. Moreover Expln. 4, S. 11, Civil P. C., is not referred to in the judgment. The only possible ground, I think, which the plaintiff could have for claiming a right to bring another suit lies in the observation of the District Munsif, which runs thus:

"If the amount was found not to be due from defendant 1, the plaintiff will get a cause of

(1) A. I. R. 1923 Mad. 257=72 I. C. 207=46 Mad. 135.
(2) A. I. R. 1926 Mad. 234=91 I. C. 660.
(3) A. I. R. 1927 Mad. 120=99 I. C. 525.
(4) A. I. R. 1922 Bom. 29=66 I. C. 815=46 Bom. 803.

action to sue defendant 2 for damages. This the plaintiff can do only in a separate suit making the necessary allegations."

I am wholly unable to see how this passage can be reconciled with the clear finding that there being no agreement to make defendant 2 liable, he must be exonerated. There is abundant authority for the position that no such statement as this in a judgment will create in the plaintiff any right to bring a fresh suit which he does not already enjoy. The code provides only one set of circumstances in which such a right arises, namely under the terms of O. 23, R.1, and as has been pointed out in *Fateh Singh* v. *Jagannath Baksh Singh* (5), it is a necessary part of the procedure that in respect of a portion of the claim the plaintiff should withdraw his suit or abandon part of his claim; and it is only then that permission can be granted to him to institute a fresh suit in respect of the subject-matter withdrawn or abandoned. No such circumstances arises in the present case, and I cannot find therefore that the plaintiff can derive from what the District Munsif said any defence against the ploa of res judicata which appears to me to be clearly established. I must accordingly differ from the view taken by the learned Subordinate Judge, set aside his decree and restore that of the District Munsif with costs throughout.

P.R.S./R.K. *Appeal allowed.*

(5) A. I. R. 1925 P. C. 55=91 I. C. 280=52 I. A. 100=27 O.C. 334=47 All. 158 (P.C.).

A. I. R. 1931 Madras 270

PANDALAI, J.

Ramanuja Naicker—Appellant.

v.

Soliappa Naicker and *others*—Respondents.

Appeal No. 71 of 1928, Decided on 18th November 1930, from appellate order of Dist. Judge, Ramnad, in Appeal Suit No. 697 of 1924.

(a) Civil P. C. (1908), S. 47 (2) — Conversion of petition into suit under S. 47 (2)—No second appeal lies but where on respondent's own invitation lower appellate Court sets aside order of executing Court refusing such conversion, on footing that it was involved in appeal under S. 47, respondent cannot be allowed to resile and say no appeal lies at appellant's instance to correct error.

Although no doubt no appeal lies from an order merely allowing the conversion of an execution petition into a suit as permitted by S. 47 (2) for the reason that the order though passed under S. 47 is not one relating to the execution, discharge or satisfaction of the decree, where on respondent's own invitation the lower appellate Court sets aside the order of the executing Court on the footing that it is involved in the appeal under S. 47, he cannot be allowed to turn round and say that no appeal lies at the appellant's instance to correct the error: *A. I. R.* 1929 *Mad.* 718 and 28 *Mad.* 127, *Rel. on.* [P 271 C 2]

(b) Civil P. C. (1908), S. 47 (2)—S. 47 (2) is intended to correct bona fide mistake.

Sub-S. (2) is intended to prevent the inconvenience and injustice caused by the discovery sometimes made after proceedings in Court have gone on for a long time or as a result of the decision of an appellate Court that the proceeding had originated in an erroneous form by a bona fide mistake by petition when it should have been by suit or vice versa. It is not intended to save litigants from the trouble of choosing the proper form and filing a plaint or an execution petition when it is discovered in time what is the proper form and there is no further question about the matter. [P 271 C 2]

K. Rajah Ayyar and *M. Rajagopalachari*—for Appellant.

B. Sitarama Rao and *S. R. Muthuswami Ayyar*—for Respondents.

Judgment.—The appellant assignee decree-holder is the purchaser of 17 properties in a mortgage suit, O. S. No. 68 of 1919, at a sale dated 24th March 1924. Respondent 1 is the purchaser of seven of these properties under a previous Court sale dated 18th December 1923 for a simple debt due by the same debtor. Respondent 1 on 16th June 1924 by E. A. No. 90 of 1924 applied to the Court executing the mortgage decree to set aside the sale to the appellant alleging (1) material irregularity in conducting and publishing the sale and (2) that the preliminary mortgage decree had been previously satisfied by the mortgagors themselves and that the subsequent assignment of the decree and execution sale were conducted fraudulently in collusion between the assignee decree-holder and judgment-debtors in the mortgage suit in order to defeat the respondent. Apparently, being advised that the latter objection could not be heard in execution, respondent 1 applied by E. A. No. 138 of 1924 to treat ground 2 of his former petition as a suit under S. 47 (2). The Subordinate Judge dismissed E. A. No. 138 of 1924 on 5th September 1924. He refused to treat E. A. No. 90 of 1924 as a suit but left it to respondent 1 to file a suit if he was so advised on the ground of fraud. On 7th October 1924 he dismissed E. A. No. 90 of 1924 so far as it alleged material irregularity on the ground that

no irregularity in publishing or conducting the sale was proved. Respondent 1 did not pursue the order of 5th September 1924 in appeal or revision but appealed to the District Court against the order of 7th October 1924, which he was entitled to do as the order was one relating to the execution, discharge or satisfaction of the decree and according to the decisions both appellant and respondent are representatives of the parties to the mortgage decree. At the hearing of the appeal on 4th February 1928, the only question which gave rise to the appeal, i. e., whether the sale to the appellant was vitiated by material irregularity in publishing and conducting it, was abandoned by respondent 1.

But the District Judge was asked to set aside the order of the Sub-Judge dated 5th September 1924 refusing to convert the petition into a suit so far as it was founded on fraud. The learned Judge though aware of the fact that there was no appeal from that order and that it was not one relating to execution, discharge or satisfaction of the decree, considered that it was merely an interlocutory matter arising in the main petition which was the subject-matter of appeal and that therefore he had power to order the conversion and holding that the Subordinate Judge had not exercised a sound discretion ordered the conversion of the petition E. A. No. 90 of 1924 into a suit. The present appeal is against that order.

Respondent 1 took the preliminary objection that no appeal lies from an order merely allowing the conversion of an execution petition into a suit as permitted by S. 47 (2), Civil P. C., for the reason that the order though passed under S. 47 is not one relating to the execution, discharge or satisfaction of the decree : *Somu Ayyar* v. *Chelliah Pillai* (1). But the answer is that, the lower Court having on respondent 1's own invitation exercised the power to set aside the order of the Subordinate Judge on the footing that it is involved in the appeal under S. 47, he cannot now turn round and say that no appeal lies at appellant's instance to correct the error : *Latchman Chetty* v. *Ramanathan Chetty* (2). This objection fails.

I doubt whether the learned Judge had any jurisdiction to set aside the order of 5th September 1924. There could be no appeal from it and the learned Judge had no power of revision. In any case I think the learned Judge should not have interfered with the order of the Subordinate Judge of 5th September 1924, nor was it a case in which he ought to have, of his own accord made an order under S. 47 (2). That sub-S. (2) is intended to prevent the inconvenience and injustice caused by the discovery sometimes made after proceedings in Court have gone on for a long time or as a result of the decision of an appellate Court, that the proceeding had originated in an erroneous form by a bona fide mistake by petition when it should have been by suit or vice versa. It was not intended to save litigants from the trouble of choosing the proper form and filing a plaint or an execution petition when it is discovered in time what is the proper form and there is no further question about the matter. Here the order of 5th September 1924 clearly informed respondent 1, if it was necessary for that purpose, that so far as his attack on the sale was founded on fraud in obtaining the final decree or in executing a decree which had been satisfied, his proper remedy was by suit Respondent 1 has not questioned the correctness of that view here and did not question it before the District Judge. He had plenty of time to correct his own error and file a plaint if so advised on the ground of fraud.

But he did not do so till the decision of the appeal on 4th February 1928. That appeal was only concerned with the allegation of material irregularity and not with any allegations of fraud. In the circumstances there was no hardship arising from respondent 1's failure to file his suit earlier, for which respondent 1 was alone responsible. It was wrong to say as the learned Judge has done that the Subordinate Judge did not exercise a sound discretion because his decision on the point has never been questioned and is obviously right. The learned Judge seems to have been influenced by the consideration that a suit brought for the first time after 4th February 1928 on the ground of fraud might be met with a plea of limitation. In the above circumstances respondent 1 has no one else to thank for this, if it should be so.

(1) A.I.R. 1929 Mad. 718=119 I.C. 43.
(2) [1905] 28 Mad. 127=14 M.L.J. 436.

The appellant's advocate has urged that it is illegal under S. 47 (2) to treat a proceeding partly as a petition and partly as a suit and that the only power given under that subsection is to treat it as one or the other, not as both. He cited *Venkatakumara Mahipati Surya Rao Bahadur* v. *Subbayamma Rao Bahadur* (3) and *Sachi Prasad Mukerjee* v. *Amarnath Roy Choudhuri* (4). I think it unnecessary to say anything about this as in my opinion the order under S. 47 (2) passed by the District Judge was unjustified on the grounds already stated.

In the result the decree of the lower Court so far as it directed the conversion of respondent 1's petition into a suit, is set aside. I understand that a suit has been filed by respondent 1. This decision will not affect any of the questions arising for decision in the suit except such as may depend upon conversion by the order of the Court of the petition into a suit.

The appellant will have his costs in this and in the lower Court.

P.R.S./V.B. *Appeal allowed.*

(3) [1915] 24 I.C. 484.
(4) [1919] 46 Cal. 103=45 I.C. 864.

A. I. R. 1931 Madras 272

WALLACE AND PANDALAI, JJ.

Ramakrishna Ayyar—Defendant—Appellant.

v.

Raghunatha Ayyar and *another*—Plaintiffs—Respondents.

Appeal No. 330 of 1925, Decided on 2nd December 1930, against decree of Sub-Judge, Ottapalam, D/- 25th November 1924.

Civil P. C. (1908), S. 35—Court can grant personal decree for costs against party, who is not mortgagor.

Though as between mortgagees and mortgagors in a mortgage decree, no separate order making the defendant-mortgagors personally liable for the costs can be passed, yet it cannot be said that it is illegal to award a personal decree for costs against a party to the suit who is not himself the mortgagor. The matter rests on discretion of the Court. [P 272 C 2]

C. V. Mahadeva Ayyar—for Appellant.

P. R. Ramakrishna Ayyar—for Respondents.

Judgment.—This is an appeal against the judgment of the learned Subordinate Judge of Ottapalam in a mortgage suit. The appeal relates to the matter of costs only, the learned Judge having decreed inter alia that defendant 5 do be liable personally for the costs of the suit. Defendant 5 is the appellant. He was not one of the mortgagors, these being defendants, 1, 2 and 3. He came on record on his own petition as a purchaser of the interest of defendant 2 in the property. Having come on the record, he adopted, we are told, the written statement of defendant 2. When the case came on for trial defendant 2 did not contest and was ex parte, and defendant 5 proceeded to contest the suit his chief contention being that the plaintiffs were benamidars for defendant 4 who, he said, is the real owner of the mortgage under an assignment deed, Ex. B.

The learned Judge found that this contention was frivolous and vexatious and obviously for that reason he has directed that defendant 5 do be personally liable for the costs of the suit. The contention put forward on his behalf is that the learned Judge's order is illegal, because the costs in a mortgage suit are primarily provided for in the mortgage decree itself, and that in fact in the decree in this suit these costs have been provided for in para. 2 of the decree to be met out of the mortgaged property, in the first instance. While it may be correct according to various authorities which the learned advocate has cited before us that as between mortgagee and mortgagor in a mortgage decree of this kind no separate order making the defendants mortgagors personally liable for the costs can be passed, we have not been referred to any authority which lays down that it is illegal to award a personal decree for costs against a party to the suit who is not himself the mortgagor. That being so, the only question remaining is, whether we can say that the decree of the lower Court regarding these costs is so perverse as to amount to a negation of the judicial discretion which is vested in the trial Court in the matter of costs. In the circumstances of the case, we are not prepared to say that that is so. In these circumstances we hold that the appeal must fail and it is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

A. I. R. 1931 Madras 273

BEASLEY, C. J.

Neelamaraju Venkata Narasimhayya—Plaintiff—Appellant.

v.

Neelamaraju Rajya Lakshmamma and *others*—Defendants—Respondents.

Second Appeal No. 201 of 1927, Decided on 1st May 1930, against decree of Sub-Judge, Bapatla, in A. S. No. 241 of 1925.

Limitation Act (1908), Art. 141—Properties sold by Hindu widow in 1899—Boy adopted in 1905 and died in 1909—Widow's death in 1921—Reversioner s suit in 1923 for recovery of possession of alienated property—Suit held not barred.

A Hindu widow sold certain properties of her late husband in 1899 and subsequently adopted a boy in 1905. The adopted boy died a minor in 1909. The widow also died in 1921 and after her death a reversioner filed a suit in 1923 for getting back the properties alienated by the widow.

Held: that under the above circumstances the suit was not barred by limitation: 32 *Cal.* 669, (*P.C.*), *Expl.* and *Rel. on*; 26 *Mad.* 143 and 41 *Mad.* 75 (*F.B.*), *Ref.* and *Expl.* [P 274 C 1,2]

B. Somayya—for Appellant.

P. Venkataramana Rao, *Government Pleader*—for Respondents.

Judgment.—The plaintiff is the appellant in this second appeal which arises out of a suit filed by him as a reversioner to the estate of one Nilamaraju Butchayya for possession of the suit property. This property was by Ex. 14 sold in the year 1889 to one Nilamaraju Bajamma by Ademma, the adoptive mother of Butchayya. The alienee is defendant 14 in the suit. In 1905 Ademma adopted Butchayya, then a minor boy. He died in 1909 being then still a minor, as has been found by the District Munsif, although there is no finding upon the point of minority by the lower appellate Court. On his adoption he divested his adoptive mother of the property and it became vested in him. After his death his adoptive mother got his estate as his legal representative. She died in 1921 and the appellant then filed this suit to set aside the sale under Ex. 14. It will thus be seen that the suit was filed 14 years after the death of the adopted son Butchayya.

In the District Munsif's Court the claim was held not to be barred, and *Sreeramulu* v. *Kristnamma* (1), was there relied upon. That case decided that where a Hindu widow alienates immovable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood. A 12 years' period of limitation was under Art. 141, Lim. Act, given and time was reckoned from the date of her death. In the judgment of the lower appellate Court it is pointed out that *Sreeramulu* v. *Kristnamma* (1), which was decided in 1902 must be taken to be overruled by a Full Bench case in 1917, *Vaidyanatha Sastri* v. *Savitri Ammal* (2). In that case a Hindu widow alienated certain properties for a purpose not binding on the inheritance and thereafter adopted a son and it was held by the Full Bench that the alienation was not binding on the adopted son and that he could sue, during the lifetime of the widow, to set aside the alienation and recover the properties so alienated, his cause of action arising from the time of his adoption. In the course of the judgment of Sir John Wallis, C.J., reference is made to *Bonomali Roy* v. *Jagat Chandra Bhowmick* (3) a decision of the Privy Council. Sir John Wallis says at p. 85 as follows:

"Their Lordships however appear to have held expressly that the adopted boy's cause of action for the recovery of the alienated property arose on the date of his adoption, and that time began to run against him in 1856 on his attaining majority and that the suit became barred in 12 years under Regulation 2 of 1803 and Act 14 of 1859."

The facts in *Bonomali Roy* v. *Jagat Chandra Bhowmick* (3) were that in 1837 the widow of the owner of a zamindari granted a lease to the predecessors of the defendants as manager for the widow of her adopted son. The latter widow in 1846 adopted a son who was the father of the plaintiff. He attained majority in 1856 and died in 1880. The suit was brought in 1897 to set aside the lease and it was held that if the lease was void the period of limitation ran from its date and if it was voidable only by the adopted son his right of action arose on his adoption and time would begin to run against him from the date when he attained his majority in 1856. There were therefore two dates taken by their Lordships, namely, the date of the adoption and the date of the attainment of majority. With regard to the former they held that the

(1) [1903] 26 Mad. 143=12 M. L. J. 197.

(2) [1918] 41 Mad. 75=42 I. C. 245 (F. B.).

(3) [1905] 32 Cal. 669=32 I. A. 80 (P. C.).

right of action arose then and for the purposes of limitation they held that limitation commenced to run from the latter date.

Applying that judgment to this case, it is quite clear that the cause of action arose in 1905, the date of the adoption, and that had the adoptive son lived, the starting point of limitation would be the date when he attained his majority. But he died, as before stated a minor. The learned Subordinate Judge has found that it is clear from *Vaidyanatha Sastri* v. *Savitri Ammal* (2) that the suit became barred by limitation 12 years from the date of Butchayya's adoption. That is certainly not the way I read that case and is certainly not what the Privy Council decided in *Bonomali Roy* v. *Jagat Chandra Bhowmick* (3) for the reasons I have already given. If the sale had been void, then the starting point of limitation would have been the date of the sale but this sale was not void but voidable. The learned Government Pleader contends on the other hand that the starting point of limitation was the date of the adoption. It was on that date he argues that possession commenced to be adverse because the adoptive mother had ceased to have any right to the property she had become divested of, and it had vested entirely in the adopted son. But with great respect to that argument, I cannot see how the fact that she had become divested of the property by reason of the adoption can affect the question of limitation The adopted son could, through a guardian, have claimed possession of the property. He had his cause of action but he was a minor and subject to a disability. He was not bound to sue and the period of limitation is not abridged by reason of S. 6, Lim. Act, as is contended for by the learned Government Pleader who argues that by reason of that section and S. 8 time ran from the date of the adoption but an extension of three years after the attainment of majority is all that is given to the minor. With great respect I do not agree with that contention and it is certainly not the view taken by Sir John Wallis, C. J., in *Vaidyanatha Sastri* v. *Savitri Ammal* (2) or by the Privy Council in *Bonomali Roy* v. *Jagat Chandra Bhowmick* (3). I must therefore hold that the learned Subordinate Judge was wrong in holding that time commenced to run against the adopted son from 1905. He died a minor, his adoptive mother succeeded to the estate and as regards her I think it is clear that she could not be in a position to dispute her previous alienation. She died in 1921 and the present appellant filed the suit in 1923.

In my view, the suit was not barred by limitation and this appeal must be allowed with costs and the case remanded to the lower appellate Court to decide all the other questions raised in the appeal and undecided by reason of the decision that the suit was barred by limitation.

P.R.S./R.K. *Appeal allowed.*

A. I. R. 1931 Madras 274

CURGENVEN, J.

Karri Adeyya and *others*—Defendants—Appellants.

v.

Tammalampudi Govindu and *others*—Plaintiffs—Respondents.

Second Appeal No. 921 of 1926, Decided on 5th December 1929, against decree of Sub-Judge, Narsapur, in A. S. No. 137 of 1924.

Hindu Law—Alienation—Widow minor—Alienation by her de facto guardian—Widow becoming major and alienating property again—Reversioner suing for declaration that latter alienation not binding on them—They should have also sued in respect of former alienation and time began to run from that date as the former alienation was voidable and not void—Limitation Act (1908), Art. 141.

There were two mortgages of the same property. The first was effected during the widow-owner's minority by her mother, her de facto guardian. The second in renewal, was by the widow herself after she came of age. The reversioners brought a suit for declaration that the ater one did not bind them.

Held: that an alienation by a de facto guardian, even without legal necessity, is not void but only voidable at the option of the minor. Therefore the former, being a valid transfer, until avoided, the reversioners had a cause of action in respect of it, irrespective of what the widow might have done as soon as it came into existence and time began to run from that date. Hence the reversioners must seek their declaration with regard to it, just as though it had been executed by the widow herself and that it was not enough to obtain a declaration with regard to the latter mortgage alone: 38 *Mad.* 1125; 34 *All.* 213; 10 *A. L. R.* 133; *A. I. R.* 1927 *Nag.* 145, *Dist.*; *A I.R.* 1928 *Mad.* 226; 97 *I.C.* 611 and *A. I. R.* 1929 *Mad.* 110, *Expl.*; *A. I. R.* 1926 *Mad.* 457 and *A. I. R.* 1930 *Lah.* 136, *Rel. on.* [P 275 C 1,2; P 276 C 1]

K. Kameswara Rao—for Appellants.

V. Govindarajachari—for Respondents.

Judgment.—The question primarily arising in this second appeal is one of limitation. The reversioners sue for a declaration that the widow's alienation is not binding on them after her lifetime. There were two mortgages of the same property. The first was effected during the widow's minority by her mother, admittedly a guardian de facto, by Ex. 2 in 1906. The second (Ex. 1), in renewal, was by the widow herself, after she came of age in 1913. I think that if Ex. 2 is only voidable, and not void, the plaintiffs must seek their declaration with regard to it, just as though it had been executed by the widow herself, and that it is not enough to obtain a declaration only with regard to the later mortgage. Their learned advocate has endeavoured to reason that, even if so, time will not run against his clients until either the widow ratifies or the time allowed her to avoid her guardian's act has expired, but neither on principle nor upon any authority shown to me do I feel disposed to accept this view. If Ex. 2 evidences a valid transfer until avoided, the reversioners had a cause of action, irrespective of what the widow might do, as soon as it came into existence.

The case mainly relied on as authority for the view that an alienation by a de facto guardian, and unsupported by necessity, is void, is *Thayammal* v. *Kuppanna Koundan* (1). After holding that a paternal aunt is not a natural guardian, Sadasiva Aiyar, J., observes that therefore her alienation need not be set aside, and that Art. 44, Lim. Act, does not apply. I infer that he would regard such an alienation as void, but the view is unsupported either by discussion or by reference to case law. The observation with regard to Art. 44 is derived from the Privy Council judgment in *Mata Din* v. *Ahmad Ali* (2), but that case was decided upon Mahomedan law, which unlike Hindu law does not recognize a de facto guardian. It appears doubtful therefore whether it is good authority for the proposition, and in any case it does not follow that because Art. 44 may be inapplicable, the transaction would be void. Its applicability depends in the first place upon the construction to be placed upon the word "guardian" in it The cases relating to Mahomedans have received some notice in *Seetharamamma* v. *Appiah* (3), where it was held that an alienation by the de facto guardian of a Hindu minor was valid if for necessity, and if not for necessity was voidable only, so that it could be ratified by the minor on attaining majority. It has been said that this was not really the question before the Bench but that is not so because both the learned Judges hold that apart from necessity there was ratification by the minor on attaining age in the case of one of the sales. The case is therefore clear authority for the proposition. It was followed by Odgers, J., in *Erulandi Thevan* v. *Subramania Aiyar* (4). In *Chinna Alagumperumal Karayalar* v. *Vinayagathammal* (5) it was found that the alienation was effected by a person who was not even a de facto guardian so that it was void ab initio. There is an obiter dictum that it is well settled that the powers of a de facto guardian are the same as those of a lawful guardian under the Hindu law and authority is cited for the proposition. The same judgment however contains the remarks that the unauthorized or improper alienation of a minor's property by a de facto guardian need not be set aside, which I cannot reconcile with the other view. The question in *Ramaswami* v. *Kasinatha*, *A.I.R.* 1928 *Mad.* 226 to which I was a party, was rather the effect of an alienation by a de facto guardian which was supported by necessity, and we held that in such a case the de facto guardian was in the same position as a de jure guardian. We reached this conclusion on a general survey of the de facto guardian's powers, though it is true that the effect of an alienation unsupported by necessity had not to be pronounced upon.

It appears to me that such authority as is furnished by decisions of this Court is perceptibly in favour of the view that such an alienation is voidable and not void. Two cases decided by the Judicial Commissioner, Nagpur, *Hussein* v. *Rajaram* (6) and *Mohadeo* v. *Somaji* (7), are against it, but they do not take into consideration the difference between Mahomedan and Hindu law upon this subject.

(1) [1914] 38 Mad. 1125=26 I.C. 179.
(2) [1912] 34 All. 213=13 I.C. 976=39 I.A. 49 (P.C.).
(3) A.I.R. 1926 Mad. 457=92 I.C. 827=49 Mad. 768.
(4) [1926] 97 I.C. 611.
(5) A.I.R. 1929 Mad. 110=117 I.C. 731.
(6) [1914] 10 N.L.R. 133=23 I.C. 813.
(7) A.I.R. 1927 Nag. 145=99 I.C. 1050.

In a Lahore case, *Papassi Ram* v. *Raja Ram* (8), it was held that under Hindu law a de facto guardian's alienation was not void.

If a de facto guardian, equally with a de jure guardian, can alienate for necessity, it is not very easy to perceive why, if not so supported, the one should be only voidable and the other void. Even to alienate for necessity connotes some power to deal with the property and indeed not only is such a power recognized in a de facto guradian but the view seems to be that in all such dealings no distinction can be drawn between the powers of the two classes of guardians. I am at least justified, I think, in laying it upon the party asserting that an alienation while voidable in the one case is void in the other, to establish his proposition, and this he has not succeeded in doing to my satisfaction. I conclude accordingly that the plaintiffs had to attack the prior mortgage of 1906, and therefore that their suit is time barred.

The second appeal is allowed and the plaintiff's suit dismissed with costs to defendants 2 to 6 throughout.

P.R.S./B.V. *Appeal allowed.*

(8) A.I.R. 1930 Lah. 136=115 I.C. 417.

A. I. R. 1931 Madras 276

JACKSON, J.

Muhammad Ahmad— Complainant—Petitioner.

v.

Bezwada Venkanna and *another*—Accused—Respondents.

Criminal Revn. Cases Nos. 443 and 444 of 1930, and Criminal Revn. Petns. Nos. 410 and 411 of 1930, Decided on 25th November 1930, against order of Sess. Judge, East Godaveri Division, at Rajahmundry, D/- 21st April 1930.

Penal Code, S. 486—Prosecution if launched within three years of offence complained against is within time—Merchandise Marks Act (4 of 1889), S. 15.

Section 486 specifically confines the offence to selling a thing. The prosecution is within time if launched within three years of specified offence complained against. The starting point for limitation is not the termination of three years from the date of the first of a series of offences; *A. I. R.* 1928 *Cal.* 495; *A. I. R.* 1930 *Cal.* 274 and 22 *Mad.* 488, *Ref.* [P 276 C 2]

A. S. Sivakaminathan—for Petitioner.

V. L. Ethiraj, G. Lakshmanna and *T. V. Srinivasachari* — for Respondents.

Order.—Petitioner seeks to revise the orders of the Sub-Magistrate of Rajahmundry in C. C. 1018 and 1019 of 1929, discharging certain accused against whom complaints had been lodged under Ss. 482, and 486, I. P. C. Some prosecution witnesses admitted that the accused had been using the alleged false trade-mark for four or five years. Thereupon the Sub-Magistrate ordered discharge finding that under S. 15, Act 4 of 1889, the prosecution was barred.

Section 486, I. P. C., runs:

"Whoever sells anything with a counterfeit trade-mark affixed shall unless he proves such and such . . . . . be punished."

Section 15, Act 4 of 1889, runs:

"No prosecution (for an offence against any of the sections of the Penal Code which relate to trade) shall be commenced after the expiration of three years next after the commission of the offence, or one year after the discovery thereof. . . . . "

Paragraph 8 of the complaint is to the effect that accused supplied certain buyers with counterfeited Otto Dilkush Ranjan, a scent of which the complainant claims to be proprietor.

It is not suggested that these sales were three years prior to the complaint or their discovery one year prior.

But the Sub-Magistrate finds that the accused's trade-mark has been in use for five years and they have sold goods under it for that period; and the cases are therefore clearly time barred.

The learned Sessions Judge, to whom the matter was referred under S. 435, Civil P. C., reads S. 15 as saying that the starting point for limitation is the termination of three years from the date of the first offence; meaning thereby the first of a series of offences, or, in this case, the first sale of a bottle of this scent. But there is nothing about a series in S. 15, Act 4 nor in S. 486, I. P. C. In fact S. 486 specifically confines the offence to selling a thing, "goods or thing." The prosecution is within time if launched within three years of the specific offence complained against.

This is the interpretation of the statutes which has prevailed in Calcutta: *A. I. R.* 1928 *Cal.* 495; *A. I. R.* 1930 *Cal.* 274, and it is not opposed to the only reported Madras case *Ruppoll* v. *Ponnuswami Tevan* (1). The learned Sessions Judge is in no way bound by unreported cases, and if he cannot agree with them he will be well advised not to criticize them.

(1) [1899] 22 Mad. 488=1 Weir 821.

The petition is allowed and the order of discharge is set aside. The Sub-Magistrate must proceed according to law.

P.R.S./K.N. *Petition allowed.*

A. I. R. 1931 Madras 277

SUNDARAM CHETTY, J.

Shankaranaraina Saralaya — Appellant.

v.

Laxmi Hengsu and *others* — Respondents.

Appeal No. 496 of 1927. Decided on 16th September 1930. against order of Sub-Judge, South Kanara, D/- 5th July 1927.

Civil P. C. (1908), O. 22, R. 3 — Two appeals out of same suit—One by plaintiff and other by defendant — Abatement of latter as legal representative of respondent not added in time while in former legal representative of appellant added within time—This fact cannot entitle the defendant appellant to say that his appeal should be allowed to proceed.

Where two appeals are independently filed and arise out of the same suit and where one is filed by the plaintiff in the original suit and the other by the defendant and where the appeal by the defendant-appellant has abated as he has not added the legal representative of the deceased respondent in time the defendant-appellant cannot claim the benefit of the fact that the legal representative of the deceased appellant in the appeal filed by the plaintiff-appellant has been added within time and therefore say that it should be taken that those legal representatives have also been added in place of the deceased respondent in his appeal. The analogy of an appeal and memorandum of cross-objections in the same appeal does not hold good in the present case and hence the abatement cannot be set aside: 45 *I. C.* 959 and 26 *Mad.* 91, *Dist.*; *A. I. R.* 1917 *P. C.* 156, *Expl.* and *Ref.* [P 277 C 2; P 278 C 1]

B. Sitaram Rao—for Appellant.

K. Y. Adiga—for Respondents.

Judgment.—This is an appeal preferred against the order of the Subordinate Judge of South Kanara refusing to set aside the order of abatement in A. S. 151 of 1926 on his file. It appears that two independent appeals were filed against the decree of the 1st Court passed in the suit one appeal being by the plaintiff and the other appeal by defendant 2. In the appeal filed by defendant 2 the legal representatives of the respondent namely the plaintiff not having been added within the time prescribed by law there was an abatement and when that abatement was sought to be set aside the lower Court found that there was no ground for allowing the petition on the merits and dismissed it.

The point now taken in this appeal is a pure question of law. It is argued that because the legal representatives of the appellant in the other appeal (who is no doubt the plaintiff in the suit) have been added within the time allowed, it should be taken that those legal representatives have also been added in place of the deceased respondent in this appeal. There is no authority directly bearing on the question that arises in this appeal. There is no interdependence between these two appeals and the analogy of an appeal and a memorandum of objections in the same appeal does not hold good in the present case where we have to deal with two separate and independent appeals though arising from the same suit. The decision in *Vathiar Venkatachariar* v. *Ponnappa Ayyangar* (1) relied on by the learned advocate for the appellant does not seem to help him in this case. In that case, though the legal representative of the deceased respondent was not added in the appeal within the prescribed period of time that legal representative came into Court with a memorandum of objections in connexion with that appeal. The learned Judges held that the rule requires that a person should be a respondent in the appeal in order to entitle him to file cross-objections and therefore when the legal representative of the respondent was allowed to come on the record in connexion with the memorandum of objections he was in effect made respondent in the appeal also. On this special ground it was held that there was no abatement of the appeal. In the present case when there are two independent appeals the principle of the aforesaid decision cannot reasonally be extended and therefore it is not possible to assume that the legal representatives of the respondent in the present appeal have been brought on record merely because they came to be added in the other appeal as the legal representatives of the deceased appellant. The decision in *Krishnachariar* v. *Mangammal* (2) proceeded mainly on the meaning to be attached to the expression "final decree" in Art. 197, Lim. Act. 15 of 1877 for the purpose of computing the starting point for limitation as regards an application for execution. The date of the final decree of the appellate Court

(1) [1918] 45 I. C. 959.
(2) [1903] 26 Mad. 91.

being the starting point for limitation, it was held that limitation should be computed from that date for executing any portion of the decree in the suit though that particular portion of the decree was not the subject matter of the appeal. I fail to understand how the view taken in that decision can be of any avail to the appellant in this case.

There remains the decision of the Privy Council reported in *Brij Indar Singh* v. *Kanshi Ram*. (3) In that case when an order on an interlocutory application passed during the course of a suit was made the subject of an appeal or revision in the appellate Court and when the legal representative of the original plaintiff was brought on record in the appellate Court as the death of the plaintiff occurred during the pendency of the matter before the appellate Court it was held that when the suit had to be tried again by the first Court after the disposal of that appeal, no fresh application to bring in the legal representatives of the deceased plaintiff was necessary. Their Lordships have held that the introduction of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. When the subjectmatter of the interlocutory application was pending in the appellate Court it was deemed to be one stage of the suit and therefore there was no need to put in a fresh application at a further stage of the suit when it came on for trial before the first Court. Can it be said in the present case that what was done in one appeal could enure for the benefit of another appeal unless the latter appeal can be deemed to be a continuation or a further stage of the appeal in which the legal representatives were brought on record? I am constrained to say that it is difficult to extend the principle of the decision of the Privy Council to the facts of this case. Though the order of abatement in this appeal cannot be set aside it is still open to this appellant who would be a respondent in the other appeal to ask the appellate Court to exercise its powers under R. 33, O. 41, Civil P. C. and give any proper relief to him if it is legally permissible to do so.

There being no provision of law or express authority in favour of the contention put forward on behalf of the appellant I should disallow that contention and dismiss this appeal with costs.

P.R.S./B.V. *Appeal dismissed.*

(3) A. I. R. 1917 P. C. 156=42 I. C. 43=44 I. A. 218=45 Cal. 94 (P. C.).

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* A. I. R. 1931 Madras 278

MADHAVAN NAIR, J.

Rama Ayyar—Defendant—Appellant.

v.

Meenakshi Ammal and *others*—Plaintiffs—Respondents.

Second Appeal No. 2014 of 1927, Decided on 19th December 1930, against decree of Dist. Judge, Tinnevelly, in A. S. No. 17 of 1926.

*** Hindu Law—Partition — Institution of suit for partition—Severance of joint family is effected from date of plaint.**

The mere filing of a suit for partition does not necessarily effect a final severance in status for a plaintiff may withdraw his declaration of intention and then no severance is effected but when notice of suit is served on the defendants the severance of the joint family status must be deemed to continue from the presentation of the plaint. Hence where a father after instituting a suit for partition against his son but before the son is served with summons settles some portion of his half share of the property on his daughters and simultaneously executes a will and thereafter dies during the pendency of the suit, the settlement and will are valid: *A. I. R.* 1924 *Oudh* 252; 35 *Ill.* 80; 28 *I. C.* 625; 39 *Mad.* 159; *A. I. R.* 1916 *P. C.* 104; *A. I. R.* 1922 *P. C.* 201; *A. I. R.* 1925 *P. C.* 49; *A. I. R.* 1925 *Mad.* 717; *A. I. R.* 1922 *P. C.* 353; *A. I. R.* 1917 *P. C.* 39 and *A. I. R.* 1929 *Mad.* 738, *Ref.* [P 231 C 2; P 232 C 1]

K. Rajah Ayyar and *K. Venkateswaran*—for Appellant.

S. Rajagopalachari—for Respondents.

Judgment.—Defendant 1 is the appellant. His father one Subbier filed a suit against him for partition of joint family property on 19th August 1922. The summons in the suit was served on the defendant by affixing it on the door on 16th September 1922. On 15th September 1922 (i. e., one day before the service of the summons) Subbier settled some portions of his half share of the property on two of his daughters and simultaneously executed a "will" with respect to the other properties. He died on 1st April 1924 but even by that time the suit had not been tried. The persons entitled under "the settlement" and the "will" were after contest brought on as his legal representatives as plaintiffs 2 to 6 and defendant 10 and they got a decree for a half share of the property. The first Court's decree was confirmed on appeal by the appellate Court.

In second appeal it is argued that on the date of the "will" and "settlement" (that is, 15th September 1922) the father had no power to execute them as the declaration of his intention to divide contained in the plaint was not communicated to the defendant till 16th September 1922 and as he for that reason still remained a member of an undivided Hindu family at the time of the execution of those documents. In reply it is contended that by the mere presentation of the plaint for partition in a suit in which notice has been served on the defendant the plaintiff becomes divided from the other members of the joint family and that the status of division in such a case takes effect from the date of the plaint and not from the date when the notice of the suit is communicated by the Court to the defendant.

The question in this form has not arisen for determination in any of the Courts but there is a decision on the point in the Judicial Commissioner's Court reported in *Rachhpali* v. *Chandesardei* (1) to which I shall refer in the course of this judgment. If the appellant's contention is accepted it would follow that his father had no power to execute the will and settlement in question as he was on the date when they were executed still a member of an undivided family since the notice was served on the defendant by Court only the next day after the execution of the documents, that is on 16th September 1922.

In considering this question it is not necessary to refer to cases earlier than the well-known Privy Council decision in *Suraj Narain* v. *Iqbal Narain* (2) in which occurs the following passage:

"The principle applicable to cases of separation from the joint undivided family has been clearly enunciated by this Board in *Beran Prasad* v. *Ratha Beeby* (3) and the well-known cases of *Appavier* v. *Rama Subba Ayyan* (4). What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case A definite and unambiguous indication by one member of intentionto separatehi mself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed"

Beyond stating the principle in broad terms their Lordships of the Privy Council did not further explain what would constitute

"a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty

and when, that intention can be said to be "unequivocal" and "clearly expressed" as they were of opinion that the application of these tests must depend upon the facts of each case. Naturally enough cases arose where Courts were called upon to consider how far the general principle enunciated by their Lordships of the Privy Council would apply to the particular facts and circumstances of the case before them. Each party has relied on the observations in these cases in support of its respective contentions.

In *Pothi Naikin* v. *Nagamma Naicken* (5), Sankaran Nair, J., referring to these observations held that:

"It is open to a member of an undivided family governed by the Mitakshara law to effect a separation between himself and the other members of the family by a declaration to that effect made to the other members. The declaration must be clear and in such a form that it is not open to him afterwards to say that he still continues as a member."

In that case the unequivocal intention to separate was found expressed in an unregistered partition deed. In *Soundararajan* v. *Arunachalam Chetty* (6) the question arose:

"whether a member of a joint Hindu family becomes separate from the other members by the fact of suing them for partition"

and it was referred to a Full Bench for decision. The learned Judges of the Full Bench answered the question in the affirmative. In the course of the judgment in this case, Sadasiva Ayyar, J., examined the question

"whether the filing of the suit for partition would constitute in the language of the Privy Council a definite and unambiguous indication by one member of his intention to separate himself and enjoy his share in individuality "and" whether such intention is made "unequivocal" by the filing of the plaint and becomes "clearly expressed" to the other coparceners by the summonses served on them in the suit."

After stating the circumstances in which the plaint may be said to contain unequivocal and unambiguous declaration

(1) A. I. R. 1924 Oudh 252 -78 I. C. 256=27 O. C. 114.
(2) [1913] 35 All. 80=18 I. C. 30=40 I. A. 40 =16 O C. 129 (P.C.).
(3) [1848-50] 4 M, I. A. 137=7 W. R. 35 (P.C.).
(4) [1853] 11 M. I. A. 75=8 W. R. P. C. 1= 2 Sar. 218 (P. C.).
(5) [1915] 28 I C. 625.
(6) [1916] 39 Mad. 159=33 I. C. 858.

of the plaintiff's intention to separate the learned Judge stated thus:

"If that intention is communicated through the Court by summonses issued to the defendants (the remaining coparceners in that case, such clear expression of intention becomes fully effectual to create division in status. I take it that the phrase "clearly expressed" means clearly expressed to the definite knowledge of the other coparceners."

In the present case it is not questioned that the plaint contains "unequivocal" declaration of the plaintiff's intention to separate himself from the joint family. Having regard to the observations of the learned Judge in the passage above referred to, Mr. Rajah Ayyar for the appellant argues that in a case where the unambiguous declaration to separate is contained in the plaint it becomes clearly expressed to the other coparceners only when the summonses are served on them in the suit and that therefore divided status arises only from that time and does not arise by the presentation of a plaint and that in this view the decision in *Soundararajan* v. *Arunachalam Chetty* (6) is authority for the position that the appellant's father in the case before us was not divided at the time when the will and the settlement were executed by him, though the plaint in the suit was filed a month anterior to that date. It is argued on the other side that the decision is a clear authority in support of the contention that on the date of the presentation of a plaint containing an unequivocal declaration of an intention to separate, the plaintiff obtains the status of a divided member. It seems to me on a careful perusal of the judgment that the precise question I am called upon to decide in the present case did not arise for decision in the Full Bench case but I think the decision is an authority for the proposition that in a case in which the notice of the plaint containing the declaration of the unequivocal intention of the plaintiff to separate is served on the other coparceners severance of status takes effect from the date of the plaint. Viewed in this way the decision supports the respondents.

In *Girija Bai* v. *Sadasiv Dhundiraj* (7) their Lordships of the Privy Council held that the conduct of the plaintiff a member of a joint Hindu family governed by the Mitakshara law in indicating by a notice in a registered letter his intention to separate himself and to enjoy his share in severalty coupled with a suit for partition was as unequivocal and clearly expressed an intention as could .be made and that amounted to a separation with all its legal consequences. In the course of their judgment their Lordships pointed out that once the decision has been unequivocally expressed it clearly intimated to the cosharers his (plaintiff's) right to which he admittedly has a title unimpeachable.

Mr. Rajah Ayyar emphasises this observation to show that the severance of status can take affect only from the date of the service of the notice of the plaint on the defendants and notfrom the date of the presentation of the plaint ; but it is clear from the judgment that in making the observations their Lordships were only combating the positions that agreement between the coparceners is essential to the disruption of the joint status or that the severance of rights can only be brought about by actual division and distribution of the properties. This decision and the observations of Sadasiva Ayyar, J.. in *Soundararajan* v. *Arunachalam Chetty* (6) are strongly relied on by the appellant in support of his contention. It may be observed that in this case their Lordships point out that severance of status is a matter of individual volition and from this it is argued by the respondents that the mere assertion of it in the plaint is enough to bring about the plaintiff's severance from the joint family.

Mr. Ramaswami Ayyar for the respondents, besides relying on the above decisions, relied upon a series of Privy Council decisions and also upon some decisions of this Court to show that the severance of joint family status commences from the date of the institution of the suit. I shall briefly refer to those cases ; but it must be observed that in most of those cases the decision turned upon the question whether the severance takes place from the date of the commencement of the suit or from the date of the decree. The present question did not arise for decision in those cases but the principle underlying those decisions seems to support the respondent's contention.

In *Ramalinga Annavi* v. *Narayana Annavi* (8) their Lordships of the Privy

(7) A. I. R. 1916 P. C. 104=37 I. C. 321=43 I. A. 151=19 Cal. 1031 (P.C.).

(8) A.I.R. 1922 P.C. 201=68 I.C. 451=49 I.A. 168=45 Mad. 489 ((P.C.).

Council held that the institution of a suit for partition by a member of a joint Hindu family effects a severance of joint status of the family and a member of the family is not entitled to have a provision made in the partition for his marriage expenses although he marries before the decree in the suit is made. The question in controversy in that suit was whether the joint family status continues till the decree for partition. In *Palani Ammal* v. *Muthu Venkatachala Moniagar* (9) it was held by their Lordships that the filing of a plaint claiming partition by a member of a joint Hindu family if the plaint has been withdrawn before the trial, does not result in the family being separate at a later date, although it is evident that an intention to separate had been entertained by the plaintiff. In that case their Lordships pointed out that if the suit is decreed the date of the severance from the joint family will, if nothing else be proved, be treated as the date when the suit was instituted. This case also does not directly deal with the point I have to decide in this case. In the same report, *Krishnaswami Thevan* v. *Pulu Karuppa Thevan* (10), it was held by Spencer and Devadoss, JJ., that a suit by a minor for partition has the effect of creating a division of status from the date of the plaint. This decision was followed in *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar* (11).

In *Syed Kasam* v. *Jorawar Singh* (12) it was pointed out by the Privy Council that :

"it is settled law in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of status is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place ; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree."

Of all the decisions referred to by the respondents' learned counsel the decision in *Kawal Nair* v. *Budh Singh* (13) seems to support him the most. In that case their Lordships of the Privy Council observed that :

"the judgment of the Judicial Committee in the recent case of *Girja Bai* v. *Sadashiv Dhundiraj* (7) renders it beyond question that the commencement of this suit for partition effected a separation from the joint family. It is immaterial, in such a case, whether the cosharers assent. A decree may be necessary for working out the result of the severance, and for allotting definite shares but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

If, as pointed out by the Privy Council the severance of status is a matter of individual volition, then on principle, it must follow that that severance can be brought about so far as the plaintiff is concerned by an assertion of his right to separate in a plaint. It is clear from the Privy Council cases referred to that the assent of the cosharers is not necessary for effecting the severance, nor is a decree necessary to bring it about. If the severance of the joint status can be brought about by individual volition, and the assent of the cosharers is not necessary for it, then, I fail to see how it can be said that there could be no severance so far as the plaintiff in a suit is concerned unless the intention is actually communicated to the other coparceners. This position is clearly not opposed to the ruling of the Privy Council which states that the unequivocal intention of the separating coparcener to be effective must be "clearly expressed" to the other coparceners. Notice to the other cosharers of the plaintiff's intention to separate would be necessary to make the severance operative against them so that they may know he is claiming his share of the joint family property from the date of the plaint and that the severance is final ; but it cannot, I think, be a condition precedent to bring about a severance of the joint family status so far as the plaintiff is concerned. To make this severance effective as against the remaining coparceners notice no doubt would be necessary. It has been held that the mere filing of the plaint does not necessarily effect a final severance in status, for a plaintiff may withdraw his declaration of intention and then no severance is effected : see *Ganapathy* v. *Subramanyam Chetty* (14), but when notice is served the severance of the joint family status must

(9) A.I.R. 1925 P.C. 49=87 I.C. 333=52 I.A. 83=48 Mad. 254 (P.C.).
(10) A.I.R. 1925 Mad. 717=88 I.C. 424=48 Mad. 465.
(11) A.I.R. 1927 Mad. 801=104 I.C. 472=50 Mad. 866.
(12) A.I.R. 1922 P.C. 353=68 I.C. 573=49 I.A. 358=50 Cal. 84 (P.C.).
(13) A.I.R. 1917 P.C. 39=40 I.C. 286=44 I.A. 159=39 All. 496 (P.C.).
(14) A.I.R. 1929 Mad. 738=122 I.C. 167=52 Mad. 845.

be deemed to continue from the presentation of the plaint. I think the general principles underlying the Privy Council decisions support the contentions of the respondents.

This very question arose for decision in *Rachhpali* v. *Chandesardei* (1) a decision of the Oudh Judicial Commissioner's Court. In that case relying on the Privy Council decisions *Girija Bai* v. *Sadashiv Dhundiraj* (7) *Kaual Nair* v. *Budh Singh* (13), *Ramalinga Annavi* v. *Narayana Annavi* (8) and *Syed Kasam* v. *Jorawar Singh* (12) the learned Judges held that the plaintiff's status as a divided member commences from the date of the presentation of the plaint and that the service of notice of the plaint is not a condition precedent to effect such severance. It may be stated that in that case the learned Judges found in appeal that as a matter of fact notice of the suit was served on the defendant prior to the execution of the will by which the properties were gifted away.

In the present case, as already stated, notice of the plaint was in fact served upon the other coparceners though the "will and the settlement" were executed before the service of this notice. I have no doubt that the plaintiff's status as a divided member commenced from the date of the plaint and not from the date of the service of notice. Having regard to the decision in *Soundararajan* v. *Arunachalam Chetty* (6) and the other decisions referred to I must uphold the respondents' contention and dismiss the second appeal with costs.

I must observe, before concluding this judgment that in this case there is evidence that the defendants knew from the plaintiffs' vakil before the execution of the "will and the settlement" that the suit for partition had been instituted by the plaintiffs. Mr. Ramaswami Ayyar desired to argue that if the actual knowledge by the defendants of the institution of the suit is necessary to effect a severance of the joint family status, this knowledge would serve the purpose; but in the view I have taken above this argument was not proceeded with.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 282

MADHAVAN NAIR, J.

(*Suna Pana Chena Voona*) *Sevugan Chetty* and *others*—Plaintiffs—Appellants.

v.

Koovanna Kana Nana Kana Kannappa Chetty (died) and *others*—Defendants—Respondents.

Second Appeal No. 1666 of 1927, Decided on 9th January 1931, against decree of Sub-Judge, Sivaganga, in A. S. No. 42 of 1926.

Limitation Act (1908). Art. 142—Waste land—Plaintiff putting forward case of effective possession cannot rely on presumption that possession follows title—Possession.

In the case of waste land, if the plaintiff proves his title to it, he can prove possession by relying on the presumption that possession follows title inasmuch as possession of waste land cannot be proved by acts of actual user, but if the plaintiff puts forward a case of effective possession and adduces evidence in support of it then he cannot give up that case and rely upon any presumption in support of his possession, because the special case set up by him is inconsistent with any such presumption : *A.I.R* 1922 *Cal.* 557, *Rel. on.* [P 283 C 1]

Advocate-General and *M. Venkatasubbiah*—for Appellant.

S. Varadachariar, *S. T. Srinivasagopalachari* and *V. Ramasuami Iyer*—for Respondents.

Judgment.—Plaintiffs 1, 2, 3, 5 and 18 are the appellants. This second appeal arises out of a suit instituted by the plaintiffs for possession of the suit property and for demolition of a wall built by defendants 1 and 2 on the plaint site. The plaintiffs' case is that the suit property belongs to them by purchase, that they have been in effective possession of the property for a considerable number of years and that while they were in possession, on or abont 25th February 1924, the defendants trespassed upon it and began to construct the wall referred to in the plaint. The District Munsif found both title and possession in favour of the plaintiffs and gave them a decree. The learned Subordinate Judge found on appeal that the plaintiffs' title was proved but that they failed to prove possession within 12 years and accordingly dismissed the suit.

The only point argued in second appeal relates to the decision of the Subordinate Judge on the question of limitation. The land in question is admittedly waste land. The contesting defendants gave evidence to show that prior to 1924, for about six or seven years a butcher was

in possession of the land with their permission. This evidence was intended to disprove the specific case of dispossession set up by the plaintiffs in the year 1924. It is not seriously contended that Art. 142, Lim. Act, is not applicable to the case. The averments in the plaint, the issues and the evidence show that the case falls clearly under Art. 142 and not under Art. 144. What the learned Advocate-General argues is that having regard to the nature of the land, which is admittedly a waste land, the learned Subordinate Judge should have held that possession follows title and that the plaintiffs were therefore in possession of the suit land, and that inasmuch as the defendants have not shown possession for more than seven years, the question of limitation should have been decided in plaintiffs' favour. In other words he argues that having regard to the special circumstances of the case it does not seriously matter whether Art. 142 or Art. 144 applies to the case; and that since possession should be deemed to have been presumptively with the plaintiffs as they have proved their title to the land the defendants should not be allowed to succeed unless they prove adverse possession of the land for over 12 years. This argument is fallacious and cannot be accepted. It is true that in the case of waste land, if the plaintiff proves his title to it he can prove possession by relying on the presumption that possession follows title inasmuch as possession of waste land cannot be proved by acts of actual user ; but if the plaintiff puts forward a case of effective possession and adduces evidence in support of it as the plaintiffs have done in this case, then he cannot give up that case and rely upon any "presumption" in support of his possession because the special case set up by him is inconsistent with any such presumption. The following passage from the judgment in *Kakhal Chandra Ghose* v. *Durga Das* (1) makes this point very clear:

"....Where definite evidence of acts of possession is forthcoming there is no difference between the proof of possession in the case of jungle, waste, or uncultivated lands and in that of cultivated lands. But where, as in the case of cultivated lands, the plaintiff will fail if he does not prove his possession within 12 years, in the case of jungle or waste lands, if he proves his title, there is a presumption in his favour where, having regard to the nature of the land, possession cannot be expected to be proved by acts of actual user and enjoyment. If however the plaintiff asserts that he exercised acts of ownership upon the land and adduces evidence in support of such assertion, he cannot, where such evidence is disbelieved by the Court, turn round and rely upon any presumption, because the case set up by him negatives the existence of circumstances which would give rise to the presumption and is inconsistent with it."

In the present case it is stated in the plaint that the plaintiffs were in possession of the suit plot, that they tried to erect a temple on it and then erected a nandavanam; and while they were in such effective occupation and enjoyment the defendants trespassed and began to build a wall on the plot in question: see paras. 7, 12 and 13 of the plaint. In this connexion it should also be noted that not content with saying that they were in such effective occupation of the suit plot they relied upon the possession and enjoyment to such an extent that they claimed also prescriptive title to the land by adverse possession: see para. 13 of the plaint. Evidence in support of these pleas was also adduced by them. These circumstances would show how inconsistent is the present plea of "presumptive possession" with the actual case put forward by them in the plaint and sought to be supported by their evidence. The defendant's evidence of possession of the suit plot on their behalf for over seven years was intended only to rebut the actual dispossession in 1924 alleged by the plaintiffs Having regard to the case put forward by the plaintiffs, the defendants were not called upon to prove any case of adverse possession for over 12 years. In my opinion the onus was rightly thrown by the lower Courts on the plaintiffs of proving possession of the property within 12 years of the suit; and, as the evidence on the question of possession was disbelieved by the lower appellate Court, the suit was rightly dismissed. I would therefore dismiss this second appeal with costs.

P.R.S./B.V. *Appeal dismissed.*

(1) A. I. R. 1922 Cal. 557=67 I. C. 673.

A. I. R. 1931 Madras 284

WALLACE AND PANDALAI, JJ.

Malyam Patel Basavana Gowd (dead) and *others*—Appellants.

v.

Lakka Narayana Reddi and *another*—Respondents.

Appeal No. 370 of 1929, Decided on 23rd October 1930, against decree of Dist. Judge, Bellary, D/- 27th February 1929.

(a) Civil P. C. (1908), O. 1, R. 10—Party may be struck off against whom no relief is claimed.

Per *Wallace, J.*—Where no cause of action is mentioned against a party to a suit and no relief is claimed against him it will be improper and unnecessary to retain him and he may be struck off from the suit. [P 286 C 1]

(b) Easements Act (1882), Ss. 7 and 17—Rights to water as against Government of a ryotwari wet land holder stated.

The ryot is entitled to be given such supply of water as is necessary and sufficient for the irrigation of his registered wet fields. He must accept that supply from the irrigation source approved by Government as the source of supply for his fields and he must accept the method or machinery by which Government supplied that water. He has no right to insist that his supply shall come from any particular source or any other source than that recognized by Government or that it shall come by any particular channel, nor can he prescribe against the Government for such right by user otherwise for any length of time. It is open to Government to alter at any time the manner and method by which it supplies the necessary water to him and he has no grievance or cause of action thereon. Between him and the Government there is something in the nature of a contractual obligation under which Government undertakes to regulate, distribute and furnish to him his necessary supply in the manner authorized by it as the proper and usual manner until and unless Government has provided him with another, equally efficient. Government by undertaking the obligation to supply him with water also undertakes that it shall be at his disposal by the usual and customary method, that is, by channel constructed either by Government or by ryot or by both, until and unless some other method is adopted. This obligation by Government is in certain cases subject to the reciprocal obligation of the ryot to keep the main channel free from silt and sometimes himself to construct the minor interfield channels. By custom certain channels are earmarked by Government for certain villages or areas of wet cultivation. As between two such villages or areas each taking off from the same source by its own channel, the right of each to water, be it contractual or proprietary, as against Government, is to its necessary and sufficient supply and as against each other to that supply so soon as the supply has passed into its own channel and earmarked for it. The same principle mutatis mutandis applies to individual wet ryots of the same villages inter se. The wet ryot has a right as against other wet ryots and even subject to Government's right to give him an equally efficient supply, as against Government to the protection of law for that supply, once it has passed into the channel earmarked for his supply. One ryot cannot prescribe against another or against Government for supply by any one particular channel. His user of a particular channel is in no sense adverse to the user by another of another channel, since each uses it by authorization of Government. Nor is it an easement by which he is conveying property of his own over a servient tenement. It is an incident of ryotwari tenure. If the customary supply and manner of supplying according to this contractual or proprietary right has been interfered with not by Government but by private parties, such interference, prima facie is an invasion of a right and will give rise to a civil cause of action: 7 *M. H. C. R.* 60; 16 *Mad.* 333; 28 *Mad.* 72; 31 *Mad.* 171; 32 *Mad.* 141; 32 *Mad.* 423; 37 *Mad.* 304 and 1 *Mad.* 205, *Ref.*; 45 *I. C.* 80; *A. I. R.* 1924 *P. C.* 126, *Dist.* [P 287 C 1, 2; P 288 C 1]

(c) Easements Act (1882), S. 7—Principles of English law relating to underground streams should not be applied to India where conditions are different.

The doctrine of percolating water flowing underground in undefined channels as settled by English decisions should not be applied to the water carried in the sandy bed of an Indian river in the dry months between monsoon to monsoon. Necessary modifications must be made in the English law of flowing water to make it applicable to the tropical countries: *Acton* v. *Bundell*, 152 *E. R.* 1223; *Chasemore* v. *Richards*, 7 *H. L. R.* 349; *English* v. *Metropolitan Water Board*, (1907) 1 *K. B.* 588; *Grand Junction Canal Co.* v. *Shingar*, 6 *Ch.* 483 and 37 *Mad.* 304, *Dist.*; *A. I. R.* 1914 *P. C.* 48; *A. I. R.* 1922 *P. C.* 105 and *Stollmeyer* v. *Trinidad Lake Petroleum Co.* (1918) *A.C.* 485, *Ref.* [P 297 C 2]

(d) Easements Act (1882), S. 7—Ryot who is injured in water supply of his customary channel has right of action against offending ryot.

If a ryot entitled to water in an irrigation source, starting in the river bed, abandons his customary channel and opens another in such a way as to cause loss or likelihood of loss of supply to another ryot in his customary channel the latter has a right of action against the offending ryot. It makes no difference in the law applicable that the Government supply of water in the river bed sinks at times below the surface. Government by recognizing these channels has recognized that the subsurface water is part of the recognized supply, which it is their duty to have conveyed in sufficient quantity to the respective wet areas. So that even if it is underground water, it is underground water in which there can be a legal right: 16 *Mad.* 333 and 31 *Mad.* 171, *Ref.*; 33 *Mad.* 280 and 45 *I. C.* 80, *Dist.* [P 289 C 1]

(e) Easements Act (1882), Ss. 33 and 35—Cutting of water supply from plaintiff's channel—Plaintiff has cause of action apart from proof of actual damage.

When the whole of water supply has not been cut off, but only some of it, and when there has also been a general shortage of supply, it is very difficult for a party to prove the precise amount or diminution caused by the action of others or

the precise amount of the particular damage caused by that diminution. Under such circumstances the injured party has a cause of action apart from proof of actual damage and has a right to an injunction if he establishes prospective probable damage: 7 *M. H. C. R.* 60, *Rel. on* and 31 *Mad.* 171, *Ref.* [P 290 C 2]

(f) Civil P. C. (1908), S. 100—Questions of fact cannot be raised in second appeal for first time

Pandalai, J.—The questions of fact which have not been raised in the lower Court cannot be raised in second appeal. [P 295 C 2]

(g) Easements Act (1882), S. 7—As between owners of land no one has right of property in water flowing underground in undefined channels by percolation.

Pandalai, J.—As between owners of land no one has a right of property in water flowing underground in undefined and unknown channels by percolation. As a consequence of this, one owner has no right of action against another, who by sinking wells or by other works on his own land, draws off and appropriates the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him and this even when it is done from an improper motive or maliciously. But that other owner cannot go on his neighbour's land, dig there and take the underground water found there and justify his action because the water was running in undefined channels, as that would be trespass and be an actionable wrong. These things should be done on one's own property. *Chasemore* v. *Richards*, 7 *H. L. R.* 349; *Acton* v. *Blundell*, 12 *M. L. W.* 324; *Mayor etc. of Bradford* v. *Pickles*, (1895) *A. C.* 587 and *Ballard* v. *Tomlinson*, 29 *Ch. D.* 115, *Ref* [P 296 C 2 ; P 297 C 1]

(h) Easements Act (1882), S. 7—Appropriating underground percolating water and consequent dimunition of water supply lawfully maintainable—There would be a breach of contract.

Pandalai, J.—Though there is no ownership to percolating water till it reaches a defined channel, not even of the owner of soil under which it percolates and though there is therefore no infringement of any right of property by appropriating such percolating water yet it is possible for an owner to be guilty of a breach of contract, if by appropriating underground percolating water from his land, he causes diminution of a supply which he is obliged by law to maintain, *M'nab* v. *Robertson* : (1897) *A. C.* 129, *Rel. on.* [P 297 C 1]

L. A. Govindaraghava Ayyar—for Appellant.

Govt. Pleader and *V. S. Narasimhachariar*—for Respondents.

Wallace, J.—This suit was filed by the plaintiff, as representative ryot of the ryotwari Malyam village, against defendants 1 and 2, as representative ryots of the ryotwari Kanekal village, for a declaration of the right of the plaintiff's village to take water to its fields from the point A in the Hagari river, shown on the plan, Ex. E-1, without any interference from the defendants, and for consequential injunction to ensure that right. These two villages lie on opposite sides of the Hagari river, Malyam on the east and Kanekal on the west. Both villages have registered wet land irrigated by the river by channels therefrom which are recognized as their irrigation source. When there is water flowing in the river, each village gets its supply direct from channels taken off from the river banks. When the surface flow in the river ceases the ryots have been in the habit of tapping the subsoil flow and leading it to the main channel. The Malyam ryots claim that it has been their custom and right to tap the river bed subsoil water at the point A, and the custom of the Kanekal ryots to tap that water at the point D, and the plaint asserts that in January 1924 the Kanekal ryots came some 500 yards further upstream than usual to the point K close to the point A, and by starting their channel there drew off from the Malyam channel a considerable portion of its former supply, so that its normal supply was seriously diminished and the wet crops of Malyam suffered in consequence. The suit was filed therefore in order to prevent the Kanekal ryots from coming higher upstream than the point D. The lower Court, the District Judge of Bellary, found—and in fact took it practically for granted as it was not seriously contested—that the usual custom was, as contended for by the plaintiff, namely that the Malyam channel took off at the point A and the Kanekal channel at D, and that the Kanekal ryots in 1924 broke the usual custom by coming up to the point K. But he held that the plaintiff had no legal right to compel the Kanekal ryots to remain at the point D, and further that the plaintiff had failed to prove any damage in consequence of the defendants' action, and he dismissed the suit. The plaintiff appeals.

It may be mentioned here that Government was not originally a party to the suit. The Secretary of State was joined as defendant 3 on the initiative of the trial Court, the District Munsif of Bellary, before whom the suit was originally filed. The plaintiff did not in consquence amend his pleadings, but slightly amended the plaint prayers. It is important to remember that the plaint is not conceived as based on any case against the Secretary of State. It is based primarily on a plea of prescriptive

right against the Kanekal ryots. When the Secretary of State was added, the plaintiff amended only prayers (b) and (c) of the plaint and not (a) and (d), perhaps by oversight, and inserted para. 12-A. He did not add any cause of action against the Secretary of State and hence reliefs (a) and (d) cannot be granted against him. It seems to me in these circumstances that it will be improper and inadvisable to retain the Secretary of State on the record, as any decree in a suit in which no relief was sought for against him would naturally give no relief against him. He was obviously not a necessary party. I think that the Secretary of State should now be struck out of the suit. It is better to strike him out than to hedge the decree about with platitudes in order to safeguard Government rights as against both sets of ryots in the suit.

The trial of the suit in the lower Court shows an inadequate appreciation of some important points at stake, and in consequence information is lacking on some of these. The plaint is couched in too vague terms and that led to an equally vague written statement. The lower Court ought to have directed the plaintiff to be more specific in stating the legal character of the right he claims. It ought further to have elicited in evidence whether the area over which the plaintiff claims the right to water is all registered wet double crop, since the time of the year to which the suit claim relates is the time of the second crop. The area claimed by the plaintiff in the plaint as entitled to water, namely 150 acres, is considerably larger than the registered double crop area in his village according to the Settlement Register of 1927, and, to judge from the figures in the Tahsildar's report about that time, Ex. 4 seems to represent rather the area on which double crop was raised than the registered double crop area. This difficulty has not been solved but it may be that the whole area has permission to take Government water. It appears to be, although that is also not certain, compounded double crop wet : see Ex. 4 with the rate of assessment fixed accordingly. It is further not as clear as it might be whether the plaint channel and the defence channel are in all their lengths the channels authorized by Government for the conveyance of water to the respective villages. Exs. B and C, official notes in 1890 for the Settlement of 1893, indicate that the recognized channels for Malyam and Kanekal are actually channels which start in the river bed at points approximately the present points A and D, and this opinion as regards D is endorsed by the Tahsildar in his report, Ex. 4, in 1921. Ex. B indicates the recognized Government channel for Malyam as thalaparisha i. e,, river bed channel head, and Ex. C indicates the Government channel for Kanekal as a fountain head in the river near Gangalapuram. To some extent we have been hampered in hearing the case by these shortcomings. But, in view of the long time the case has been pending, it does not seem worth while to postpone decision in order to call for further information, and I have taken for granted, what at least does not seem to have been contested, that the wet area for which the plaint claim is put forward is registered wet or at least permitted wet, apparently compounded double crop, and that the authorized irrigation channels for Malyam and Kanekal are those which have been usually taken off in the river bed itself at the points A and D respectively.

The general law of this Presidency governing the rights to water as against government of a ryotwari wet land holder is well settled and admits of no doubt. The ryot is entitled to be given such supply of water as is necessary and sufficient for the irrigation of his registered wet fields. He must accept that supply from the irrigation source approved by Government as the source of supply for his fields and he must accept the method or machinery by which Government supplied that water. He has no right to insist that his supply shall come from any particular source or any other source than that recognized by Government or that it shall come by any particular channel, nor can he prescribe against Government for such right by user otherwise for any length of time It is open to Government to alter at any time the manner and method by which it supplies the necessary water to him and he has no grievance or cause of action thereon. It follows that between him and Government there is something in the nature of a contractual obligation under which Government undertakes to regulate, distribute and furnish to him

his necessary supply in the manner authorized by it as the proper and usual manner until and unless Government has provided him with another, equally efficient. The leading cases on this subject are *Krishna Ayyan* v. *Venkatachella Mudali* (1), *Ramachandra* v. *Narayanaswami* (2), *Sankaravodivelu Pillai* v. *Secretary of State* (3), *Rama Odayan* v. *Subramania Ayyar* (4); *Fisher* v. *Secretary of State* (5) and *Nynappa Servai* v. *Veeran* (6). It has never been very definitely laid down whether this right is of the nature of a proprietary right or a contractual right, nor is it necessary to distinguish so long as the nature and scope of the right is clearly defined.

It is not a mere right to water so that, as the defendants here contend, the ryot has no right whatever recognizable in law until the water has actually reached his field and therefore the only remedy for him if the water in his usual irrigation channel has been abstracted by a neighbour whose land is irrigated by a different channel would be to petition Government for his proper supply of water. Government by undertaking the obligation to supply him with water also undertakes that it shall be at his disposal by the usual and customary method, that is by channel constructed either by Government or by the ryot or both, until and unless some other method is adopted. This obligation by Government is in certain cases subject to the reciprocal obligation of the ryot to keep the main channel free from silt and sometimes himself to construct the minor inter-field channels. By custom certain main channels are earmarked by Government for certain villages or areas of wet cultivation. As between such villages, or areas each taking off from the same source by its own channel, the right of each to water, be it contractual or proprietary, as against Government is to its necessary and sufficient supply, and, as against each other, to that supply so soon as the supply has passed into its own channel earmarked for it. The same principle mutatis mutandis applies to individual wet ryots of the same village inter se. To accept the defendants' contention that each wet land ryot has no legal right as against another in the water earmarked for him in his own channel until the water actually reaches his fields, would lead to the consequence that any wet ryot can, not only with impunity but with the direct approval of the law, abstract from his neighbour's channel the whole of the water intended for his neighbours' field provided he does it before that water has reached his neighbours' field. That would be a disastrous proposition for the Courts to uphold and fortunately it has, so far as I can see, no support in law or in precedent. While therefore the wet ryot cannot insist as against Government that he has any right to have his supply carried by any particular channel and cannot object to Government altering the channel of supply, he has a right as against other wet ryots and even, subject to Government's right to give him an equally efficient supply, as against Government to the protection of law for that supply once it has passed into the channel at present earmarked for his supply. That is the general principle and I have to see if any of the circumstances of this case alter its application.

The plaintiff founded his plaint which, be it remembered, was framed before Government was made a party, on a claim that the Malyam ryots had by their long user and open enjoyment acquired a prescriptive right to take to their lands from the point A all the water which would naturally come to A without interruption by anyone else, and that that right had been infringed by the defendants' action in moving the head of their channel from D to K. It is clear from what has been said that no such prescriptive right can be acquired. One ryot cannot prescribe against another or against Government for supply by any one particular channel. His user of a particular channel is in no sense adverse to the user by another of another channel, since each uses it by authorization of Government. Nor is it an easement by which he is conveying property of his own over a servient tenement. The plea of easement was in fact abandoned in the lower Court. The most that the plaintiff can claim against defendants is that he and the other

(1) 7 M.L.J.O.R. 69.
(2) [1892] 16 Mad. 333=2 M.L.J. 279.
(3) [1905] 28 Mad. 72=15 M.L.J. 32.
(4) [1903] 31 Mad. 171=18 M.L.J. 178.
(5) [1909] 32 Mad. 141=2 I.C. 325.
(6) [1909] 32 Mad. 423=4 I.C. 722.

ryots of Malyam village have a legal right, contractual or proprietary, to have their usual supply furnished by the channel implicitly or explicitly recognized by Government as the usual method of supply for the time being, until and unless an equally efficient supply and method of supply are adopted. But if that customary supply and manner of supply according to this contractual or proprietary right has been interfered with, not by Government but by private parties, such interference, prime facie, is an invasion of the plaintiff's rights and will give rise to a civil cause of action. On this point : see *Krishna Ayyan* v. *Venkatachella Mudali* (1), *Rama Odayan* v. *Subramania Ayyar* (4) which will be dealt with later and *Audinarayana* v. *Ramudu* (7) which clearly recognizes that wet field owners have this right to the water of their supply channels, while these exist as definite channels.

Against this conclusion the defendants contend, first that the plaintiff acquires no legal right to the water until it has reached his field, a contention with which I have already dealt; secondly, that in this case the ordinary Presidency law as set out above will not apply because these river bed channels from A and D are too undefined and uncertain to be the subject matter of any legal right; third, that the water tapped is subsoil water and in that no property rights accrue; fourth, that no action will lie without proof of actual damage, which they contend, has not been proved. As to point 2, the argument must be that the course of the channels is too indefinite to justify the conclusion that they are intended to be the sources of supply to the villages. But obviously this cannot stand on the facts proved. On the evidence there can be no doubt, as the District Judge has found that Malyam village was in the habit of taking its channel at point A and the Kanekal ryots at the point D until the crucial year 1924. Defendants' own witnesses admit that the usual point of take off for their channel was opposite to the hamlet of Gangalapuram in Kanekal village, i. e., somewhere near D. These witnesses in fact assert that the Kanekal village ryots had not even in 1924 gone higher up than D; but that was obviously a false case, and need not be pressed against them here. I take it that until 1924 Kanekal village had usually taken off at the point D and that points A and D are sufficiently definite and familiar to the villagers. This matter seems to me concluded by the fact which appears from Exs. B and C, already noted that these river bed channels taking off at A and D are the recognized Government sources of supply. If these are definite enough for Government and the ryots so to recognize them, they are definite enough for all practical purposes. The points B and E where the two channels leave the river bed seem also to be fixed points. I think the contention that the channels are too undefined to give rise to a cause of action is not justified.

On the third point it is sought to apply the principles of English law applicable to underground streams defined and undefined as set out chiefly in *Acton* v *Blundell* (8) and later cases *English* v. *Metropolitan Water Board* (9) and *Chasemore* v. *Richards* (10) cited by the respondents and *Grand Junction Cannal Co.* v. *Shugar* (11), cited by the appellant. It is urged by the respondents that no one can predicate, or prescribe for a proprietary right or easement in underground streams. Although both sides have to a certain extent relied upon English cases, my considered view is that conditions in England are so different to those in the District of Bellary that I deprecate calling in aid English law on this subject and confess that I do not myself find it of any assistance here. In the first place, irrigation rights such as have been set out above to supply of water for irrigation from recognized Government sources are unknown in England, such rights are therefore unknown to English law. Secondly, the running of a river current down its natural bed in the dry season a few inches below the sandy surface is a phenomenon unknown in England. The underground water to which the English cases apply is usually water between layers of

(7) [1914] 37 Mad. 304=17 I. C. 648.

(8) 152 E. R. 1223=12 M. & W. 324 = 13 L. J. Ex. 289.

(9) [1907] 1 K. B. 588=96 L. T. 573=71 J. P. 313=5 L.G. R. 384=23 T. L. R. 313,

(10) [1854] 7 H. L. C. 349=29 L. J. Ex. 81= 5 Jur. (n.s.) 873=7 W. R. 685.

(11) [1871] 6 Ch. 483=24 L. T. 402=19 W.R. 69.

subterranean rock or clay so hidden that no one can guess what their course is.

In this country, it is fairly safe to say that the under-current of a river is probably flowing down the river bed and that its course is defined in the sense that one will probably be able to tap it somewhere in the river bed, and the water thus is found in, and has not left, the recognized irrigation source, namely, the river. Finally, the English cases are usually contests between owner of the surface property under which the subterranean water originally was and the owner of the surface under which it was subsequently found and the crucial question was whether the ordinary rights of ownership extended to such water. Here there is no question of rival owners of the surface lawfully using their own lawful property and claiming that ownership of the surface imports ownership of and property in subsoil water, but a question of the rights of rival claimants to water which is the property of a third party, namely, Government. No doubt the principles of these English cases have been referred to and applied by this High Court in a case *Adinarayana* v. *Ramudu* (7) but there the question was whether the plaintiff could claim rights in water which merely spread over his neighbour's field casually and not in a defined channel. The parties to that suit were zamindari ryots and no question arose of the rights of ryotwari ryots to the water of a river bed in a sub-surface channel which is their recognized source of irrigation. In the present case it seems to me amply proved on the facts that the river channels customarily taking off from A and D are 'the recognized sources of irrigation for the wet lands in Malyam and Kanekal respectively, and in my view it makes no difference in the law applicable that the Government supply of water in the river bed sinks at times below the surface. Government has by recognizing these channels recognized that the sub-surface water is part of the recognized supply which it is their duty to have conveyed in sufficient quantity to the respective wet areas. So that even if it is "underground" water, it is underground water in which, by the law of this Presidency, there can be a legal right, and to which plaintiff has a legal right.

The position is much as if the river were a large well or a subterranean pond from which authorized channels took off at various recognized points for irrigating various wet areas. I am not pointed to any authority which has laid down that, if a ryot entitled to water in such an irrigation source abandons his customary channel and opens another in such a way as to cause loss or likelihood of loss of supply to another ryot in his customary channel, the latter has no action against the offending ryot. On the contrary it has been held in several cases that he has such a right. In *Ramachandran* v. *Narayanaswami* (2) damages were awarded against a ryot who had induced Government to open for his benefit a new channel which materially diminished the customary water supply of another's land. In 31 *Mad.* 171 an injunction was awarded against some ryots who had wholly cut off another ryot's usual channel supply by blocking the entrance of the channel. The ruling in *Narasappa* v. *Ganapathi Rao* (12) is not in point, because there neither the plaintiff nor the defendant had any right to the water of the pond and had therefore no right to prevent the other taking, if he could, the whole of it. Isolated passages in *Mahankali Lakshmia* v. *Kurnam Narayanappa* (13), are strongly relied upon by the respondents, but the general ratio decidendi does not assist them, for there the point was whether the plaintiffs could maintain an action on a mere threat of the defendants to interfere with a channel which was not the recognized channel of irrigation, though they had taken water from it without objection from Government for a long time, and it was held that the plaintiffs' claim of a possessory right in the water of this channel, which possessory right had been threatened, could not stand.

This was negatived because the plaintiffs did not prove any right to take water by that channel at all and had not made the Government a party to the suit to give Government an opportunity of saying whether they recognized the plaintiffs' right to the water of this channel or not. If any point be made that in this *Madras Weekly Notes* case Government had by acquiescence for

(12) [1915] 38 Mad. 280=29 I. C. 255.
(13) [1918] 45 I. C. 80.

some time authorized water being taken by the unauthorized channel, that is not the case here, as Government distinctly plead that they did not authorize the defendants to come to the point K. I therefore find that the defendants' ground of contention No. 3 is not made out and is no bar to the maintainability of this action.

The only question therefore now to be considered is contention No. 4, whether actual damage must be proved, and if so, whether it has been proved. I shall take the latter point first. I am of opinion that actual damage has not been proved. The oral evidence of the villagers on both sides is very unsatisfactory. The evidence offered for Malyam on this point is very inadequate. Only one villager of Malyam is examined, the plaintiff himself, and no Malyam village accounts were filed for the plaintiff. Some have been exhibited by the defendants and they show that there was certainly not a total failure of the Malyam crop, although there was a short crop put at about six annas. To come to plaintiff's witnesses P. Ws. 1 and 2 discount their own evidence by a barefaced denial that the Malyam ryots shifted their channel head higher up to Srirangapuram. There can be no doubt that they did so shift it. P. W. 3 is not relied upon. His tergiversations are too pronounced. P. Ws. 4, 5 and 7 are very vague. P. W. 8 goes further than any other witness in saying Malyam channel got no water at all. That cannot be true, because the village got a six anna crop. On the defence side the evidence of D. Ws. 2, 3 and 4 is discounted by their denial that they ever shifted the Kanekal channel from the point D. The evidence of the Revenue Inspector, D. W. 5, that he did not remember any ryot of Malyam complaining to him of insufficient water supply is contradicted by Ex. 1, the statement of P. W. 1 and others put in to this very officer by the Malyam ryots on 19th May 1921. The evidence of the Tahsildar, D. W. 1, taken with his report, Ex. 4, in 1921, shows that that year was one of considerable drought and that in that locality the usual second crop was a six anna crop. It is clear that Kanekal, even with the added water which Malyam claims they got by shifting the channel head, was not able to get more than a six anna crop. It is unlikely therefore that Malyam even if Kanekal village had not come to point K would have got their normal crop or would have obtained any better than the six anna crop which the Kanekal village got. There is no evidence that any assessment was remitted in Malyam, but if the land, as I have suggested, is compounded double crop, remission would not ordinarily be given. It must be admitted that, in cases like the present, when the whole water supply has not been cut off, but only some of it, and when there has also been a general shortage of supply, it is very difficult for a party to prove the precise amount of diminution caused by the action of others or the precise extent of the particular damage caused by that diminution.

However it seems to me unnecessary to pursue this point further since I am of opinion that, on the facts of this case, the plaintiffs have a cause of action apart from proof of actual damage, and that they have a right to an injunction if they establish probable prospective damage. Even as early as *Krishnan Ayyan* v. *Venkatachella Mudali* (1), Innes, J., held that there was no cause of action for an injunction, "because no case of prospective damage had been made out upon the facts," and Kernan, J., held that it must be proved that "damage has accrued or must necessarily accrue." In *Rama Odayan* v. *Subramania Ayyar* (4) damage was presumed because the entire supply was cut off. But the ruling is that a plaintiff is entitled to succeed "if the act is such as to be likely to cause damage to him." Decision on this point must be guided by the report and the evidence of the expert commissioner examined in the case rather than by the vague surmises of lay witnesses. The P.W.D. Executive Engineer's opinion as set out in his evidence as P. W. 6, and his report Ex. E, seem to me quite clear, namely that the supply of water in the Malyam channel is likely to suffer if the Kanekal channel is taken near the point K. He says in effect that in the case of such channels tapping subsurface currents in the river bed there is always a likelihood of the lower channel drawing off water from the higher so long as the former takes off from any point above the level where the latter leaves the river bed. It is true that he says—and it is obvious—that he cannot predicate the exact

extent of the diminution without actual experiment. The District Judge, I think has been unduly impressed by that admission. For that in all probability the Kanekal channel will prejudicially affect the supply in the Malyam channel if it comes further up the river than the point D, which is opposite the point B where the Malyam channel leaves the river, there can on the Engineer's opinion be no doubt. Thus we find - and it strengthens my acceptance of the Engineer's conclusion—that the actual customary practice has been in accordance with what the expert thinks is necessary to preserve the customary supply in the Malyam channel. That is, if the location of the channels for Kanekal and Malyam had been designed by an Engineer, he would have placed the heads of of them in their present customary positions at A and D. In these circumstances it seems to me that the plaintiff is entitled to have these retained in their customary position, and to have an injunction restraining the defendants from taking off their channel in the river bed at any point higher up than the point D, so long as the plaintiff's village has the head of its channel at A and so long as it is not supplied by Government with an equally efficient supply for its registered wet lands. I would therefore reverse the decree of the lower Court and grant the plaintiff an injunction in these terms and direct that each party bear his own costs here and below.

In the view I have taken that the subsurface water of the river bed is the Government source of supply, it is clear that Government cannot shelve its duty of seeing to the equitable distribution of this supply, and that the Revenue Divisional Officer was not justified in his refusal to interfere, when the ryots of Malyam approached him with complaints of shortage of water, on the ground set out in his order in Ex. 4 that "there is no water flowing in Hagari and this is not a case of regulation of water." It appears to me clearly the duty of Government, until and unless they supply other equally efficient sources of irrigation, to see that the heads of the recognized channels at A and D are not carried further upstream but remain as they are, and that any attempt to alter the customary position should be penalized as an unauthorized interference with the rights of others equally entitled to the water of the river for their registered wet lands. I have noted above that I think Government ought to be struck out of the case as an unnecessary party and order accordingly. I would direct that Government bear its own costs in the case.

Pandalai, J.—As the case involves some novel features and we are differing from the learned Judge below I shall state my reasons for our decision.

The case arose out of a dispute in 1924 between the ryots of two ryotwari villages Malyam and Kanekal lying on opposite banks of the Hagari river about utilizing the water of the river for second crop cultivation. The Hagari flows northward, Malyam on the right, or east bank and Kanekal on the left or west bank. The Hagari is a tributary of the Tungabhadra and rises in Mysore to the south of the Bellary District and traverses the District from south to north for a distance of about 80 miles till it falls into the main river. In the Bellary District Manual it is described as a very shallow river though impassable except by boats in the three months of the monsoon. On both sides of the river are broad belts of sand and there is reason for supposing that it is gradually changing its bed. At Moka, 12 miles from Bellary, the sand bed is two miles broad. The part of the river concerned in this case is near the Union of Kanekalla which is shown in the district map and is only three or four miles from the south eastern boundary of the Rayadrug taluk where it enters the district.

This river in which there is no surface flow for nine months out of twelve (October to July) is the registered source of irrigation for the ryotwari villages on either bank. The first wet crop is sown in July, and cut in November. This crop is irrigated by channels which take off the flowing water from the river. The second wet crop is cultivated between January and April when the river is dry. Water for the second crop is obtained by digging spring channels in the dry bed of the river from points which are fixed by custom along courses which are also similarly fixed and taking the water so obtained to a point in the river bank where the village channels begin. The depth to which the spring channels have to be dug depends on the previous rainfall. If it has been deficient the channels have to

be dug deeper and even then the supply may not be sufficient. The digging begins in this area in December and the channels have to be kept open by constant labour towards which the villagers contribute according to the area each has to irrigate. For obvious reasons the custom as to where these spring channels should start and the course they should take is zealously guarded by the villagers and disputes leading often to breaches of the peace result from any attempted variation. Malyam is a comparatively small village with a wet ayacut in 1927 of about 150 acres. It has no other source of irrigation except the Hagari. Kanekal is a bigger village with a wet ayacut under the Hagari at the same settlement of about 500 acres. It has the advantage also of a tank which in normal years supplies its surplus water to irrigate the area whose registered source is the Hagari. According to mamool, which is definitely established to have existed at least from 1890 and which probably existed from 1836 the earliest year for which we have any written record of these channels, the Malyam ryots began their channel (called Malyam channel or Malyam nala) at a point A in the river opposite the village of Rachmarri somewhat higher up in the river bed than the Malyam village. This channel, after traversing the river bed in a north-easterly direction, left the river at the point B (see the plan Ex. E-1) and entered the channel leading to Malyam. The Kanekal ryots, on the other hand, used to begin their channel called the Devisetti channel or Devisetti nala at a point D in the river bed opposite the village of Gangalapuram and take the channel along the dotted line to E where it left the river. The point D is about 500 yards north of A and is nearly opposite B which is almost due east of it on the opposite bank. In short the Devisetti nala began near the western bank of the river nearly opposite the place on the eastern bank where the Malyam channel left it.

In January 1924 disputes between the two villages arose because the Kanekal ryots shifted the course of the Devisetti channel by digging it nearer to the middle of the river bed and therefore to the Malyam channel than the accustomed course and also by pushing up the head of the channel first to a point H and then to a point K in the plan which was only two chains from A. The Malyam ryots found that the result of this was to diminish the water in their own Malyam channel. They first tried to make up for the loss by pushing up the source of Malyam channel southward, i. e. upstream and took it up to Srirangapuram. This had no great effect. Tney then complained to the Tahsildar, but nothing came of it as he reported to the Divisional Officer, on 14th February 1924, that though the wet crops of Malayam appeared to be in need of more water and they are not faring as well as they ought, yet if the status quo ante is restored and the (Devisetti) channel forming the encroachment beyond the mamool point is closed there would be naturally diminution of supply to the vast ayacut (greater irrigated area in Kanekal). He added that the shortage was due to deficient rainfall and that though the question whether the Devisetti channel drew off the water of the Malyam channel is one for engineers on which he could give no definite opinion yet on the whole he was not convinced that it did so and therefore that the Malyam ryots were adopting a dog-in-the-manger policy.

On the whole he entertained a rather unfavourable opinion of the complaint of the Malyam ryots which in his view evinced more jealousy than real self interest and he described them as people who would not come to any amicable settlement and all his talk with them was of no avail. The Revenue Divisional Officer, on 7th March 1924, without going to the spot, confirmed the opinion of the Tahsildar holding that the action of the Kanekal ryots in extending their channel higher up has not really caused any appreciable hardship to the Malyam ryots so as to justify any interference. The Collector (the late Mr. Duff) who came on Jamabundi to the spot on 22nd March 1924, also noted that the complaint was not justified. The appeal to the revenue authorities having thus failed, the Malyam ryots filed this suit on 31st March 1924, in the District Munsif's Court. The Secretary of State for India in Council was later made a party by order of the District Munsif. In

July 1926, as a result of revaluation of the reliefs in the suit, the suit was found to be above the jurisdiction of the District Munsif and the plaint was returned to be presented to the District Court. The suit was heard by that Court and dismissed by the learned District Judge on 27th February 1929. The Malyam ryots appeal.

At the outset it may be remarked that the Secretary of State for India in Council did not contest the suit at any stage of it. In his written statement, he stated that he did not authorize the alleged acts of the Kanekal ryots in diminishing the supply of water to the Malyam ryots by varying the source and course of Devisetti nala and submitted himself to the judgment of the Court as to the mutual rights of the parties and only prayed that the paramount right of Government to do everything necessary in the general interests of distribution of water may be recognized in the decree. In this Court also the learned Government Pleader adopted the same attitude. We have therefore thought it better to strike him out of the parties as no relief is claimed against him.

As between the two really contesting parties, i. e. the appellants, the ryots of Malyam, and the respondents, the ryots of Kanekal, who have sued and been sued through their respective representatives, the learned Judge found the most material facts in favour of the appellants. He found that the Malyam ryots have certainly a customary right to start their channel near Rachmarri village at about the point A in the suit plan. He also found that the Kanekal ryots should begin their channel according to custom at D and that in 1924 they had started it from K. But his reason for dismissing their suit was that

"the Malyam ryots have not established their rights to keep the Kanekal ryots from starting their channel at any point in the river that suits them, in that they have not made out that they will suffer any detriment if the Kanekal ryots do not start their channel at or lower down than the point D".

In other words, it was not proved that taking the Devisetti nala beyond D had caused or was likely to cause any damage by diminution of water in the Malyam nala. Having come to this conclusion he went on to add in a rather inconsistent manner the following :

"No doubt it would be better from many points of view and would prevent possible conflicts, if the revenue authorities insisted that the Kanekal channel in dry years should be started at the point D while the Malyam channel should be started at the point A but this is merely a matter for the revenue authorities in their capacity as distributors of water supply and I cannot hold that the Malyam ryots have any right to insist that the distribution should be made in such a way."

The finding that the defendants' acts have not adversely affected plaintiffs' channel is certainly weakened by the opinion that from many points of view and to prevent conflicts it is better to insist that the defendants' channel should start at D. What these points of view are, unless one of them is that the plaintiffs have a legitimate grievance that defendants are abstracting their customary supply of water, the learned Judge has not indicated. Nor is it clear how or why the revenue authorities as distributors of water can or ought to insist that the defendants' channel should begin at D or lower down, unless they were by snifting their channel interfering with plaintiffs' rights, the fair inference from his conclusion, is that the learned Judge while satisfied that the defendants' channel ought according to mamool to start at D or lower down and that a continuance of that mamool was from many points of view and to avoid conflicts, desirable, yet felt that no legal right to such a decree was established as according to him it was not proved that defendants had by their act diminished the water in plaintiff's channel.

I think that this last conclusion cannot be supported on the evidence. That the water in Malyam channel did diminish and that their crops suffered in 1924 was never disputed and is amply proved. The attempt of the Kanekal ryots in 1924 was to explain it away by suggesting that the diminution of water was due to deficiency of rainfall and to Malyam ryots not working hard enough at their channel and that the damage to Malyam crops was caused by salinity of soil and by pests. At the trial the defendants adopted a different attitude.

Their witnesses, 2, 3 and 4 went to the length of denying that they had pushed the source of their channel from D to K. This is significant. The learned Judge did not believe them on this point. D. W. 1, the Tahsildar who reported in1 924 that the Malyam lands were suffering for want

of water and were not faring as well as they ought, swore in 1928 that the crops on the Malyam lands were doing well. The witness must have been making a mistake. It is probably true that rainfall had been deficient. But that would not justify the Kanekal ryots from abstracting, if their act was capable of that result, even the small supply which Malyam was in the circumstances likely to get from their mamool channel. Absolutely no evidence was given at the trial that the Malyam ryots did not spend the necessary labour on their channel. On the contrary the evidence was that when faced with shortage of water they did what the defendants did, i. e., pushed up their own channel to the village of Srirangapuram further up the river which must have cost extra labour. As to salinity of scil, this, if true, is as pointed out by the appellants' advocate a permanent factor which had no special effect in 1924. As to pests it is well known that pests will more easily attack badly irrigated crops which are thereby in poor condition. It is difficult to see why the Kanekal ryots took the trouble to dig a new channel and bring it to K unless they, who know something of the river, thought they could get more water. Of the plaintiffs' witnesses 1 to 5, 7 and 8, all but the plaintiff (P. W. 1) are residents of the neighbouring villages Kalekurti, Rachmarri and Srirangapuram and presumably disinterested persons. They all swear that as a result of the defendants' shifting their channel and pushing it up from D to K, the water in the Malyam channel first diminished and then ceased to flow and that the Malyam crops failed in consequence.

The most important evidence in the case as to the consequence of the defendants' act is the report and evidence of Mr. Ireland (P. W. 1), the Executive Engineer in charge of the Tungabhadra project who was deputed by the Court to inspect the spot and make a report on the question whether the Malyam chanel is liable to diminution if the Kanekal channel is dug near the village of Rachmarri. He reported (Ex. E.) that in his opinion such diminution is likely to result. He gave his reasons for that opinion which was founded on experience of behaviour of similar channels in dry river beds. On the question what distance should be maintained between the plaintiffs' and defendants' channel in order that the latter may not interfere with the former he said that the exact distance can be found out only by making an experiment of digging one channel first, gauging its flow and then digging the other and observing the effect on the first. This could only be done in the dry weather. As Mr. Ireland was appointed commissioner in September 1928 just before plaintiffs' evidence began and his report had to be submitted before the evidence closed and was in fact made in October 1928, the experiment was not carried out probably owing to water in the river. But Mr. Ireland, from his experience and knowledge and having inspected the spot, reported that the only safe way to prevent interference is to fix the spring head of the lower (Kanekal) channel at a point D not above the spot where the higher (Malyam) channel enters the river margin, B, the practice which had been found by actual experience to be the safe rule, that the distance between D and B should not be nearer than about 15 chains or 1000 feet and that the course of the Kanekal channel below D in the river bed D G E should not approach the Malyam bank nearer than the centre line of the river.

The learned Judge has discarded the engineer's opinion confirmed by his sworn evidence on the ground that the above experiment, which, as pointed out above, was impossible at the time, was not carried out and preferred the opinion of the Tahsildar (D. W. 1) first expressed by him in his report of 1924 (Ex. 4) and repeated by him in Court that the defendants' acts did not interfere with the Malyam channel. Seeing that the Tahsildar himself in Ex. 4 said that he was unable for want of professional knowledge to give any definite opinion as the question was one on which only engineers could give a competent opinion, I think the learned Judge erred in preferring his opinion to that of Mr. Ireland which was entitled to much greater weight. I think the only safe conclusion possible on the whole evidence is that to which Mr. Ireland came and it follows that the ground on which the plaintiffs were nonsuited is not sustainable.

But the respondents contend that even if the plaintiffs have proved that they suffered diminution of water in their

channel by reason of the defendants shifting their channel, they are not entitled to any relief. The grounds of this contention are: (1) plaintiffs must prove not merely diminution of water in their channel but diminution of the quantity of water which plaintiffs as ryotwari tenants are entitled to, i.e., the quantity which is necessary for cultivation of their registered wet lands and there is no proof of that character in the case; (2) the plaintiffs' case was based on a prescriptive right, which can only be proved by 60 years enjoyment against Government and there is no such proof even if ryotwari tenants can prescribe against Government for necessary water for their holdings; (3) that plaintiffs' rights to water are only against Government and even if defendants interfere with that supply plaintiffs have no cause of action against them but must only apply to Government for water; (4) according to law the plaintiffs can have no claim in law to percolating water fowing in undefined channels which the defendants drew off by deviation of their own channel and therefore plaintiffs can have no right to a declaration or injunction in respect thereof.

The first point raised for the respondents raises questions of fact, what is the registered wet area for which the plaintiffs are entitled to water from Government and whether the plaintiffs were taking by their Malyam channel more than they were entitled to when the defendants by their act diminished that supply, which were never raised by them in the lower Court and on which therefore no issues were raised and no evidence taken. It is therefore sufficient to say that the respondents cannot now be allowed to raise new defences of fact on which there has been no trial; but all the indications are that as regards the second crop cultivation of 1924 which is in question, the plaintiffs were at no time in a position to draw off more water than was necessary for that crop for their registered wet lands. No one not even the Revenue Officer suggested that such was the case. On the contrary it seems to have been understood and conceded by all that there would not have been enough water in any case. The nasolwari accounts of that crop both in defendants' and in plaintiffs' villages (Exs. 5 and 8) show that the crops yield ranged from 1 to 8 annas which is practically conclusive that there was a general shortage of water. This objection therefore fails.

Points 2 and 3 relate to the nature of the plaintiff's right and may be dealt with together. The right of ryotwari landholders as against Government to water necessary and sufficient for cultivation of their registered wet lands and their right to take it from the accustomed or recognized source of supply till other reasonable and sufficient sources are provided have been settled by a series of decisions of this Court. *Krishna Iyyan* v. *Venkatachella Mudali* (1), *Ramachandra* v. *Narayansuami* (2), and *Sankaravadivelu* v. *Secretary of State* (3). There has been controversy as to whether the right is a contractual right as held in *Fakir Muhammad* v. *Tirumalachari* (14), or whether it is a proprietary right as observed in *Sankaravadivelu* v. *Secy. of State* (3). Whatever the legal character of the right, it is now settled that Government themselves cannot interfere with the accustomed mode of supply unless and until they substitute another and equally efficient mode and if they do, will be legally liable to the injured ryot: *Rama Odayan* v. *Subramania Ayyar* (4), and that third parties like other ryots similarly interfering will be likewise liable: *Ramachandra* v. *Narayanaswami* (2), and *Rama Odayan* v. *Subramania Ayyar* (4).

The contention of the respondents that only Government is liable in such cases was sought to be supported by the decisions in *Mahankali Lakshmiah* v *Karnam Narayanappa* (13), which is no authority for that proposition:

"To understand the meaning of that decision it is necessary to know what the facts and the points for decision were: *Hari Baksh* v. *Babu Lal* (15)."

In that case the defendants had been the lessees of plaintiffs' land for about 30 years and during that time had used for the cultivation of the plaintiffs' land water from a channel which was not the registered source for those lands but was the registered source for the defendants' own lands. This was apparently a matter of convenience. After the termination of the lease the defendants refused to allow the continuance of the same

(14) [1877] 1 Mad. 205 (F.B.).
(15) A I. R. 1924 P.C. 126=83 I. C. 418=51 I.A. 163=5 Lah. 92 (P.C.).

arrangement for irrigating plaintiffs' land and plaintiff sued for an injunction restraining defendant from interference with what was claimed as an easement or growing easement. The Government was not made a party. In these circumstances it was held that the registered source of supply to plaintiff's lands being different and no arrangement or sanction from Government for what was done during the tenancy being proved, no allegation of easement or growing easement was of any avail as a cause of action and the suit must fail. That decision has no application to this case in which the facts are different and therefore the questions for decision are different.

The respondents' argument is however right to the extent, that the plaintiffs erroneously founded the plaint on a right of easement. The ordinary right of ryotwari landholders against Government to water sufficient to irrigate their fields is not an easement within the meaning of S. 4, Easements Act, as it is not a right to do or continue to do something or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own. S. 2 of the Act expressly saves the rights of Government in the water of natural rivers and streams from the operation of the Act. The right of ryotwari landholders to water for their holdings is an incident of ryotwari tenure whether it be regarded as having a contractual or proprietary origin. Whether ryots may by prescription or otherwise acquire a right against Government to more water or to take it in a particular way does not arise in this case. Therefore there is no question in this case of dominant and servient heritage essential to easements. Nor is the right of ryots enjoyment of their rights of water undisturbed by other ryots an easement as against the holdings of those ryots. But it is the ordinary right of all who have rights to the undisturbed enjoyment of those rights undisturbed by acts which the doers have no right to do. The plaintiff therefore was subjecting himself to an erroneous and gratuitous limitation when he founded his claim on prescription as apparently his advisers did in the lower Court, as the language of issue 1 shows. But this error does not furnish an answer to the suit based as it ought to be on a better and more complete right which the facts establish. The arguments submitted by the respondents furnish no answer to the plaintiff's claim when the legal relations following from the established facts are properly conceived.

The most plausible of the respondents' objections is the one based on the well-known rule of law that as between owners of land, no one has a right of property in water flowing underground in undefined and unknown channels by percolation; as a consequence of which one owner has no right of action against another who by sinking wells or by other works on his own land draws off and appropriates, the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him; and this even when it is done from an improper motive or maliciously: *Chasemore* v. *Richards* (10), *Acton* v. *Blundell* (8), *Mayor etc. of Bradford* v. *Pickles* (16). But as stated by Lindley, J., in *Ballard* v. *Tomlinson* (17) at p. 125

"the reasons for the distinction between water in defined and visible channels and water percolating through the soil and not yet in any defined visible channel must be borne in mind or the decisions establishing it may be misunderstood and be made the basis of reasoning leading to results which are as startling as they were unforeseen."

The argument of the respondents is that, even according to our finding, what they have done is only to prevent the water borne in the sandy bed of the Hagari which might otherwise have percolated through unknown and undefined interspaces of the sand into the Malyam channel from reaching it and it is urged that on the authorities above referred to they cannot be legally prevented from doing so. There are several answers to this contention.

In the first place the right of taking underground water and, in exercise of that right, of abstracting all the water that may percolate into your land in undefind channels from the surrounding lands belongs to the owner of the soil and can only be exercised by works done on your own property. You cannot go on your neighbour's land, dig there and take the underground water found there and justify your action because the water was running underground in undefined

(16) [1893] A.C. 537.
(17) [1885] 29 Ch. D. 115.

channels. That would be trespass as against the owner and would be also actionable at the instance of those who have rights against the owner to the water you abstract. The respondents are not owners of the bed of the Hagari which belongs to Government and they cannot invoke the doctrine of percolating water in their aid. The plea of the Government is that they have not authorized the acts of the respondents and are therefore not responsible for them.

Secondly, the Government themselves who are owners of the bed of the Hagari would not be justified in diminishing the supply of the Malyam channel on the plea that they were entitled as owners to draw off the underground percolating water seeing that they were bound to maintain the supply of that channel in fulfilment of their obligation to their ryots (the appellants) till they furnished another equally efficacious substitute. And this on the broad ground that no one may derogate from his own grant or take advantage of his own wrong. The Government being bound by law to furnish water to the appellants for their cultivation and to substitute another sufficient source of supply before interfering with the registered source customarily in use, which ex hypothesi is the water percolating into the Malyam channel, would be presumed to have bound themselves not to do anything to interfere with the existing source of supply till they had found the substitute. And though, according to the theory of the decisions about percolating water, no one not even the owner of the soil under which it flows, has any property in such water till it actually reaches a defined channel and therefore there is no infringement of any right of property by appropriating what belongs to no one in particular, yet it is possible for an owner to be guilty of breach of contract if, by appropriating underground percolating water from his land he causes diminution of a supply which he is obliged by law to maintain. The decision of the House of Lords in *M'nab* v. *Robertson* (18) shows that this is possible though the actual decision of the Court was that, even if such contract were implied, as to which some of their Lordships expressed doubt, there was no proof of damage. The question on which their Lordships differed was whether water oozing (seeping) through a marshy area from a spring to a pond was included within the term "streams" used in a demise. This was negatived by the majority. But the lessee also urged alternatively that the lessor must be deemed to have contracted not to diminish the supply of water actually available to the land demised at the date of the demise. On this point Lord Watson said:

"I see no reason to doubt that such a contract right as the appellant alternatively claims, seeing it may be the subject of express stipulation, may also be derived by reasonable implication from the terms of the lease : p. 136:"

Lord Shand said that he was disposed to hold that there is such an obligation implied, that although the water in question was not directly conveyed there was an obligation on the part of the landlord not to diminish the water supply: p. 138.

Lord Davey, like Lord Watson, felt the difficulty of implying the obligation not to diminish the supply of water in the case of a demise which expressly mentioned certain sources but otherwise did not disagree with the opinion that such an implication was possible: p. 142.

We are not hampered by the express language of any deed from giving effect to the relation between ryotwari tenants and the Government according to the meaning and intent of the parties and the justice of the case, and I feel no doubt that having regard to the obligation of Government not to interfere with existing sources of water till a sufficient substitute was found by them, they would be bound not to do anything to diminish that supply while it lasted. It follows that Government itself would not find justification in the doctrine of percolating water for diminishing the supply of water in Malyam channel and that the defendants can find no justification in it for producing that result.

Finally, I share with my learned brother doubts about applyingthe doctrine of percolating water flowing underground in undefined chann els as settled by English decisions to the water carried in the sandy bed of an Indian river in the dry months between mansoon to mansoon. This feature of our rivers is due to the physical features of the country and other natural causes. The monsoons produce floods and torrents of a rapidity not known in Western Europe. The

(18) [1897] A. C. 129.

tropical heat produces rapid evaporation. But after the floods have subsided and the sands dried up in the scorching sun, the cunning river still saves up in her sandy mantle, an ample store of life-giving water which only requires the thin covering to be pushed aside to come to the relief of the thirsty villager and his crop. Some of these rivers have no flow at all in the dry weather. More frequently there is a straggling, thin stream winding along the bed. Shall we say that all water under the river sand is percolating water flowing in undefined channels? Or shall we say that the river remains an underground "stream" covered with a coating of sand the flow being still continuous though slow and invisible, a body of water still flowing within the defined channel of the river bed?

The distinction between the two cases is not whether the water is found above or below the ground or whether the movement of water particles is or is not scientifically to be ascribed to percolation; but the distinction is whether the water can as a whole be reasonably spoken of as moving in one direction within a definite and unknown channel. Having regard to the descriptions of a stream given by Lord Watson and Halsbury in *Mc.'nab* v. *Robertson* (18), I respectfully submit that the question is not capable of a general answer applicable to all conditions to be found on the globe and that the doctrine of percolating water being publici juris must be applied to Indian rivers with due regard to the reasons of the rule which is ultimately one of convenience. As explained in the English cases if a man who sank a well was to be held liable for the diminution of water in the wells of surrounding properties, to what distance is this liability to extend? The water in the next garden may not be affected but owing to some underground fissure of which no one knows anything, the water in some distinct properties may be affected. There could be no reasonable method of fixing liability of such results. The doctrine, useful because convenient in such cases, becomes unmeaning where the result of drawing water from one place in a water-bearing river bed, at another not distant place can be easily foretold from experience. The water of such rivers drawn off by channels like the Malyam and Kanekal channels is recognized by the law of the land as the registered source of irrrigation for hundreds of villages all over the Presidency. The ryots are expected and required to resort to such sources and only to such sources for water, and if they transgress, as unfortunately they too often do, when water is scanty, they are penalized in all ways permitted by law. The duty of Government with respect to water derived from such sources stands in the same footing as that concerning other public sources of irrigation. The land revenue derived from the properties irrigated from such sources must be considerable. The result of holding that the water of such rivers is subject to the rules of underground water percolating in undefined channels would be to create such confusion in the civil and revenue law of this Presidency that in the absence of any authority binding on me I should be most reluctant to do so. For this reluctance I derive much support from the way modifications of English doctrines relating to water have been recognized by the highest authority to suit Indian conditions. In *Sri Nath Roy* v. *Deenabandu Sen* (19), the Privy Council held that the English rule which connects the subject's rights to an exclusive fishery in tidal navigable waters within the limits of the Crown's ownership is not applicable to Bengal. In *Secy. of State* v. *Raja of Vizianagaram* (20), their Lordships in applying to the river Godaveri the English rule as to accretions observed that the actual rate of progress necessary to satisfy the rule is not necessarily the same as in the case of English rivers. Having regard to the difference in climatic conditions between England and this Presidency and to its necessary results, it seems not so unreasonable, to assimilate the legal incident of streams flowing in known channels whether over or underground, to rivers like the Hagari, as well during the dry months as in the monsoon months. Perhaps we may adopt the observation of Lord Sumner in a sense somewhat different from that in which it occurs in the context :

(19) A. I. R. 1914 P. C. 48=25 I. C. 467=41 I. A. 221=42 Cal. 489 (P.C.).

(20) A. I. R. 1922 P. C. 105=67 I. C. 1=49 I. A. 67=45 Mad. 207 (P.C.).

"Sometimes there is no water in these water courses, and sometimes what is there does not course nor are they ever fed by springs; but these circumstances are not critical. A river may be fed by the rains directly without any intermediate collection of the water in the bowels of the earth and still be a river and a river which naturally runs during a good part of the year does not cease to be a river merely because at times it is accustomed to become dry: *Stollmeyar* v. *Trinidad Lake Petroleum Company* 21) (at p. 491)."

His Lordship was there referring to the riparian rights in the water of a river in Trinidad during the months when it was running, and no question arose about any water retained in the sandy bed after the surface flow had ceased. Though this observation was not intended to apply to the present question, it shows that necessary modifications must be applied to the English law of flowing water to make it applicable to tropical countries. The respondents' advocate has not drawn my attention to any Indian decision on this point nor have I found any, bearing any similarity to this case.

In the lower Court it seems to have been too easily taken for granted by every one that water which is not visible on the surface must be percolating water flowing in undefined channels and the plaintiffs' advocate thereupon conceded that he could not prescribe for an easement in such water. It has been pointed out that there is no question of easement in the case. Probably due to this misapprehension the evidence does not disclose that any particular attention was paid to the aspect of the case now under discussion. The learned Judge refers to a statement of the plaintiff that there are no fixed head springs, that

"the course of the channels are not marked and that the depth of them varies with the rainfall."

But in Ex. B which contains the information collected in 1890 for the last Settlement, the source of irrigation for the Malyam village is described in Col. 7 under the heading "Talaparisha, where does it originate, and how is the canal formed" and the information recorded is that it originates from the river Hagari close to the village of Marri (Rachmarri), (whence), the canal was dug; and from there it runs for a mile in the river and extends as far as the wet land. Percolation water flows through the canal. Similarly the corresponding entry in Ex. C for Kanekal village is that there is a fountain head formed in the river Hagari near Gangalapuram hamlet of the village and a canal was dug along the very edge wherefrom are formed small canals feeding the wet land. The expression "Talaparisha" means head springs in the bed of a river from which such channels begin and it is significant that it is the description used for the source of both channels. As to the use made by the learned Judge of the statement that the course of the channels is not marked, and that their depth may vary, this is to a certain extent unavoidable as the river bed is sandy, but that the source and course of the channels is sufficiently identifiable is seen from his own finding under issue 2 that the places (where the channels are annually dug) are generally in much the same neighbourhood. That the ryots have no difficulty in this matter is clear from the statement of Mr. Ireland that at his inspection he was informed by them that the line A B C in the plan represented the line of the Malyam channel and D E F that of the Kanekal channel. As to the way, water is derived in these channels he says that in rivers like the Hagari with small supply each channel must have its own catchment area to give it the necessary supply and cannot afford to have that area encroached upon, as such encroachment would in his opinion adversely affect its supply.

On the best consideration I can give to the matter, I am not able to accept the contention that the water to which the plaintiff is laying claim is governed by the rule laid down in English decisions as to percolating water flowing underground in undefined channels. I have already given grounds for holding that, even if the water were to be regarded as governed by that rule, the respondents could derive no benefit from the argument.

In the result I think that the appeal should be allowed. I agree to the orders proposed by my learned brother.

P.R.S./B.V. *Appeal allowed.*

(21) [1918] A. C. 485=87 L. J. P. C. 77=118 L. T. 514.

A. I. R. 1931 Madras 300

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

C. Krishnaswamy Naidu—Defendant—Appellant.

v.

K. Jayalakshmi Ammal—Plaintiff—Respondent.

O. S. Appeal No. 135 of 1928, Decided on 8th September 1930, against the decree of Kumaraswami Sastri, J., D/- 17th October 1928.

(a) Civil P. C. (1908), O. 6, R. 17—Suit by principal against agent—Decree should not be allowed on basis of partnership at least without prior amendment of plaint.

The suits by principals against their agents should not originally be allowed to be converted into suits by one partner against another because they are essentially different in character and because the defendant may be taken by surprise, if it is so allowed. Therefore in former suit no decree should be allowed on partnership basis at least without a prior amendment of plaint: *A.I.R.* 1923 *Cal.* 142, *Expl.* and *Rel. on*; *A.I.R.* 1922 *P. C.* 249 and 23 *I. C.* 332, *Rel. on*; 43 *I. C.* 893, *Ref.* [P 301 C 1, 2]

(b) Partnership — Accounts — Special grounds are necessary for Court in granting partner's request for account without dissolution.

If a partner asks for an account without asking for a dissolution the Court must be satisfied that there are special grounds for granting the prayer and these grounds must be alleged by the plaintiff while the defendant must have an opportunity of showing cause against: 9 *All.* 120, *Rel. on*; 43 *I. C.* 217 and 32 *Mad.* 76, *Ref.* [P 302 C 1]

T. V. Venkatarama Ayyar and *R. Thirumalai Thathachariar*—for Appellant.

K. S. Krishnaswamy Ayyangar and *E. R. Krishnan*—for Respondent.

Judgment.—The suit which gives rise to this appeal was filed by the widow of one Changayya Nayudu, who died in April 1918, against her maternal uncle for an account of certain businesses which she alleged he had conducted as her agent. We are only concerned here with a rice mandi business which the defendant carried on from the time of Chengayya Nayudu's death up to date of suit. The plaintiff's case was that since her husband did not dispose of this business by will, as he did of some other assets, it was hers by right of inheritance and that the defendant, who held her power of attorney, was only her agent. The defendant contended on the other hand that the mandi which Chengayya Nayudu had been conducting was closed a few days before his death and that the subsequent business was the defendant's own, to a share in which the plaintiff had no title. Nevertheless, in consideration of the facts that she had lost her husband, was his relative and was living with him, he had voluntarily given her a half share, which continued up to October 1918, when the successive arrangements described in para. 12 of the written statement were made. He further alleged that accounts had been settled and the plaintiff had received the allowances under this arrangement up to the 1st February 1926. The case was tried by Kumaraswami Sastri, J., who found that neither the plaintiff nor the defendant was speaking the truth and decided that each was jointly interested in the business and entitled to a half share. He accordingly gave a declaration to this effect and referred the suit to a commissioner to take an account. This decision has been attacked before us on the ground that it is consistent neither with the plaintiff's nor the defendant's pleas, and that of course is true. It appears that there was no application to amend the plaint, nor indeed could there well have been one because this was no example of an inadvertent mis-statement of facts or legal position, but, according to the learned Judge's finding, a deliberate falsification of the truth. A number of issues were framed, Nos. 1 and 4 relating particularly to the rice mandi business. No. 1 was framed in the terms of the pleadings to enquire whether the business belonged to the plaintiff and whether she entrusted it to the defendant for management, or whether it had been given to the defendant. No. 4 ran thus:

"Was there an agreement to give the plaintiff a share of the profits in the said business as stated in para. 12 of the written statement, and if so, what are the terms thereof?"

There has been some discussion as to what the learned Judge's finding amounts to, whether it means that the parties were in partnership. Mr. K. S. Krishnaswamy Ayyangar for the respondent has done his best to resist that conclusion for reasons which are not very difficult to surmise. It is true that the judgment contains no express reference to a partnership, but it is further true that, if the incidents of such a legal relationship appear to have been found by the Court, a partnership must be inferred. The learned Judge expresses the view in the first place that the business was not

transferred to the defendant and that he was not merely looking after it on plaintiff's account. He then gives grounds for adopting an intermediate view, involving some arrangement for carrying on the business; and says that all probabilities point to the conclusion that each was to get a half share, adding his finding that they were "jointly interested." For the respondent it is sought to add to these findings an averment of the defendant that the plaintiff, who was to get ex gratia a half share, was not to be liable for any losses, but the judgment makes no reference to this, and we have reason to suppose that this condition was held proved. Under S. 239, Contract Act, partnership is defined as

"the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them."

We cannot find sufficient reason to doubt that this was the nature of the relationship between the parties which the learned Judge found, and not some other form of contract not specifically recognized or provided for by law, as Mr. K. S. Krishnaswami Ayyangar would suggest.

Thus the question is whether a suit by a principal against an agent can be converted into a suit by one partner against another. There can be no doubt that the two suits are essentially different in character and this circumstance, together with the consideration that the defendant may have been taken by surprise, are the two main grounds upon which decisions on this question have been based. The principles are thus stated in *Ananda Chandra Chuckerbutty* v. *Brajalal Singh* (1).

"The rule that the pleading and proof must correspond is intended to serve a double purpose; first, to apprise the defendant distinctly and specifically of the case he is called upon to answer; and, secondly to preserve an accurate record of the cause of action as a protection against a second proceeding upon the same allegations. The test is, whether the defendant will be taken by surprise if relief is granted on the facts established by the evidence; or, as has sometimes been said, a variance between a pleading and what is proved is immaterial unless it hampers a defence or unless it relates to an integral part of the cause of action."

In *Ma Shwe Mya* v. *Maung Mo Huaung* (2) the Privy Council decided that a claim must be dismissed because the cause of action upon which it was allowed was different from that recited in the plaint, and in *Sayedani Muhmuda Khaton* v. *Mahamood Ellahadid Khan* (3) the same principle was applied by the Board where the plaintiff's claim was found to be

"upon a basis wholly different from that upon which the suit was founded."

There are a number of cases relating to the amendment of a plaint which applied the same principles. An example of such a case is *Kali Das Chaudhuri* v. *Sm. Drapaudi Sundari Dassi* (4), which gives effect to the principle that

"where a plaintiff bases his claim upon a specific legal relation alleged to exist between him and the defendant, he should not be allowed to amend the plaint so as to base it on a different legal relation."

Although therefore there is some substance in the plea that the defendant may not have been taken by surprise in view of the framing of issue 4, there is undoubtedly much authority for the appellant's contention that a decree on a partnership basis should not have been given in the circumstances, and certainly not without a prior amendment of the plaint. The matter however does not rest there.

It has been said that the plaintiff has been given a decree for an account, and it arises for consideration in what circumstances such a decree, unassociated with a decree for dissolution, and during the currency of the partnership, can be given. No doubt in England the old rule, that the Courts of equity will not interfere between partners except for the purpose of dissolving the partnership, or, if it was dissolved already, of finally winding up its affairs, has been relaxed in modern times. But still the question arises, when one partner sues another otherwise than for dissolution, can relief be had without dissolving the partnership? (Lindley, Edn. 9, pp. 568–9). A similar statement of the law is to be found in 22 Halsbury 71, S. 138. The same principle has been applied to such suits in this country, as were in *Kassa Mal* v. *Gopi* (5). Edge, C. J., observes:

(1) A. I. R. 1923 Cal. 142=74 I. C. 793=50 Cal. 292.

(2) A. I. R. 1922 P. C. 249=63 I. C. 914=48 I. A. 214=48 Cal. 832 (P. C.).
(3) [1913] 23 I. C. 332.
(4) [1918] 43 I. C. 893.
(5) [1887] 9 All. 120=(1886) A. W. N. 216.

"It is only under exceptional circumstances that partners can bring such actions against their copartners, except when the action is for a dissolution of partnership, in which case they may claim an account and payment over of moneys that may be found to be due to them on the account being taken. So far as I am aware, actions between partners, which involve the taking of partnership accounts prior to dissolution, are almost unheard of;"

and he proceeds to discuss the English law on the subject. The same principle was applied in *Damodara Shanbhaga* v. *Subraya Pai* (6) and was recognized in *Karrivenkata Reddi* v. *Kollu Narasayya* (7), although the special circumstances of that case justified the Court in interfering. The respondent's learned advocate scarcely contests the correctness of this position, his contention being, as has been said, that the arrangement between the parties did not amount to partnership. He further undertakes on behalf of his client not to press any subsequent claims, but we are unable to regard this as entitled to affect our view of the legal position. There seems no question but that if a partner asks for an account without asking for a dissolution, the Court must be satisfied that there are special grounds for granting the prayer, and it follows that these grounds must be alleged by the plaintiff, while the defendant must have an opportunity of showing cause against. This condition necessarily remains unfulfilled in the present case and we are unable to hold that the plaintiff is entitled to a decree for an account in the face of the circumstances that not only has she failed to justify special treatment, but, on the finding of the learned Judge, has falsified her case to the extent of not alleging a partnership at all. In these circumstances we think there are very special reasons why a decree of the nature under reference should not have been granted upon the pleadings and with much respect we are unable to support the learned Judge's decision to this extent. We must accordingly allow the appeal and direct that the reference to the rice mandi business be expunged from the decree. This will involve the deletion of paras. 1 and 2 of the words "either in respect of the said mandi business or" in para 4 and para. 5 (a), the remaining paragraphs being renumbered. Costs in the lower Court have been reserved for the final decree. The appellant will get his costs in this Court.

P.R.S./B.V. *Appeal allowed.*

(6) [1917] 43 I. C. 217.
(7) [1909] 32 Mad. 76=1 I. C. 384.

A. I. R. 1931 Madras 302

REILLY AND ANANTAKRISHNA AYYAR, JJ.

(*Pasupuleti*) *Bangarayya* and *others*—Appellants.

v.

Sree Nallapparaju Venkata Subbaraju and *others*—Respondents.

Appeal No. 396 of 1929, Decided on 8th September 1930, against order of Dist. Judge, East Godaveri, D/- 13th August 1929.

Registration Act (1877), S. 17 — Registration for deed transferring mortgage decree is unnecessary.

Where a transfer deed does not disclose on its face what kind of decree is transferred it cannot be made inadmissible because it is not registered. Registration of a deed transferring a mortgage decree is unnecessary: 9 *All.* 108, *Rel. on.* [P 302 C 2]

M. Appa Rao—for Appellants.

N. Rama Rao—Respondents.

Judgment.—Before 1st April 1930 there was a conflict of opinion between the Bombay High Court on the one hand and the Calcutta, Allahabad and Lahore High Courts on the other on the question whether a deed transferring a mortgage decree required registration the view of the latter three High Courts being that registration was unnecessary. There appears to be no reported decision of this Court on the question. As the preponderance of authority is in favour of the view that registration was unnecessary and as the transfer deed in this case does not on its face disclose what kind of decree is transferred and so may be covered by the view of the Full Bench of the Allahabad High Court in *Jiwan Ali Beg* v. *Basa Mal* (1) we are not prepared to say that the transfer-deed was inadmissible because it was not registered.

This appeal is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

(1) [1886] 9 All. 108=(1886) A. W. N. 310 (F. B).

* A. I. R. 1931 Madras 303

REILLY AND ANANTAKRISHNA AYYAR, JJ.

(*Upadrasta*) *Venkatalakshmamma* — Appellant.

v.

Garikipati Seshagiri Rao — Respondent.

Appeal No. 213 of 1927, Decided on 25th November 1930, against appellate order of Sub-Judge, Bapatla, D/- 3rd January 1927.

*** (a) Civil P. C. (1908), O. 22, Rr. 12 and 4 — Judgment-debtor's legal representative can be brought on record in execution proceedings already started — Fresh execution petition need not be presented — Execution petition filed within 12 years' limitation — After 12 years from decree judgment-debtor dying — Decree-holder can bring judgment-debtor's legal representatives on record in same execution proceedings and his remedy is not barred by Civil P. C. (1908), S. 48.**

Rule 12, O. 22 read with R. 4 of the same order does not have the effect of requiring a fresh execution petition to be presented in case the judgment-debtor dies while execution proceedings are pending and the decree-holder seeks to proceed against his legal representative. The legal representative of the judgment-debtor can be brought on record in the execution proceedings already initiated and a new execution petition is not necessary.

Hence where while execution proceedings, started prior to the expiry of 12 years since the date of the decree, are pending, and the judgment-debtor dies after the period of 12 years is over, the remedy of the decree-holder is not barred by S. 48, because the judgment-debtor's legal representative can be brought on record in the same execution proceedings without filing a fresh execution petition : *A. I. R.* 1927 *Mad.* 184, *Disc., Disappr.* and *Dist.*; *A. I. R.* 1928 *Mad.* 772; 34 *Bom.* 142; 42 *All.* 570; 3 *I. C.* 324; *A. I. R.* 1929 *Mad.* 275 and *A. I. R.* 1928 *P. C.* 162, *Rel. on.* [P 308 C 1]

(b) Civil P. C. (1908), S. 151—Where rights are conferred by sections but no provision is made for particular set of facts, Courts should apply rules nearest in point with necessary modifications.

Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts, Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of S. 151 is to give such power to Courts and to prevent a failure of justice: *A. I. R.* 1921 *Mad.* 599 (*F.B.*) *Foll.* [P 306 C 2]

(c) Civil P. C. (1908), S. 11 — Execution pending—Judgment-debtor dying—His widow brought on record — Widow not appealing against order bringing her on record but contending that property against which execution was sought was gifted to her by judgment-debtor—Her contention is not barred by res judicata.

During pendency of execution proceedings, the judgment-debtor died and his widow was brought on record as his legal representative. The widow did not appeal against the order bringing her on record but contended that the property against which execution was sought was gifted to her by the judgment-debtor.

Held : that her contention was not barred by res judicata by the fact that she did not appeal against the order bringing her on record. [P 308 C 2]

P. Satyanarayana Rao—for Appellant.

T. V. Venkatarama Ayyar — for Respondent.

Reilly, J.—In this case a decree was obtained by the plaintiff for money against one Ramachandrayya on 29th February 1912. After a number of other execution petitions eventually a petition, E. P. 125 of 1924, was put in for execution of the decree against Ramachandrayya on 18th February 1924. In the course of those proceedings it came to light that Ramachandrayya had disappeared seven or eight years earlier, and therefore it was presumed that he was dead. The decree-holder in those circumstances wished to prosecute the same execution petition against Ramachandrayya's widow as his legal representative and put in an application E. A. No. 543 of 1924 for that purpose on 5th July 1924. It will be seen that that application to treat the widow as Ramachandrayya's legal representative was put in more than 12 years after the date of the decree. It was contended that on account of that lapse of time S. 48, Civil P. C., prevented the execution against the widow continuing. The widow took some other objections to the execution in the District Munsif's Court. The District Munsif overruled them all. She then went on appeal to the Subordinate Judge, who disposed of two of her contentions, including this one that execution was barred by S. 48 of the Code, and dismissed her appeal. She has therefore come to this Court on second appeal.

The contention before us is that in execution proceedings, if the judgment-debtor dies while the proceedings are pending, no legal representative of the judgment-debtor can be brought on record in those proceedings, but a new execution petition has to be presented. It is argued that in the Code there is no procedure for adding the legal representative of the judgment-debtor in the

course of an execution petition. If that is so, then Ramachandrayya's widow could not be added in E. P. No. 125 of 1924, which was launched against Ramachandrayya himself, and by the time the application was made to take proceedings against the widow in E. A. No. 543 of 1924, it was too late to start a new execution petition because 12 years from the date of the decree had elapsed. It will be seen therefore that, unless the decree-holder is entitled, when his judgment-debtor dies in the course of execution proceedings. to bring on record the judgment-debtor's legal representative in the execution proceedings already initiated, the decree-holder in this case must fail.

It may be noticed that the general principles of the Civil Procedure Code are that, if a party can take proceedings against another person and that person dies, the remedy does not lapse but proceedings may be taken against the dead person's representative. S. 146 of the Code lays down that

"save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

So far as suits are concerned, some of course lapse with the death of the defendant, and the right of suit does not survive; but in the majority of cases this is not so. And, if a decree has been made, S. 50 of the Code provides:

"Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."

In such cases the personal remedy is gone, but the remedy against the judgment-debtor's estate remains. Now it cannot be denied, I think, that the practice in the Courts of this Presidency and, I believe, of the rest of India for many years has been to allow the legal representatives of deceased judgment-debtors to be brought on record in subsisting execution petitions and to allow those petitions to be prosecuted against the estate of the judgment-debtors represented by the legal representatives so brought on. But it is urged for the appellant, Ramachandrayya's widow, that the only machinery provided by the Code for bringing legal representatives on the record is to be found in O. 22. Rr. 3 and 4 of that order provide for bringing on record representatives of plaintiffs or defendants who die in the course of a suit in order that the suit may be prosecuted by or against the representatives to a finish and R. 11 of that order applies that procedure to appeals. Then at the end of the order there is R.12, which says that nothing in Rr.3 or 4 shall apply to execution proceedings. As Mr. Satyanarayana Rao has pointed out for the appellant, those rules were considered by Coutts Trotter, C. J. and Curgenven, J., in *Palaniappa Chettiar* v. *Valliammai Achi* (1) in which they decided that the legal representative of a decree-holder who has died during the pendency of an execution petition filed by him cannot be substituted in his place in the execution petition and be allowed to continue it, but that he must start a new execution petition if that is available. That result was reached by the learned Judges by interpreting the rules of O. 22. As I have said, it is in conflict with the long-established practice of the Courts of this Presidency; and it will be seen that the decision involves some very awkward, inconvenient and even unjust consequences.

If an execution petition is in progress and an attachment has been made, and then the judgment-debtor dies, according to the principle adopted in *Palaniappa Chettiar* v. *Valliammai Achi* (1), that petition comes to an end and the attachment must go. The accident that the judgment-debtor has died may therefore throw a most serious obstacle in the way of a diligent decree-holder. In the same way persons who have come into those execution proceedings for rateable distribution in a proper way may be entirely defeated. And, if the decision is pressed to its logical conclusion, when a judgment-debtor dies during the pendency of execution proceedings which have been taken on appeal or second appeal, the result will be that the whole proceedings fall to the ground and even at that late stage a new execution petition has to be started. It happened that soon after the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1) the question whether it could be extended to appeals in execution matters came before Wallace and Tiruvenkatachariar, JJ., in

(1) A. I. R. 1927 Mad. 184=99 I. C. 627=50 Mad. 1.

Sundayee Ammal v. *Krishnan Chetty* (2), and although they did not definitely say they disagreed with the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1) they indicated, if I may say so with respect, something very like it, and at any rate they refused to extend its principle to appeals in execution matters. And again, in cases such as the one before us, if a decree-holder were properly and legally prosecuting the execution of his decree by a petition put in near the end of the twelve years allowed by S. 48 of the Code, then by the accident of the judgment-debtor dying a day after the twelve years expired he for no fault of his own would be entirely defeated. Those are very curious results; to my mind unreasonable and unjust results. It is not clear whether they were before the minds of Coutts-Trotter, C. J. and Curgenven, J., when they decided *Palaniappa Chettiar* v. *Valliammai Achi* (1).

Now, is there any reason why legal representatives should not be brought on record in execution petitions? No reason has been suggested in the arguments before us; no justification for making the law in that way. If that is the law, what has been suggested for the appellant in effect is that it is a strange eccentricity of the legislature; R. 12, O. 22, of the Code has made it so in spite of the principles of the Code expressed in Ss. 50 and 146. That is very curious if it is so. If it was the intention of the legislature to enact that in execution proceedings legal representatives should never be brought on record, but that, when a judgment-debtor or a decree-holder dies, new execution petitions should always be started, one would have expected that very important provision to be put into the body of the Code itself. There is nothing of the sort in the body of the Code; but this rule, which it is suggested has that effect, is to be found in Sch. 1, which contains rules subject to amendment by the various High Courts of the country. Indeed, speaking for myself, if I thought that R. 12, O. 22, really had the effect that has been suggested, I should not hesitate to propose that this Court should, with the consent of the Local Government, amend it, as would be within our powers.

But, if we examine O. 22, do these rules really have the effect that is suggested? R. 12 runs:

"Nothing in Rr. 3, 4 and 8 shall apply to proceedings in execution of a decree or order."

Now it will be seen that the rule does not say that legal representatives shall never be brought on record in execution proceedings. If that was meant, I do not understand why it was not so stated directly. What R. 12 does say is, so far as we are concerned with it, that nothing in Rr. 3 and 4 of the order shall apply to proceedings in execution of a decree or order. What is it that R. 4, with which we are more immediately concerned in this case, says? It provides that, when a defendant dies in the course of a suit and the right to sue survives, the Court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit, and then in subR. (3) comes an important provision:

"Where within the time limited by law no application is made under sub-R. (1), the suit shall abate as against the deceased defendant;"

and, as we know, the time allowed by law is very brief, only 90 days. R. 3 contains similar provisions relating to the death of a plaintiff. Well, R. 12 says those provisions shall not apply to execution proceedings. What is the result of that? If we take Rr. 4 and 12 together in their literal meaning it amounts to this: if instead of a defendant dying in the course of a suit a judgment-debtor dies while an execution petition against him is pending, then the provision in R. 4, that on an application the Court is bound to bring the legal representative of the deceased person on record, does not apply; and it also means that, if no application is made to bring a legal representative on record within the time allowed, the provision that the proceedings abate does not apply. That is the literal meaning of saying that R. 4 does not apply to execution proceedings. I think, if we examine the matter, it is not unreasonable that the rules in regard to suits should be different from the rules in regard to execution. If a suit is going on in a Court, the Court is interested in seeing that that suit is disposed of promptly, both for the sake of its own business and out of fairness to other parties concerned. It is reasonable that, if a defendant dies and the right to sue survives, the plaintiff should be required

(2) A. I. R. 1928 Mad. 772=110 I. C. 662=51 Mad. 859.

under a penalty to make up his mind promptly whether he is going to continue to trouble the Court with that suit. It would be unreasonable that the suit should be left for a very long time pending on the Court's file while the plaintiff made up his mind what he was going to do about it, having already launched it. But, when we come to execution proceedings, after a decision has been given between the parties and a decree has been made, the Court is not interested in urging the decree-holder to press on with his execution. It matters nothing to the Court if the decree-holder takes the full time allowed by law for his execution proceedings or drops them altogether. There is no reason to introduce a provision that, if a decree-holder does not execute his decree promptly, the whole execution shall abate and he shall lose his decree. There would be no object in such a provision. Nor is it really necessary that there should be such a provision even in regard to any particular execution petition. If the decree-holder applies to execute the decree by arrest, and the judgment-debtor dies, that matter is finished. If he applies to execute by attachment and sale and the judgment-debtor dies and the decree-holder is dilatory and does not do anything in the way of proceeding with his execution petition, it is always open to the Court to say that he is in default and to raise the attachment. Apart from that the fact that he does not prosecute his execution petition does not inconvenience or trouble anyone. So that, although it is perfectly reasonable that there should be penalties provided by our procedure to make plaintiffs prosecute their suits promptly, even if a defendant dies, by taking steps to bring the legal representative on record subject to a very severe penalty if they do not take those steps with promptness, there is no necessity for such a procedure in regard to execution proceedings. In that view of the matter, Rr. 3 and 4, O. 22 of the Code are not necessary for execution proceedings and are not really suitable to them; and I think it extremely probable that is why the legislature provided in R. 12, O. 22, that they should not apply to execution proceedings.

It has been asked by Mr. Satyanarayana Rao: if Rr. 3 and 4, O. 22, do not apply to execution proceedings, where is the machinery for bringing the legal representative on record at all in execution proceedings? He suggests that it is only because there is machinery provided in O. 22 that legal representatives can be brought on record in suits and appeals, and that, if that machinery is absent so far as execution proceedings are concerned, then there are no means of bringing legal representatives on record in them. But is it right to assume that explicit machinery must be provided by the Code for bringing legal representatives on record? If Rr. 3 and 4, O. 22, were not there, would it follow that no legal representatives could be brought on record in suits or appeals? We have to remember that there is S. 146 of the Code, which provides the principle. Supposing for a moment that Rr. 3 and 4, O. 22, were not there, in the face of S. 146 could we assume that, if a defendant died in the course of a suit the only thing that a plaintiff could do would be to start a new suit, which might well be time barred then? Would that be the result? Surely the Courts are not so helpless as that. As Kumaraswami Sastriar, J. said in *Muthiah Chettiar* v. *Govindoss Krishna Doss* (3):

> "Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of S. 151 is to give such power to Courts and to prevent a failure of justice."

I think the correct view is that, if Rr. 3 and 4, O. 22, were not there still, if a defendant died and the right to sue survived, the plaintiff could bring on record the legal representative of the defendant, and we should have to let him do so. Otherwise we should be denying him his legal remedy. But in the absence of those rules he would have three years for doing it under Art. 181, Limitation Act. That would be very inconveniently long; and for that reason Rr. 3 and 4, O. 22, have been enacted to ensure that such a long time is not occupied but that, if legal representatives are to be brought on record, they are brought on record promptly subject

(3) A. I. R. 1921 Mad, 599=69 I. C. 337=44 Mad. 919 (F. B.).

to the penalty of abatement when that is not done. Indeed it may be said that those rules do not create the right to bring legal representatives on record but penalize those who do not exercise that right promptly.

But it is a fact that the learned Judges in *Palaniappa Chettiar* v. *Valliammai Achi* (1) took a different view of the position, as they said in effect that R. 12, O. 22, settled the matter, and without going further into it they decided that the practice of our Courts long in vogue was illegal. But, if I may say so with great respect, I doubt whether they examined the actual wording of R. 12 with sufficient care. They said

> "By R. 12 this rule (that is R. 3) is expressly rendered inapplicable to execution proceedings, an expression of intention on the part of the framers of the rules so clear that it is really unnecessary to look further;"

and therefore they did not look into the consequences nor consider the existing practice, nor refer to the earlier cases on the subject. It is possible that certain important cases were not brought to their notice; at any rate they are not mentioned in their judgment. But with all respect I cannot agree with their view of the actual wording of R. 12. It does not lay down that no legal representative shall be brought on record in execution proceedings but, merely states that nothing in Rr. 3, 4 and 8 of that order shall apply to execution proceedings. The meaning attributed to R. 12 by the learned Judges is not explicitly expressed in it nor, so far as I can see, necessarily implied in it.

One of the important cases not mentioned by the learned Judges is *Purshotam* v. *Rajbai* (4). That was a case dealing with the Code of 1882. It was the view of the Bombay High Court that the sections of that Code which correspond with the rules now in O. 22 were not applicable to execution proceedings. Nevertheless in that case the learned Bombay Judges, holding the view that those sections were not applicable to execution proceedings, laid down that in an execution petition, if the judgment-debtor died, his legal representative could be brought on record, the very point before us. *Bhagwan Das* v. *Jugal Kishore* (5) is perhaps an even more interesting case because it deals with the present Code. There again in spite of R. 12, O. 22, having stated that nothing in Rr. 3 and 4 shall apply to execution petitions, the learned Judges of the Allahabad High Court decided that there was still a power in the Court to bring on record the legal representative of the deceased judgment-debtor in the course of an existing execution petition. And a similar view was expressed by two learned Judges of the Calcutta High Court in *Jagattari Dasi* v. *Raklal Chandra Tewary* (6), in respect of a decree-holder dying in the course of an execution petition. That is a case which would have been of even more interest to the learned Chief Justice and Curgenven, J., if it had been brought to their notice in the argument in *Palaniappa Chettiar* v. *Vallimmai Achi* (1). With the greatest respect it appears to me that the value of the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1) cannot but be affected by the fact that these earlier decisions were not noticed.

However we are not dealing with exactly the same question here as was before the learned Judges in *Palaniappa Chettiar* v. *Valliammai Achi* (1), though the principle of their decisions would apply to this case. That case, as I have said, concerned a decree-holder. He was actually a transferee decree-holder, who died in the course of execution proceedings, and the question was whether his legal representative could be brought on to continue the same execution petition. Here we are dealing with a slightly different question, whether, when the judgment-debtor dies in the course of execution proceedings, his legal representative can be brought on record in those very execution proceedings. As I have mentioned, Wallace and Thiruvenkatachariar, JJ., in *Sundayee Ammal* v. *Krishnan Chetty* (2) was not prepared to press the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1) to its logical conclusion so far as appeals in execution matters were concerned. But we get much nearer to the question now before us in the opinion expressed by Wallace and Madhavan Nair, JJ., in *Ramanathan Chettiar* v. *Ramanathan Chettiar* (7). There they definitely express the opinion that the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1) could not be

(4) [1909] 34 Bom. 142=4 I. C. 839.
(5) [1920] 42 All. 570=57 I. C. 610.
(6) [1909] 3 I. C. 324.
(7) A. I. R. 1929 Mad. 275=117 I. C. 705.

applied to judgment-debtors. And Jackson, J., sitting alone, in C. M. S. A. No. 140 of 1928 expressly refused to apply *Palaniappa Chettiar* v. *Valliammai Achi* (1) to the case of a judgment-debtor. As he remarked in that case, the Privy Council have given us guidance in this matter in *Jang Bahadur* v. *Bank of Upper India Ltd.* (8). It is there remarked:

"If the judgment-debtor dies, before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree."

There is an indication that in the view of the Privy Council substitution of the legal representative for a deceased judgment-debtor is possible, and, as I understand the passage, substitution in an existing execution petition. Now, three learned Judges of this Court having dissented from the principle of *Palaniappa Chettiar* v. *Valliammai Achi* (1) and their dissent appearing to be supported by the opinion of their Lordships of the Privy Council, I do not think we need feel ourselves bound by *Palaniappa Chettiar* v. *Valliammai Achi* (1) in this case. That being so, in my opinion there is no doubt, that Ramachandrayya's widow could properly be brought on record as his representative in E. P. 125 of 1924, which was presented within 12 years of the date of the decree, and therefore S. 48 of the Code, which bars fresh applications for execution made more than 12 years from the date of the decree, is no obstacle in the decree-holder's way.

As I have said, there were other objections to the execution of the decree raised by Ramachandrayya's widow before the lower Courts. Her objections that the previous execution petitions had not been in accordance with law has not been pressed before us. The learned Subordinate Judge thought it unnecessary to go into what he called "the merits of the case," as he was of opinion that, when the District Munsif brought the widow on record as Ramachandrayya's legal representative before making his final order and she did not appeal against that, her present contentions became res judicata, against her, a view which cannot be supported, and S. 128, T. P. Act could not be applied in these proceedings, which contention is not pressed for the decree-holder before us. By "the merits" the learned Subordinate Judge apparently referred to the widow's contention that she had received the property concerned by a gift from Ramachandrayya in 1910. The decree-holder maintained that that gift was a sham transfer. The learned Judge has not decided that question. It is not enough merely to bring Ramachandrayya's widow on record as his legal representative: the decree-holder has to make out his right to proceed against the property as part of his estate. Therefore, although I do not agree with the contention urged for the appellant here, it appears to me necessary that this execution petition should go back to the Subordinate Judge for fresh disposal on the remaining question, whether the property concerned is Ramachandrayya's property, i.e., part of his estate. I therefore propose that the order of the learned Subordinate Judge be set aside and the appeal before him be remanded to him for fresh disposal and that the costs of this appeal should abide and follow the Subordinate Judge's decision.

Anantakrishna Ayyar, J.—I agree. As this case raises a question of importance, I directed, when it came on for hearing before me, that it should be posted before a Bench. I should like to add a few words of my own, having regard to the importance of the question. After obtaining a money decree in O. S. No. 179 of 1912, the decree-holder filed several petitions for execution of the decree. The last of such execution petitions with which we are now concerned here was filed on 18th February 1924, the date of the decree being 29th February 1912. The judgment-debtor having been absent from the country, and not having been heard of for 8 or 9 years, the decree-holder applied to have his legal representative, his widow, brought on the record with a view to proceed with his main execution petition. When he made the application on 5th July 1924, more than 12 years had lapsed from the date of the decree; the legal representative of the judgment-debtor raised the objection that execution of the decree was barred by virtue of the provisions of S. 48, Civil P. C. It was also argued on behalf of the legal representative that in

(8) A. I. R. 1928 P. C. 162=109 I. C. 417=55 I. A. 227=3 Luck. 314 (P.C.).

such circumstances the proper procedure that the decree-holder should adopt was to file a fresh execution petition, and that it was not open to him, in the course of the execution petition that was pending, to apply for orders regarding the substitution of the legal representative of the judgment-debtor. In support of this contention, the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1) was relied on. The lower Courts however decided against the contentions of the legal representative of the judgment-debtor, and allowed the execution to issue, on the ground that the question was res judicata by virtue of a prior order against which no appeal had been preferred by the judgment-debtor's legal representative. Therefore this civil miscellaneous second appeal has been preferred by the legal representative of the judgment-debtor.

I may at once state that the lower appellate Court's view, that the question is res judicata, has not been sought to be supported before us (and, in my view, quite properly) by the learned advocate for the respondent. I proceed to consider the two main contentions raised by the appellant. It will be convenient to take the second contention first.

The second of the two main contentions that were raised before us is based on the decision of this Court in the case reported in *Palaniappa Chettiar* v. *Valliammai Achi* (1) and though that case related to the death of the decree-holder, and not, as is the case before us, of the judgment-debtor, yet as many of the arguments applicable to the case of the death of a decree-holder would have weight in considering the decision of a similar question arising in the case of the death of the judgment-debtor, we are anxious to consider how exactly the matter stands having regard to the provisions of the Code and to the decisions of Courts here and elsewhere. Before proceeding to discuss the question further, I may mention that the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1) worked a very important change in the practice which was till then prevailing here, having regard to the consequences of that decision so far as the legal representative of the decree-holder was concerned. If the only remedy open to the legal representative of a deceased decree-holder in such a case be to file a fresh execution petition, then fresh pleas of limitation might be open to the judgment-debtor, the intervening period affording him basis for such contention. Attachments which were effected pending the prior execution petition would prima facie no longer be available when a fresh execution petition is filed. The advantages which a decree-holder has as a result of his having filed execution petition, such as the right to share in the proceeds of auction sales held by the same Court after the filing of such execution petition, might not be necessarily available to him on such fresh execution petition. Other disadvantages to the decree-holder's representative also could be really imagined, so that the decision in *Palaniappa Chettiar* v. *Valliammai Aehi* (1) did not only affect the practice as it prevailed till then, but also substantially affected the right of the legal representative of the decree-holder. All the same, if such results necessarily or properly follow from the provisions of the Code, then, any remedy to avoid such results should be sought elsewhere.

In *Palaniappa Chettiar* v. *Valliammai Achi* (1) the learned Judge sitting on the original side of this Court had an execution petition pending before him. When such petition was pending, the decree-holder died and an application was made to have the deceased decree-holder's legal representative brought on the record. The learned Judge passed orders substituting the name of the legal representative in the place of the decree-holder, with a view to proceed further with the execution petition that was pending. The matter was taken on appeal by the judgment-debtor. The two learned Judges, before whom the appeal came, reversed the trial Judge's order and held that it followed from the provisions of O. 22, Civil P. C., that the only remedy open to the legal representative of a decree-holder in such circumstances was to file a fresh execution petition. The grounds on which the judgment was based appear at p. 4 of the report. In answer to the contention that under S. 146 and under O. 21, R. 16 it was open to a person on whom rights devolved by operation of law &c., to take steps to carry on further proceedings their Lordships observed as follows:

"At the same time we do not accept the argument that because this rule (O. 21, R. 16) lays one method of proceeding with execution it excludes any other method. For an answer to the question raised it is necessary to go to O. 22, which relates to death, marriage and insolvency of parties. Rr. 3 and 4 of this order respectively provide for the substitution during the course of a suit of the legal representative for a deceased plaintiff or a deceased defendant and construing the word "suit" so as to embrace execution proceedings R. 3 would furnish the required authority. By R. 12 however this rule (with two others) is expressly rendered inapplicable to execution proceedings an expression of intention on the part of the framers of the rules so clear that it is really unnecessary to look further."

Holding therefore that the case before the Court was specifically dealt in Rr. 3 and 4, O. 22, and that S. 146, Civil P. C. could not apply to such a case the Court came to the conclusion that it was not open to the legal representative of the decree-holder to apply to have his name substituted in the place of the deceased decree-holder in the execution petition already pending.

I have quoted the material portion of the judgment of the Court and I gather that the basis of the decision is R. 12, O. 22, read with Rr. 3 and 4. Turning to Rr. 3, 4 and 8 what one finds is that the legislature has provided for abatement of suits if the plaintiff who is dominus litus in such matters should not proceed to take steps to bring the legal representative of a deceased defendant or a deceased plaintiff as the case might be within the time allowed by law. The suit is declared to have abated with reference to the deceased parties. Now to declare that a suit abates wholly or in part is to impose a penalty upon a person for not taking steps which the law requires him to take in proper time. O. 22, R. 12, as I read it only declares that the legislature did not think it proper to impose upon decree-holders this penalty and I am not able to gather anything further from the provisions of O. 22. One may recall to one's mind several rules of practice which are made applicable to suits but which are not applicable to execution petitions. It is not necessary for me to elaborate on this matter. If a plaintiff should not appear on the date fixed for the hearing of his suit, then the suit is dismissed. It is not open to him to file a fresh suit except under particular circumstances. His ordinary remedy is to have the old suit restored to the file and to have the relief prayed for therein granted to him in that suit. But in the case of execution petitions greater latitude has been for obvious reasons allowed to a decree-holder.

A decree-holder who does not promptly and expeditiously carry on proceedings in execution but allows his petition to be dismissed because proper steps have not been taken by him is not thereby denied the relief claimed for all time. He is subject to question of limitation which I am not considering here, entitled to file a fresh execution petition seeking the same reliefs. As I said there are also other rules of procedure applicable to suits but not applicable to execution petitions. These rules have been recognized by Courts long prior to the enactment of O. 22, R. 12 in the Code of 1908. It has been laid down that though a decree-holder has just like a plaintiff the right to have the legal representative of the deceased judgment-debtor substituted in the original execution petition and to go on with the same till complete effectual relief is afforded to him in execution he is not bound to do so and that the principle of abatement does not apply to execution petitions. In fact that disability is not cast on decree-holders in respect of execution petitions but decree-holders' legal representatives are given the option, of which they may avail themselves or not in the circumstances. To construe that O. 22, R. 12, casts an obligation on the decree-holders in such circumstances and practically applies to them the principle of abatement (with the only difference that the filing of a fresh execution petition is allowed) would I think work a great change in the procedure relating to execution of decrees as it was understood at the time when the new Code was passed and in the absence of definite indication on the part of the legislature making such an intention clear I do not think we would be justified in inferring that that was the intention of the legislature. Now this question, viz. how far the doctrine of abatement applied to execution petitions and whether on the death of a judgment-debtor or a decree-holder pending an execution petition applications are maintainable for the substitution of the legal representative of the deceased came

for consideration before the Courts in India long before the Code of 1908. The earliest case relating to the death of a decree-holder would seem to be the case in *Gulabdas* v. *Lakshman Narhar* (9) referred to in *Bhagwan Das* v. *Jugal Kishore* (5) at p. 573. Two cases relating to the death of judgment-debtors during the pendency of execution petitions were brought to our notice. In *Purushotam* v. *Rajbai* (4) the learned Chief Justice of the Bombay High Court and Bachelor, J., had a case where the judgment-debtor died before the execution of the decree was completed. They held that when execution proceedings were commenced against the judgment-debtor they could be continued after his death by substituting the name of the legal representative in the place of that of the deceased judgment-debtor in the execution petition and that it was not necessary to file a fresh execution petition under the provisions of S. 235 of the prior Code. They remarked at p. 151 that an earlier case quoted before them decided

"that Ss. 361 to 372 of the Code did not relate to execution proceedings."

After discussing the matter further they observed;

"We think therefore that there is no objection to the continuance of the execution proceeding against the present respondent without fresh application under S. 235."

Thus it is clear that, even before the legislature enacted under O. 22, R. 12, that the provisions of Rr. 3, 4 and 8 did not apply to execution proceedings, Courts had decided that the corresponding provisions of the prior Code did not apply to execution proceedings and in spite of the same, Courts have exercised their jurisdiction in the matter by allowing the name of the legal representative to be substituted in the place of the deceased party in the original execution petition, and by directing that the proceedings in execution should proceed further, and that it was not necessary to file a fresh execution petition. After the Code of 1908, the question was raised before the Allahabad High Court in the case reported in *Bhagwan Das* v. *Jugal Kishore* (5). There after the attachment of the judgment-debtor's property in execution of a money decree, the judgment-debtor died. The Court held that the decree-holder was not bound, on peril of his execution petition abating, to bring upon the record the legal representative of the judgment-debtor and that, so long as the execution of the decree was not barred by limitation, he could execute it against the legal representative of the deceased judgment-debtor. The learned Judges went further and added:

"On the other hand, there is no bar to the decree-holder, if so advised, in applying to have the legal representative made a party to the execution proceedings."

It should be noticed that in the case of a suit it is obligatory on the plaintiff or his legal representative to file the necessary application in time to avoid abatement, and it is not open to him to file a fresh plaint. In the case of execution petitions the Court held in *Bhagwan Das* v. *Jugal Kishore* (5) that, while it was open to the decree-holder to apply in the pending execution petition to have the legal representative's name substituted, it was also open to him, if he was so advised, and if there be no bar of limitation, or any other bar, to drop the pending proceedings and to file a fresh execution petition. At p. 572 the learned Judges observed:

"Rule 12 distinctly shows that this rule shall not apply to execution preceedings, i. e. that it is not compulsory upon a decree-holder to have the name of the heirs brought upon the record in that way, on penalty of his decree abating. It is open to him to apply under S. 50 of the Act for execution of his decree as against the heirs. But there is nothing in the Code of Civil Procedure which lays it down that a Court cannot bring the heirs of a judgment-debtor upon the record in execution proceedings and continue with them, nor is there anything in the law which lays it down that on the death of the judgment-debtor any pending execution petition shall abate."

They added later on:

"It is nowhere held that execution proceedings must abate on the death of the judgment-debtor. If the decision of the Court below be correct, then on the abatement of these proceedings, the attachment would cease and it would be open to the heirs to dispose of the property before it could be re-attached under a fresh execution proceeding."

The matter was considered by the Calcutta High Court in the case reported in *Jugat Tarini Dasi* v. *Rakhal Chandra* (6). I should like to quote one or two sentences from the judgment of Mookerji, J., in that case at p. 399. A preliminary objection was taken before the learned Judge that, upon the death of the applicant, her legal representatives were not entitled to prosecute the appeal and in support of that proposition, re-

(9) [1878] 3 Bom. 221.

liance was placed upon O. 22, R. 12, of the Code. The learned Judge characterized the objection .in the following terms:

"This preliminary objection is of a somewhat novel character and would not be worthy of serious consideration but for the insistence with which it has been pressed."

The learned Judge, after stating that even before the enactment of the present code, Courts had held that the corresponding provisions of the prior Code did not apply to execution proceedings and that Court had power to bring the legal representatives of deceased decree-holders and judgment-debtors on record in pending execution petitions, observed that the effect of R. 12, O. 22 does not in any way nullify that practice. The Privy Council in the case reported in *Jang Bahadur* v. *Bank of Upper India Ltd.* (8) had occasion to note the practice in such matters. At p. 233 in the India Appeals volume, their Lordships observed as follows:

"If the judgment-debtor dies before any such certificate is issued, certificate as regards complete satisfaction of the decree, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction."

The passage quoted from *Jang Bahadur* v. *Bank of Upper India Ltd.* (8) would seem to lay it down as clear law that execution proceedings do not abate by reason of the death of any of the parties to the same, and also that in the case of death of the judgment-debtor, during the pendency of the execution petition the decree-holder must get "an order for substitution" from the proper Court. This is clearly against the contention that in such cases execution proceedings "abate" or, as it was said "lapse" or in any other way "become infructuous," and that the only remedy open to the decree-holder in such circumstances is to file a fresh petition for execution.

It further seems to me that certain observations made by Sir John Wallis, C. J., and Kumaraswami Sastri, J., in the Full Bench case reported in *Muthiah Chettiar* v. *Govindoss Krishna Doss* (3) furnish answers to the contentions raised before us by Mr. P. Satyanarayana Rao, the learned advocate for the appellant. At p. 924 (of 44 *Mad.*) this is what the learned Chief Justice says :

"If (the Code) expressly provides by O. 22, R. 12, that nothing under Rr. 3, 4 and 8 of that order which provide for abatements shall apply to execution."

I take that to be a pronouncement on a question on which there have been prior pronouncements of Courts to similar effect, that the doctrine of abatment does not apply to execution proceedings and that is what is laid down in R. 12, O. 22. If that be so there is absolutely no ground for putting a construction on R. 12 which not only is contrary to the settled practice of Courts but which also involves at the same time serious consequences prejudicial to decree-holders. But the learned advocate for the appellant asked, what is the provision of the Code which would authorize the Court to pass "order for substitution" in such cases? To that question, Kumaraswami Sastri, J's., opinion delivered in the Full Bench case contains the necessary answer. This is what the learned Judge says at p. 952 :

"Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts, I think Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not refuse relief on the ground that the legislature has not made provision for a particular case, though within the generality of a section of the Code. The object of S. 151 is to give such power to Courts and to prevent a failure of justice."

As the Code gives a decree-holder the right to execute his decree till complete satisfaction is rendered if the circumstances of the judgment-debtors permit the same (subject to the law of limitation and some other provisions enacted in this behalf), it is open to the decree-holder to seek the assistance of the Court in all matters in which such assistance is necessary to give him the benefit of the complete realization of his decree ; and if the Court finds that no specific provisions exist in the Code in respect of any contingency that might happen, it is open to the Court to mould its procedure according to the equities of the case. It therefore seems to me that having regard to the principles applicable to the case, the prior practice, and the decisions of the various Courts on this question, one should avoid the consequences which would follow if we accept the appellant's contention if it be legitimately possible

to do so. I am glad that, after the elaborate and learned arguments that were addressed to us by the learned advocates in this case, materials have been placed before us which enable us to answer the question in a way which would avoid injustice.

Having said so much with reference to the general principles applicable to procedure and applicable to execution I proceed to note that our attention was drawn to a decision in *Sundayee Ammal* v. *Krishnan Chetty* (2) by Wallace and Thiruvenkatachariar, JJ., where the applicability of *Palaniappa Chettiar* v. *Valliammai Achi* (1) to an execution appeal was raised. As I read the judgment of the learned Judges, they apparently did not feel quite sure about the ground on which *Palaniappa Chettiar* v. *Valliammai Achi* (1) was based, but they thought that, for the disposal of the matter immediately before them, it was enough to express the opinion that they would not be prepared to extend the principle of the decision in *Palaniappa Chettiar* v. *Valliammai Achi* (1). But the matter came again before Wallace, and Madhavan Nair, JJ., in *Ramanathan Chettiar* v. *Ramanathan Chettiar* (7). It is said that the observations made by the learned Judges in that case were not strictly necessary for the decision of the case.

But they were making observations on a question of practice, and, for my part, I attach great weight to pronouncements by learned Judges on matters of procedure. Now, at pp. 1004 and 1005 of (30 *L. W.*) *Ramanathan Chettiar* v. *Ramanathan Chettiar* (7), there are passages in the judgment from which it is clear that the learned Judges were not prepared to accept the soundness of the principle laid down in *Palaniappa Chettiar* v. *Valliammai Achi* (1). They observed :

"The Court has clearly jurisdiction to go on with the execution proceedings and to receive an application to bring on necessary parties if such are necessary. Does then the death of original judgment-debtor during the pendency of execution proceedings entail in law the issue of a fresh notice to his legal representatives?"

After discussing the question further, they expressed their view in the following terms :

"It is obviously not the law that the moment the judgment-debtor in an execution petition dies, the Court loses jurisdiction in the matter, and the execution petition collapses."

These observations related to the death of the judgment-debtor pending the execution petition, and therefore are exactly applicable to the case before us. Jackson, J., sitting as a single Judge also expressed similar views in C. M. S. A. 140 of 1928.

Having regard to these later pronouncements made by the learned Judges of this Court, to the previous law and practice relating to such important matter as proceedings in execution of decrees, to the opinions expressed by learned Judges of Bombay, Allahabad and Calcutta, with no course of decisions contra in our Court, and. finally—(and this should by itself be conclusive of the question)—having regard to the passages quoted from the decision of the Privy Council in *Jang Bahadur* v. *Bank of Upper India Ltd.* (8) I think that we should not be justified in reading O. 22, R. 12 in the way we are asked to do by the learned advocate for the appellant.

The other main contention raised by the learned advocate for the appellant—that the application in question filed in the execution petition is barred under the provisions of S. 48 of the Code, in my opinion, also fails, because S. 48 of the Code would apply only when a fresh execution petition has to be filed, and not when an execution application is made in a pending execution petition (The rules framed by this High Court draw a distinction between an execution petition (E. P.) and an execution application (E. A.), the latter term being applied to the media by which further and other steps are sought to be taken in the main matter of execution and in a pending execution petition.) I therefore overrule the main contentions raised by the learned advocate for the appellant.

I also agree with my learned brother that the decision of the lower appellate Court on the question of res judicata is not sustainable in the circumstances, and that the appeal must be remanded to the lower appellate Court for fresh disposal. I also agree in the order as to costs proposed by him.

P.R.S./S.N. *Case remanded.*

A. I. R. 1931 Madras 313

BHASHYAM AYYANGAR, J.

Devanai Ammal—Appellant.

v.

Mahadeva Chetti—Respondents.

Second Appeal No. 1646 of 1927, Decided on 28th November 1930, against decree of Dist. Judge., North Arcot.

Civil P. C. (1908), O. 2, R. 2 — Legacy—Executors agreeing to pay interest on legacy but declining to pay principal except on production of succession certificate—Prior suit by legatee for interest alone — O. 2, R. 2, does not bar subsequent suit for principal.

The executors under a will declined to pay a legacy to the legal representative of the legatee, except upon the production of a succession certificate, but agreed to pay interest thereon. Legal representative after first suing for the interest alone subsequently sued for the legacy amount after getting succession certificate.

Held: that under the said circumstances, O. 2, R. 2, did not bar the subsequent suit for the legacy amount after getting a succession certificate, because the legal representative in the prior suit could not get a decree for the legacy amount without producing the succession certificate and hence was then not entitled to make the claim for that amount. He could therefore sue subsequently on the same cause of action for the legacy amount : *A. I. R.* 1929 *P. C.* 166, *Expl.* and *Rel. on.*; 8 *Cal.* 422 ; 21 *Bom.* 267 ; *A.I.R.* 1925 *Mad.* 1120 ; 18 *Mad.* 466 ; *A. I. R.* 1922 *P. C.* 23 ; 8 *Cal.* 422 (*P. C.*) 40 *Mad.* 291 ; *A. I. R.* 1922 *P.C.* 412, *Ref.* ; 33 *Mad.* 317, *Dist.* [P 315 C 2]

S. Varadachariar and *T. S. Venkataraman*—for Appellant.

A. Ramaswami Ayyar, A. C. Sampath Ayyangar, T. R. Srinivasan, A. Vishwanatha Ayyar and *P. Venkataramana Rao*—for Respondents.

Judgment.—In this case one Palani alias Dharmalinga Chetty was entitled to a certain sum of money under a deed of settlement executed by his father and that sum of money was with one Lakshmana Chetty. Lakshmana Chetty, who died in 1908, left a will dated 24th April 1906, whereby he appointed five executors for his estate and directed them inter alia to pay a sum of Rs. 4,000 to the said Palani alias Dharmalinga Chetty (Ex. A). Defendant 2 was the residuary legatee under the said will. As he was then a minor defendant 1 was thereby appointed his "executor", that is, apparently his guardian.

Two of the five executors did not accept office, but the other three did and administered the estate. These three were : (1) Venkatachala Mudali, defendant 3 who was alive on the date of this suit but is now dead and represented by respondents 12 to 15 in the second appeal ; (2) Kumaraswami Ayyar who died before the suit and whose sons and legal representatives were added as defendants 4 to 6 ; and (3) Ellappa Chetty who died still earlier and whose sons and legal representatives were added as defendants 7 to 10. Palani alias Dharmalinga Chetty died a minor and unmarried soon after the death of Lakshmana Chetty, leaving the plaintiff, his mother and only heir. The will of Lakshmana Chetty does not provide for the payment of any interest on the sum of Rs. 4,000 directed to be paid to Palani alias Dharmalinga Chetty.

It appears from Ex. C, prceedings recorded by the three executors of Lakshmana Chetty who entered on their office and defendant 1, the guardian of the residuary legatee, on 14th October 1915, that after the death of Palani alias Dharmalinga Chetty there was an arrangement between the plaintiff and them whereby she allowed them to retain and invest the money due to her and pay her interest "either per month or at any time as suited her." These proceedings and the subsequent proceedings, Ex. D, show that the rate of interest was varying from time to time. The executors paid interest accordingly to the plaintiff on several occasions. They however declined to pay up the principal amount unless she produced a succession certificate.

Defendant 2, the residuary legatee, attained majority in the year 1915 and the executors then delivered over "all the assets" of the estate to him, retaining a sum of Rs. 5,143-0-2 only with them, being the amount which remained payable to the plaintiff and two others : see defendant 2's deposition and Ex. 8. They kept the said sum in a bank and continued to pay the interest which accrued due on it to the plaintiff.

In 1918 the plaintiff filed O.S. No. 406 of that year on the file of the District Munsif's Court of Vellore against defendant 1 and two of the executors, namely Kumaraswami Ayyar and Venkatachala Mudali. Ellappa Chetty died prior to that suit and he was not therefore impleaded. That suit was to recover the interest due from 19th July 1916 till its date. The plaintiff alleged therein that she

> "without asking for the entire principal sum, was receiving only the whole of the income thereof from the executors, the defendants and others, and enjoying the same till 19th July 1916"

and that the subsequent interest was not paid in spite of demands (Ex. E).

Kumaraswami Ayyar, one of the executors and defendant 2 in that suit, at-

once paid up the amount sued (Ex. X) and the suit was reported settled out of Court on 17th September 1918. The executors are said to have continued to pay the interest even subsequently and to have again defaulted from and after December 1922. The plaintiff then obtained a succession certificate in her fav our in O. P. 18 of 1923 on the file of the District Court of North Arcot and instituted the present suit to recover the principal said to be Rs. 3,575 and the interest on it from December 1922.

Several issues were raised before the Court of first instance and the learned Subordinate Judge recorded his finding on all of them. He held that the claim was made out against all the defendants except defendant 2 but that the suit was barred by reason of the previous suit, O. S. No. 406 of 1918, under O. 2, R. 2, Civil P. C. He therefore dismissed the suit not only against defendant 2 but against all the defendants.

On appeal by the plaintiff the learned District Judge agreed with the Subordinate Judge that the suit was barred by O. 2, R. 2, Civil P. C. He accordingly dismissed the appeal. He did not go into the other issues. The plaintiff has filed this second appeal and the only question is whether the finding of the lower Courts that this suit is barred under O. 2, R. 2, Civil P. C., by reason of the previous suit is correct.

Now, Mr. S. Varadachariar the learned advocate for the appellant, has raised a threefold contention. His first contention was based on the fact that the plaintiff had not obtained a succession certificate at the time of the previous suit. He urged that in the absence of succession certificate the plaintiff was not entitled to claim the principal amount from the executors (who had refused to pay it without such certificate) and her omission to sue for it in the previous suit cannot therefore bar the present suit under O. 2, R. 2. His second contention was that the interest sued for in the previous suit was not due on the original cause of action but on the agreement entered into by the executors after the death of Lakshmana Chetty, and the previous suit brought for the interest cannot therefore bar the present suit for the principal. His last contention was that in any case the plaintiff's claim was not barred as against defendants 7 to 10 who or whose father was not impleaded as parties in the previous suit.

I am of opinion that the appellant is entitled to succeed on the first two points and it is therefore unnecessary to consider the third point.

Taking the first point : it is necessary to note that what Cl. 1, O. 2, R. 2, requires is that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. It is only when the plaintiff contravenes this requirement that the bar laid down in Cl. 2 can come into operation. Now, was the plaintiff entitled to claim the principal from the executors on the date of the previous suit ? It must, I think, be held that she was not, for the simple reason that she had not obtained a succession certificate in respect of it. Under S. 4, Succession Certificate Act which is now enacted as S. 214, Succession Act, no Court can pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof except on the production of a succession certificate or like authority.

It was pointed cut and it is no doubt true that the production of a succession certificate is not a condition precedent to the filing of a suit for the recovery of a debt due to a deceased person and the certificate could be produced at any stage of the suit, but the fact remains that no decree could be passed without its production. As the plaintiff who had not obtained a succession certificate could not have insisted on a decree being passed in her favour on the date of the previous suit, it must, I think, be held that she was then not entitled, to make the claim. It seems to me irrelevant that the Court could and might have given time after the suit was filed for producing the succession certificate and could have passed a decree on such certificate being produced within the time granted.

There is the authority on this point of the decision of the Privy Council in *Jaggo Bai* v. *Utsava Lal* (1). In that case a malikana which was not made the subject matter of a previous suit was claimed in the second suit along with other properties. A certificate under the

(1) A.I.R. 1929 P.C. 166=117 I. C. 498 = 56 I. A. 267=51 All. 439 (P.C.).

Pensions Act, 1871, was necessary to maintain the claim as regards the malikana and such certificate had not been obtained at the time of the previous suit. In dealing with the plea of the bar under O. 2, R. 2. raised in the subsequent suit brought after obtaining that certificate as regards the claim for malikana, their Lordships observe at p. 449 of the report as follows:

"By reason of the absence of a certificate under the Pensions Act of 1871, the Court in the previous suit (No. 481 of 1890), was not competent to deal with the question of the malikana and the plaintiff had no right of action in respect of it. In their Lordships' opinion the plaintiff's claim to malikana was not therefore part of the claim which she was entitled to make in the previous suit."

That reasoning fully applies to this case and the plaintiff must therefore be held not to have had a right of action in respect of the principal on the date of the previous suit.

The learned advocate for the respondents drew attention to the difference in the language between S. 4, Succession Certificate Act, and Ss. 4 and 6, Pensions Act. No doubt the former provided that no Court shall pass a decree except on the production of a certificate whereas the latter Act provides first in S. 4 'that no Court shall entertain any suit relating to any pension" and then in S. 6 "a civil Court otherwise competent to try the same shall take cognizance of any such claim upon receiving a certificate" but this difference does not seem to be material for the present purpose, for it has been held by the Privy Council that a suit for the maintenance of which a certificate is necessary under the Pensions Act, but which is filed without such certificate may be taken cognizance of and proceeded with on the subsequent production of the necessary certificate: see *Muhammad Azamat Ali Khan* v. *Lalli Begum* (2), at pp. 433 and 435. In this connexion reference may also be made to the following observations of Subramania Ayyar, J., in *Pethaperumal Chetty* v. *Murugandi Servaigaran*(3) at p. 468:

"It cannot be said that the analogy between a case where the plaintiff omits to produce the Collector's certificate under the Pensions Act and a case where he fails to produce a succession certificate required by Act 7 of 1889 is incomplete because in the former case the absence of the Collector's certificate prevents a Court from taking cognizance of the claim (S. 6, Act 23 of 1871), whereas in the latter a Court is precluded from passing a decree except on the production of a certificate (S. 4, Act 7 of 1889). For in *Muhammad Azamat Ali Khan* v. *Mt. Lalli Begum* (2) it was held by the Privy Council that a suit relating to a grant of property within the meaning of the Pensions Act need not be dismissed because no certificate had been obtained before the commencement thereof."

It was pointed out on behalf of the respondent that if the plaintiff was not entitled to sue for the principal for want of a succession certificate, she was equally not entitled to sue for the interest. Assuming this reasoning to be correct, it does not in the least affect the legal argument advanced on behalf of the appellant.

The point under consideration may also be tested in another way: Suppose the plaintiff had gone on with the previous suit and it was dismissed for the nonproduction of a succession certificate: it cannot be doubted that she can in that case sue again on the same cause of action, subject of course to the law of limitation after obtaining the necessary certificate: see *Pethperumal Chetty* v. *Murugandi Servaigaran* (3). This shows that the previous suit is in such cases ignored or treated "as if it was never filed', and if so it is difficult to understand how the bar of O. 2, R. 2, can be pleaded. It has been held that the bar of O. 2, R. 2, has no application where the plaint in the first suit is returned for presentation to the proper Court .and not represented, *Subba Rao* v. *Rama Rao* (4), as well as where the first suit is withdrawn: see the judgment of Phillips, J., in *S. A.* 1641 *of* 1923. Reliance was placed on the observation of Krishnaswami Ayyar, J., in *Ramanjulu Naidu* v. *Aravamuda Ayyangar* (5) at p. 322 that

"Section 43, Civil P. C. (which corresponds to O. 2, R. 2 of the present Code) operates to bar the second suit even where the first was dismissed and not decreed, for its applicability depends upon the frame of the suit instituted and not upon the result."

But this observation obviously applies to cases where the first suit is gone into and adjudicated and not to cases where it was not possible to adjudicate it and it was not adjudicated for want of a necessary legal requisite.

Now coming to the second contention: I have observed already that the will of Laksmana Chetty did not provide for the payment of any interest, and the interest which the plaintiff was drawing was only

(2) [1882] 8 Cal. 422=9 I. A. 8 (P. C.).
(3) [1895] 18 Mad. 466=5 M. L. J. 189.
(4) [1917] 40 Mad. 291=32 I. C. 899.
(5) [1910] 33 Mad. 317=5 I. C. 735.

due under an agreement which she subsequently entered into with the executors. As the interest was thus due to her on an independent covenant, the suit filed for its recovery cannot bar her suit to recover the principal: see *Yashvant* v. *Vithal* (6), *Muhammad Hafiz* v. *Muhammad Zakariya* (7), *Kishen Narain* v. *Pala Mal* (8) and *Sawmy Rao* v. *Official Assignee of Madras* (9).

For these reasons I hold disagreeing with the view of the lower Courts, that this suit is not barred under O. 2, R. 2, Civil P. C.

In the result I reverse the decree of the lower appellate Court and send back the case to it for disposal on the other issues in the case.

Costs incurred till now will be costs in the cause and be provided for in the revised decree to be passed by the lower appellate Court. The appellant will have a refund of the court-fee paid on the memorandum of second appeal.

P.R.S./B.V. *Appeal allowed ; case remanded.*

(6) [1897] 21 Bom. 267.
(7) A. I. R. 1922 P. C. 23=65 I. C. 79=49 I.A. 9=44 All. 121 (P. C.).
(8) A. I. R. 1922 P. C. 412=72 I. C. 187=50 I. A. 115=4 Lah. 32 (P. C.).
(9) A. I. R. 1925 Mad. 1120=91 I. C. 403=48 Mad. 703.

*A. I. R. 1931 Madras 317

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

A. N. Ramachandra Iyer and *others*—Appellants.

v.

The Official Assignee of Madras and *others*—Respondents.

O. S. Appeal No. 111 of 1928, Decided on 12th September 1930, against order of Waller, J., D/- 2nd May 1928.

***(a) Presidency Towns Insolvency Act (1909), S 52 (2) (b)—Suit for partition and consequent division in status—Hindu father adjudicated insolvent—Right of father to have his debts paid vests in Official Assignee.**

Notwithstanding the suit for partition and the consequent division in status, the right of the father to have his just debts paid out of the entire family property subsists and where the father has been adjudicated insolvent such right vests in the Official Assignee as "property of the insolvent divisible among his creditors:" *A. I. R.* 1927 *Mad.* 471 (*F. B.*) ; *A. I. R.* 1925 *P. C.* 18 and *A. I. R.* 1926 *Mad.* 994, *Ref.*

[P 322 C 1]

***(b) Presidency Towns Insolvency Act (1909), S. 7—Official Assignee can obtain declaration regarding liability of son's share in family property for just debts of insolvent father although there is division of status by suit for partition.**

Although owing to the division of status brought about by a suit for partition instituted by the sons after their father's insolvency, the father and the Official Assignee lose the right of private sale of the family property including the shares of the sons, it is open to the Official Assignee to obtain a declaration against the sons and get the family property including their shares therein sold by or through Court. S. 7 gives the widest powers to the insolvency Court to go into such a question and to declare the liability of the son's shares in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realizations : *Mozeley* v. *White*, 8 *Ch. A.* 214 ; *A. I. R.* 1929 *Mad.* 705 ; *A. I. R.* 1926 *Mad.* 360 and *A. I. R.* 1921 *Mad.* 456, *Ref.*

[P 320 C 1, 2]

(c) Presidency Towns Insolvency Act (1909), S. 46 (3) — Remedy in insolvency against son is not barred if father's debt is alive.

While a father's debt is alive in insolvency, any remedy against the sons in insolvency is not barred. That the debts as against the father are alive is all that is necessary to enable the Official Assignee to make the son's shares liable for them in insolvency by appropriate proceedings.

[P 321 C 1, 2]

T. R. Venkataramana Sastriar and *N. Rajagopala Aiyangar*—for Appellants.

V. V. Srinivasa Iyengar—for Respondents.

Curgenven, J.—The question of law which this appeal raises is whether, during the pendency of a suit for partition, the Official Assignee can obtain in proceedings under S. 7, Presidency Towns Insolvency Act, a declaration that the debts of an insolvent father are binding upon the sons to the extent of their shares in the family property. The father, Narasimha Iyer, was adjudicated together with his partner on 2nd December 1919. A few days earlier, on 26th November, a partition deed had been executed between himself and his sons which was held to be void as against the Official Assignee, and this decision was confirmed on appeal by this Court on 1st August 1922. Meanwhile, in July 1922, the sons filed a suit for partition in the Court of the Subordinate Judge of Madura against their father. On 5th February 1924 the Official Assignee made the application to the insolvency Court out of which this appeal arises. It was a notice of motion praying for a declaration that the insolvent's debts were binding upon his sons and for sale of their interests in the joint family property. The matter came in the first in-

stance before Kumaraswami Sastri, J., who was in doubt as to the effect of the suit for partition upon the claim made by the Official Assignee and referred the question to a Full Bench. The opinion of the Full Bench is reported as *Baluswami Ayyar, In re.* (1) Ramesam and Madhavan Nair, JJ., Phillips, J,. dissenting, held that the institution of the partition suit put an end to the joint family status and with that to the right of the father to alienate the sons' shares for his debts, thus extinguishing the right of the Official Assignee to effect such a sale. The latter, it was held, took the father's property exactly as it stood with all its advantages and all its burdens, and notwithstanding that he took it as it existed at the commencement of the insolvency, yet the division in status effected by the filing of the suit deprived the Official Assignee equally with the father of the power of sale. In his judgment Ramesam, J., adverts to certain other remedies which might still be open to the Official Assignee. He might, the learned Judge considered, as representing the creditors or associating himself with them, file suits against the sons, obtain decrees and sell the sons' shares also, or again he might apply in the partition suit for the creditors to be made parties and ask for a decree providing for the payment of such debts as were not illegal or immoral.

He then adverts to another possible remedy, by taking what are called garnishee proceedings in the insolvency Court itself, adding that this was a matter for the Judge sitting in insolvency to decide. These observations about a possible alternative course, are it is needless to say, obiter. The case then came before Waller, J., who was of opinion that it was open to him to adopt the course last suggested under S. 7, Presidency Towns Insolvency Act, and he gave the Official Assignee the declaration for which he asked. Waller, J., did not in his judgment grant the further prayer for sale of the son's shares and a direction to that effect inserted in the decretal order goes further, we must presume, than his intention. This appeal has now been instituted by the sons and it is contended before us that it is not open to the insolvency Court to deal with the liability of the sons' shares under the Act.

Mr. T. R. Venkatarama Sastri, for the appellants, bases his arguments largely upon certain general considerations. In the first place he says the Insolvency Act has for its scope only the distribution of the debtor's property or assets, the term "property" of course including such property as the Official Assignee by virtue of his special powers may recover under Ss. 55 or 56. The proceeds of a son's liability to pay his father's debts cannot be described as the property of the insolvent, he continues, because in no circumstances would the insolvent be entitled to realize it for his own benefit ; the son is not under any pecuniary liability to his father, but only the creditors of the father, so that the Official Assignee standing in the father's shoes cannot lay claim to a payment of this kind as money due to the father. The son's position bears some analogy to that of a surety and I think it may at once be conceded that in the ordinary acceptance of the term "property," the sale proceeds of the son's share could not be described as the property of the insolvent. Mr. Venkatarama Sastri's second main argument is that, assuming that the Official Assignee could deal with this property as an asset of the debtor, it would not necessarily be divisible equally amongst all the creditors. It might be that the debts due to some of the creditors were tainted with illegality or immorality or it might be that, while some of the creditors were pre-partition creditors, others were post-partition creditors, and the latter, of course, would have no claim on the son's shares. It is urged that equal distribution is of the essence of insolvency procedure and attention is drawn to the terms of S. 49 of the Act whereby after certain special provisions sub-S. 5 lays down that

"subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference."

This principle also, I think, must in general terms be conceded.

For the Official Assignee it is contended that S. 52 (2) (b) affords the necessary statutory authority for dealing with the sons' shares in insolvency. This section defines what is to be deemed the property of the insolvent divisible among

(1) A. I. R. 1928 Mad. 735 =112 I. C. 541=51 Mad. 417 (F. B.).

his creditors and the portion with which we are concerned includes as such property

"the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge."

The specific question with which we are concerned is what capacity had the insolvent to take proceedings to exercise powers in respect of the sons' shares, because whatever capacity he may have enjoyed will as "property" vest in the Official Assignee and will be at his disposal. It is clear, I think, that the section does not require that the property itself in respect of which the powers are to be exercised should in the ordinary sense be property of the insolvent. So long as he has a capacity to take certain proceedings in respect of some other person's property, that capacity passes to the Official Assignee and it seems to follow that the proceeds realized by taking advantage of that capacity must themselves become the property of the insolvent. If this were not so, it would lead to the result that, whereas the capacity to take proceedings is an asset, no benefit could accrue to the creditors as the outcome of such proceedings, which appears an irrational position. The effect of this provision would seem therefore in some cases artificially to enlarge the meaning of the term "property of the insolvent" and to include in it funds which according to ordinary tests would not be so classified. It may be pointed out that the next ensuing portion of the section declares to be his property goods in his possession at the commencement of the insolvency in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof, which seems to be another artificial extension of the idea.

Whatever difficulty there may be in holding that a sum of money so derived is an asset divisible among the creditors, the position undoubtedly has the support of a Full Bench of this Court. After the Privy Council in *Sat Narain* v. *Behari Lal* (2), had settled that a son's share in the joint family property does not vest in the Official Assignee upon the father becoming insolvent, it became necessary to decide whether the father's power to sell that property so vested, and this question was affirmatively answered in *Seetharama Chettiar* v. *Official Receiver, Tanjore* (3). That decision was under the Provincial Insolvency Act, which does not contain any counterpart to S. 52, Presidency Towns Insolvency Act, but the Full Bench was able to hold, even without the aid of a provision in those terms, that the power to sell was property, although the share to be sold was not. Now one of the logical implications of so holding clearly is that the proceeds of such a sale of property not itself the property of the insolvent is divisible among the creditors and is therefore "property of the insolvent" within the meaning and intention of the Act, if, as seems reasonable to hold, only property which can technically be so described is so divisible. It is impossible to avoid seeing the difficulties which attach to this view. How, for instance, is any surplus to be dealt with, when S. 76 provides that it is to be returned to the insolvent, whereas it is not in any ordinary sense his property? But unless we are to adopt a position inconsistent with this Full Bench ruling I do not see how we can hold that, if in the one case the capacity to sell an undivided share affords sale proceeds divisible in insolvency, the capacity whatever it may be held to amount to take proceedings to realize debts due to the creditors out of a divided share does not afford proceeds equally divisible, and, assuming for the present that the insolvent has the capacity, which S. 52 declares to be his "property," or, in other words, to vest in the Official Assignee, it seems necessary to hold, apart from this authority, that the proceeds become "property" in their turn, or at least that they are divisible among the creditors otherwise as I have already said, the capacity itself would vest to no purpose.

The case must be regarded, I think, as anomalous, because in all ordinary instances of the application of S. 52 (2) (b) it will be found that where the insolvent has a capacity to take proceedings to enforce some power over property, whatever those proceedings realize in the shape of money would be his property in the ordinary sense of the term.

(2) A.I.R. 1925 P.C. 18=84 I.C. 883=52 I.A. 22=6 Lah. 1 (P.C.).

(3) A.I.R. 1926 Mad. 994=97 I.C. 825=49 Mad. 849 (F.B.).

The same Full Bench case bears upon the other main objection raised by Mr. Venkatarama Sastri, that the proceeds of a sale of the son's divided share would not necessarily be divisible among all the creditors, because the same condition might attach to the sale proceeds of an undivided share, the father's right to sell this too depending upon the debts not having been incurred for illegal or immoral purposes. This point has not been dealt with by the Full Bench and therefore it may be said that the decision does not in terms bind us ; but here again considerations of consistency seem to require that the rule accepted in the one case should be in conformity with the rule accepted in the other. In defence of it may be adduced the ground that normally the father's debts would be binding upon the son and the proceeds equally divisible. In a special case, where this was not so, it would be for consideration whether the insolvency procedure could be applied to distribute among only those creditors whose claims against the son could be sustained.

Let us now consider what capacity the father has to take proceedings for exercising power over the son's share for the purpose of ensuring the due discharge of the debts. Admittedly, he has the power upon a partition, to require that suitable provision is made for the discharge of the debts out of the estate before it is divided up; indeed he can insist upon the payment of the debts by sale of a sufficient portion of the family property before the partition of the remainder is effected. And it has not been denied that, in the pending partition suit, the Official Assignee could take his place and secure the same result. Is it open to the Official Assignee, instead of adopting this course, to get a sale of a sufficiency of the property carried out in insolvency, by means of an application under S. 7, Presidency Towns Insolvency Act? Such a proposition does, I think, at first sight seem to extend the scope of the section to extreme and perhaps unjustifiable lengths ; it virtually requires that the insolvency Court should constitute itself a Court for the trial of a partition action and that too when there is already a partition action pending in the ordinary civil Court. Mr. Srinivasa Iyengar has rightly enough dwelt upon the very wide language in which S. 7 is couched, the only qualifying phrase which needs consideration being the opening words 'subject to the provisions of this Act'. I have already endeavoured to deal with the contention that the provisions of the Act require that the subject-matter of an application under the section must be "property of the insolvent divisible among his creditor." If the views expressed are not erroneous, I can discover nothing in the provisions of the Act to exclude the enquiry upon this score. Ramesam, J., in *Baluswamy Ayyar, In re* (1) appears to hold that the test is whether or not the sons are "garnishess" a term not to be found in the Act, but meaning I think third persons from whom divisible assets are realizable. The line of reasoning followed above would appear to bring them within this class. In another Full Bench case, *Official Assignee, Madras* v. *Narasimha Mudaliar* (4), composed of Coutts-Trotter, C. J., and Odgers and Beasley, JJ., the scope of S. 7 came under consideration, with particular reference to the amended terms of S. 36. That specific point does not now concern us, but the learned Judges had occasion to lay down that, whatever might be the practice in England,

> "the Official Assignee is entitled to proceed by way of motion under S. 7 of the Act in these cases where he has money claim against a stranger to the insolvency."

By "money claim" is meant, I suppose, any claim to money which, on realisation, would rank as a divisible asset. This gives a very wide extension to the section, so far as the only question we are dealing with—that of jurisdiction—is concerned. So long as its purpose is the realization of assets, it seems that every species of action that would yield such a result can be so brought, discretion being reserved to the Court to decline to exercise jurisdiction in unsuitable cases. Mr. Srinivasa Iyengar has endeavoured to show by examples the divers uses to which the section, or the corresponding section in the Provincial Insolvency Act, has been put. In *Ramasomayajulu* v. *Official Receiver, Godavari* (5), an issue had to be tried whether a partition had taken place or not. In *Doraiappa Iyer* v. *Official As-*

(4) A. I. R. 1929 Mad. 705=118 I. C. 506=52 Mad. 717 (F.B.).
(5) A. I. R. 1926 Mad. 360=92 I. C. 249.

signee of Madras (6), the insolvent had sold certain family property and had further given his purchaser a mortgage over other family property as security against a challenge of the sale by the other family members. The insolvency Court was asked to decide whether the sale was or was not binding on the other members, so that it might be ascertained how far, if at all, the security bond 'was necessary. In both these instances, of course, the object of the enquiry was to determine what was and what was not property of the insolvent, and perhaps they do not take us very far. On the other hand it is worth note that no decision against the applicability of the section has been cited before us. There is, for instance, no authority for the view that if it should suit the Official Assignee, as representing the insolvent, to bring what would in effect be a suit for partition, the insolvency Court would have no jurisdiction to entertain it. In *Moreley* v. *White, In re White* (7), where the creditors of a deceased father filed an administration suit in the Chancery Division and the son petitioned in bankruptcy, and connected questions arose in each Court with regard to the estates, it was decided by the Court of appeal that the Court of bankruptcy was the proper tribunal to determine them:

"The case is one," said James, L. J., "which shows how beneficial is the effect of S. 72" (corresponding to S. 7, Presidency Towns Insolvency Act), and he adds: "It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made; but the Court of bankruptcy is armed for that purpose with every power as of a Court of law and a Court of equity and there is not a single question stated to us as an important and difficult question arising in this matter which cannot be litigated and determined by that Court of bankruptcy which the legislature has thought to be the proper tribunal for the determination of it."

There is no ground for holding that a Court of insolvency in India has powers more circumscribed than these, and I cannot find any convincing answer to the contention that whatever a Court of law may do, an insolvency Court, subject to the provisions of the Act, may do under S. 7. I think therefore that the learned Judge was acting with jurisdiction in giving the declaration asked for by the Official Assignee. We have not to adjudicate upon this power to direct sale of the property, but upon the line of reasoning I have accepted, it seems that the insolvency Court must possess that consequential power.

I think also that he has rightly decided the question of limitation. Generally speaking, and excluding such an exceptional case as the post-partition renewal of a debt by the father, the liability of the son's share is enforceable so long as the father himself may be proceeded against; and it can make no difference to this principle what rule of limitation the circumstances may render applicable. Nor is it pertinent to say that the debt would be time barred in an ordinary Court. We have been shown no authority for the view that, while a father's debt is alive in insolvency, any remedy in insolvency against the son may become barred; and that is the only question we have to decide. It is represented to us that Sch. A appended to the decretal order enumerating the liabilities, needs amendment in some respects, but we think that this should be effected through an application to the Judge sitting in insolvency. We dismiss the appeal with taxed costs on the original side scale, to be paid by the Official Assignee, as receiver in the partition suit, out of the appellants' shares in the family property.

Bhashyam Ayyangar, J.—The Full Bench have, by a majority decided in this case, that the severance of status brought about by the institution of a suit for partition by the appellants against their father, the insolvent in question, extinguished the right of the Official Assignee to sell by himself their shares in the family property to meet the debts of the insolvent.

The main questions in this appeal are, whether the Official Assignee has still any right left "in or over or in respect of" the said shares in the family property and, if so, how, that is, by what means, he is entitled to utilize it for the benefit of the general body of creditors.

As regards the first question, it is conceded in the leading judgment of the majority of the Full Bench delivered by Ramesam, J.:

"The only remedy lost to the Official Assignee is the right of selling the sons' shares by private sale. This is merely a processual right. The substantial right of the Official Assignee to enforce the debts due to the creditors against the sons remains."

(6) A. I. R. 1921 Mad. 456=62 I. C. 244.
(7) [1873] 8 Ch. A. 214.

Now, there cannot be the least doubt that, even after a division in status, the father has the right to ask and insist that, before a partition is made, all his proper debts be paid out of the family estate and that the sons cannot resist such a demand. This has been laid down by the Full Bench of this Court in *Venkureddi* v. *Venku Reddi* (8).

The right of the father just referred to may not be "property" as defined in S. 2 (e), Presidency Towns Insolvency Act, but it cannot be denied that it is a "power in or over or in respect of property" exercisable by the father for his own benefit. The capacity to exercise and to take proceedings for exercising this power is one of the "particulars" comprised in and going to make up "the property of the insolvent (father) divisible amongst his creditors," as explained and defined by S. 52 of the Act. If authority were needed in support of this statement, it is found in the judgment of the Privy Council in *Sat Narain* v. *Behari Lal* (2), in which their Lordships observe at p. 6 that the property of an insolvent, which by S. 17 vests in the Official Assignee, must mean the property which by that section and S. 52 is divisible among his creditors, after first pointing out that the power to obtain a partition of the joint family property is a power which the Official Assignee might exercise under S. 52 (2) (b).

The conclusion is therefore that, notwithstanding the suit for partition and the consequent division in status, the right of the father to have his just debts paid out of the entire family property subsists, and the father being an insolvent, it now vests in the Official Assignee, "as property of the insolvent divisible among his creditors."

Going to the second question it will be noted in the first place that in the case already cited, their Lordships of the Privy Council, while holding that the insolvency of the father does not of itself vest his sons' shares in the joint family property in the Official Assignee, observe that the Official Assignee may, in a proper case, make that property available for the payment of the father's just debts "under the provisions of S. 52 or in some other way": p. 23. This goes to show that it is open to the Official Assignee to realize or convert into money, the right or capacity referred to already, in the insolvency proceedings themselves, without the necessity to proceed by or in an independent action. The right is given to, and the duty is laid on, the Official Assignee, under S. 68 of the Act to realize the property of the insolvent, with all convenient speed. It has been shown that on the insolvency of the father (of divided status), the Official Assignee becomes vested with his right to get all his just debts paid up from and out of the entire family property before partition. How is this right or capacity, which is property divisible among the creditors of the insolvent father, to be realized or converted into money? It can only be done by getting the family property of which he is in joint possession, or a sufficient portion thereof, sold. The Full Bench has held that owing to the division of status brought about by the suit for partition instituted by the sons after insolvency, the father, and consequently the Official Assignee, also lost the right of private sale. The only other course open to him is therefore to obtain a declaration against the sons and get the family property including their shares therein sold by or through Court.

In what Court is this to be done? Is the Official Assignee entitled to get it done through the insolvency Court itself or is he bound to seek the aid of a different Court? It was argued that the sons being strangers to the insolvency, the Official Assignee can get any order or relief against them only in or by means of an independent action against them, but this argument does not seem tenable. In the first place, the relief asked for by the Official Assignee is not against the sons (personally), but their shares in the property of their family, which was being represented by the father insolvent. Secondly, the sons' shares being undoubtedly liable for all the just debts of the father insolvent, the sons who are entitled to get only the balance or surplus cannot, in so far as they own such shares be said to be entire strangers to the insolvency. And thirdly, S. 7 of the Act gives the widest powers to the insolvency Court to go into and decide all questions whatsoever arising in any case of insolvency,

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(8) A.I.R. 1927 Mad. 471=100 I.C. 1018=50 Mad. 535 (F.B.).

"for the purpose of doing complete justice or making a complete distribution of property in any such case."

It must therefore be open to the insolvency Court in a case of this sort to declare the liability of the sons' shares in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realization.

The mere fact that the father alone is the insolvent and the sons are not does not preclude the insolvency Court from exercising jurisdiction over the latter to the extent necessary for the realization of all the assets divisible among the creditors of the former. That the jurisdiction of the insolvency Court extends to the determination of questions affecting persons not parties to the insolvency has been decided in several cases under S. 105, English Bankruptcy Act (1914), which corresponds to our S. 7. In some cases the bankruptcy Courts even assumed exclusive jurisdiction by the issue of an injunction. These cases are collected in the commentaries on S. 105 in Williams on Bankruptcy, and special reference need only be made to one of them, namely *Morley* v. *White* (7). In that case an administration suit was first filed in the Court of Chancery by a creditor of a testator against the executor, the estate consisting of a business in which the executor, son of the testator, had individually been partner with the testator. Subsequently a liquidation petition was filed in the bankruptcy Court by the executor. A receiver was then appointed in the suit and thereafter a trustee in the liquidation proceedings. Competition having arisen between the receiver in the suit and the trustee in bankruptcy in the matter of the realization of the partnership assets, the Court of appeal held in favour of the trustee. Sir W. M. James, L. J., observed as follows:

"It appears to me that the Court of bankruptcy is the proper tribunal to determine the questions arising in this matter. The case is one which shows how beneficial is the effect of S. 42 the reference was to the Bankruptcy Act of 1869, S. 72, of which corresponded to S. 105 Bankruptcy Act (of 1914). There are no doubt questions between the father's estate and the son's estate which have been mixed up together, questions between the joint creditors of the father and son, the separate creditors of the father and the separate creditors of the son. These questions must be determined somewhere before the assets can be distributed among the creditors. If the orders under appeal are to stand the result must be that the whole administration of the estate, and its division among the creditors according to their respective rights will be delayed until the suit is determined. It is true that there may be important questions to be determined before it can be ascertained how the distribution is to be made, but the Court of bankruptcy is armed for that purpose with every power of a Court of law and a Court of equity and there is not a single question stated to us as an important and difficult question arising in this matter which cannot be litigated and determined by that Court of bankruptcy which the legislature has thought to be the proper tribunal for the determination of it; and those questions, if decided in bankruptcy, would come on appeal before the same Court as if they had been determined in Chancery, that is, before the same Judges sitting under one name instead of under another."

These observations apply with full force to the facts of this case. They are not merely authority for the position that the insolvency Court has jurisdiction in the present case to decide on the liability of the sons' shares and direct their realization for the payment of the debts of the insolvent father but to show that as between that Court and the Court in which the sons have subsequently sought partition of the family property, the former is by far the more proper tribunal for dealing with the said matters satisfactorily and expeditiously.

There is also the direct authority of a Full Bench of this Court in support of a liberal construction of S. 7 of the Act. It has been held in the *Official Assignee of Madras* v. *Narasimha Mudaliar* (4) that

"Section 7, Presidency Towns Insolvency Act, is not limited in its scope to matters in which the Official Assignee by the operation of the insolvency law claims a higher title than what the insolvent himself would have had and the Official Assignee is entitled to proceed by way a motion under S. 7 . . . . against strangers to the insolvency."

It was said that it is of the essence of the distribution of assets in insolvency that it should be rateable among all the simple creditors of the insolvent and as the sons' shares in the family property can be made liable only for such debts of the father as are just, that is, not illegal or immoral, these shares cannot be proceeded against and realized in insolvency but only, if at all, in suits by individual creditors. This contention cannot however be accepted. It will be observed that if this objection were good, it would equally apply against the exercise of the Official Assignee of the power of selling the shares of the sons on the adjudication of their undivided father. But the power

of the Official Assignee to effect such a sale is undoubted and has been upheld by the Full Bench of this Court in *Seetharama Chettiar* v. *The Official Receiver of Tanjore* (3).

It must be held for these reasons that the learned Judge in insolvency had full power and jurisdiction to grant the declaration asked for by the Official Assignee under S. 7 of the Act.

A further point was raised that the debts of the insolvent father are now barred by time against the sons and the Official Assignee cannot therefore seek to make the latters' shares in the family property liable for them, but there is no force in this argument. It is conceded that limitation ceases to run as against the insolvent as soon as the adjudication is made, so long as the adjudication is in force. The debts are therefore alive as against the father. And this is all that is necessary to enable the Official Assignee to make the sons' shares liable for them in insolvency by appropriate proceedings. The only question is whether the sons' shares can or cannot be made liable in insolvency and there is really no point of limitation with reference to them, so long as the father's debts subsist and the subsistence is not due to any act of the father for which he had no authority such as in acknowledgment made after a division of status.

The decision of the learned trial Judge was not challenged on any other ground. I concur with the order just pronounced by my learned brother.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1931 Madras 324

BHASHYAM AYYANGAR, J.

Arumuga Goundan — Plaintiff—Petitioner.

v.

Subramania Goundan — Defendant—Respondent.

Civil Revn. Petn. No. 1673 of 1929, Decided on 27th November 1930, against order of Sub-Judge, Coimbatore, D/- 18th October 1929.

Civil P. C. (1908), O. 33, R. 9 and S. 146—Pauper plaintiff dying pendente lite—Heir impleaded as legal representative—Heir himself not a pauper—Heir can be dispaupered under O. 33, R. 9 read with S. 146.

A pauper plaintiff died pendente lite and his heir who was added pendente lite as his legal representative was found to be possessed of sufficient means to pay the court-fee.

Held: that the heir could be dispaupered under O. 33, R. 9 read along with S. 146, because the case of the plaintiff did not come under any of the exceptions to S. 146: 36 *Bom.* 279, *Foll.*; Per Jackson, J., in *A. I. R.* 1925 *Mad.* 819, *Rel. on*; *A.I R.* 1925 *Mad.* 765 and *A. I.R.* 1928 *Mad.* 66, *Dist.* [P 324 C 2; P 325 C 1]

A. C. Sampath Ayyangar and *T. R. Srinivasa Ayyar*—for Petitioner.

M. Krishna Bharathi—for Respondent.

Judgment.—In this case the plaintiff who had been permitted to sue as a pauper died pending the suit and his concubine's son and heir who claimed to have succeeded to the subject-matter of of the suit was added in his place as plaintiff 2 and permitted to proceed with the suit. Defendant 1 then applied under O. 33, R. 9. Civil P. C., to dispauper the substituted plaintiff on the ground that he was possessed of sufficient means to pay the court-fee. The lower Court took evidence, and, being satisfied that the newly added plaintiff was not a pauper, directed him to pay the court-fee due on the plaint. He now seeks a revision of that order.

I am not prepared to interfere with the finding of the lower Court that the above plaintiff is not a pauper. The question is whether on this footing he can be dispaupered under O. 33, R. 9, and ordered to pay the court-fee which would have been paid by the original plaintiff if he had not been permitted to sue as a pauper.

Now it was first suggested that an application to dispauper can only be filed against the particular plaintiff who was permitted to sue as a pauper and not against anybody who might take his place such as his legal representative or assignee. But this suggestion cannot in my opinion be sustained for, under S. 146 of the Code, save as otherwise provided which is not the case here, any application which can be made by or against a person can also be made or against any person claiming under him. If it was open to the defendant to apply to dispauper the original plaintiff for proper reasons, it must also be open to him to apply to dispauper his legal representative claiming under him for similar reasons.

The learned advocate for the petitioner then relied on the decision in *Sivagami Ammal* v. *Gopalasami Udayar* (1), but that case is easily distinguishable from the present. What was therein decided

(1) A. I. R. 1925 Mad. 765=87 I. C. 372.

was that when the plaintiff in a suit instituted in forma pauperis dies, and his executor continues the suit, the executor is not liable to be dispaupered because he is personally not a pauper. The decision is expressly based on the ground that the person who wanted to continue the suit in that case wanted to do so in his capacity as executor and not in his own personal capacity. But in this case the petitioner does not seek to continue the suit in any other capacity than his own personal capacity. He does not represent any other person or body but himself in seeking to go on with the suit. It seems to me therefore that the case cited has no application to this case.

The view taken by the lower Court is not only supported by the decision in *Manaji Rajuji* v. *Kandoo Baloo* (2), but also by the observations of Jackson, J., in *Radhakrishna Ayyar, In re* (3) concurring with the decision in *Manaji Rajuji* v. *Kandoo Baloo* (2).

A decision of Kumaraswami Sastri, J. reported in *Ammakannu Ammal* v. *Damoodhara Mudaliar* (4) was also cited, but it is similar to the case in *Sivagami Ammal* v. *Gopalasami Udayar* (1), and distinguishable for the reasons stated with reference to the latter.

On the whole I am clear that the order of the lower Court is right. The revision petition is dismissed with costs. The lower Court may grant a reasonable time for the payment of the court-fee.

P.R.S./B.V. *Revision dismissed.*

(2) [1912] 36 Bom. 279=11 I. C. 724.
(3) A. I. R. 1925 Mad. 819=88 I. C. 91.
(4) A. I. R. 1928 Mad. 66=109 I. C. 258.

A. I. R. 1931 Madras 325

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Vellachami Chetti—Appellant.

v.

Arunachalam Chetti (dead) and *others*—Respondents.

Appeal No. 537 of 1925, Decided on 17th November 1930, against order of Dist. Judge, West Tanjore, D/- 28th April 1925.

Provincial Insolvency Act (1920), Ss. 42 and 43—Insolvent applying for extension of time within time fixed for discharge—Court refusing to grant extension and annulling adjudication—Court should not annul adjudication but treat it is application for discharge.

An insolvent within the time fixed for his application for discharge applied for extension of that time. The Court refused to grant extension and annulled the adjudication.

Held: that the penalty of annulment under S. 43 did not appear to be intended for insolvents coming before the Court in time and submitting themselves to the discipline of the Court. If the Court was not prepared to extend time he might properly have treated that application as one for discharge or should have allowed the insolvent to make an immediate application for discharge. His order of annulment was not proper. [P 325 C 2]

K. Chandrasekharan for *C. A. Seshagiri Sastri*—for Appellant.

R. Gopalaswami Ayyangar and *S. R. Muthaswami Ayyar*—for Respondents.

Judgment. — The insolvent in this case within the time fixed for his application for discharge applied for extension of that time. The learned District Judge refused to grant an extension and annulled the adjudication. The latter part of his order annulling the adjudication does not appear to us to have been proper. The insolvent though he may not have applied for discharge in so many words had submitted himself to the Court and expressed his desire to apply for a discharge an application which would involve the investigation and consideration of his conduct by the Court. As the learned District Judge was not prepared to extend the time he might properly have treated the insolvent's application for time as an application for discharge or should have allowed the insolvent to make an immediate application for discharge if that was thought formally necessary. The penalty of annulment under S. 43 of the Act does not appear to be intended for insolvents who come before the Court in time and submit themselves to the discipline of the Court.

But the learned Judge was right in his view that this was not a case for immediate discharge. Indeed absolute discharge could not have been granted under the Act. The order of annulment is set aside and the petition is remanded to the District Judge who should now consider on what conditions if any the insolvent should be discharged. There will be no order as to costs in this appeal.

P.R.S./B.V. *Appeal allowed*; *Petition remanded*.

A. I. R. 1931 Madras 326

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

Hussain Meah Sahib (died) and *others* —Appellants.

v.

A. G. Abdul Rahim Sahib—Respondents.

Appeals Nos. 4 and 5 of 1928, Decided on 5th November 1930, against decrees of City Civil Judge, Madras, in O. S. Nos. 447 and 679 of 1926.

Tort—Trade-mark — "Passing of" — One man taking name associated with other's goods and building reputation—Former cannot prevent latter for using his name.

One man has no right to put off his goods for sale as the goods of a rival trader and he cannot therefore be allowed to use names, marks, letters, or other indicia by which he may induce purchasers to believe that the goods he is selling are the manufacture of another person. But a person who takes up a name asssociated with the goods of another cannot by applying it to his own goods and building up a reputation in his own way, seek to restrain the person, with whose goods the name was previously associated and who has not abandoned it from continuing to use the same, for in a case of that sort it will be impossible to say that the defendant passes his goods off as those of the plaintiff : *Leather Cloth Co.* v. *American Leather Cloth Co.* 11 *H. L. C.* 530 and *Perry* v. *Truefitt*, 6 *Beav.* 66, *Rel. on.* [P 328 C 1]

G. Krishnaswami Ayyar, *A. Abdul Rahim* and *Devarajan*—for Appellant.

S. A. K. Shah—for Respondent.

Bhashyam Ayyangar, J.—These appeals arise out of two "passing off" actions: a suit and a cross suit, between the same parties. It will be convenient to refer to Abdul Rahim Sahib, the plaintiff in the one and the defendant in the other, as the plaintiff, and Hussain Mean Sahib, the defendant in the former and the plaintiff in the latter, as the defendant.

Both plaintiff and defendant are beedi manufacturers and traders of Madras. Each of them appears to have alleged that the other came into that trade shortly before the dispute arose between them, but it was conceded at the hearing that they had both been in it for some considerable time. As between them the defendant was certainly the earlier in the field. In fact, the evidence is that it was he who introduced beedies in Madras about 40 years ago when he removed to it from somewhere near Bombay. He made and sold them loose at first and then in packets. His business, which must originally have been small, gradually grew and appears to have assumed quite a respectable magnitude in or even some time before 1920, and there is evidence to show that his income from it was assessed for taxation at Rs. 3,000 or Rs 4,000 in the years 1921 to 1924. The plaintiff, according to his own statement, began this business only about 25 years ago. He too was first selling his beedies loose and it was only later on he began to sell them in packets with wrappers on. When he commenced to use wrappers, he first described his beedies as "Siva Nesan beedies" and after some time he adopted another designation also, namely "Rahim beedies" (Rahim being his own name).

Then, about the end of 1922, he registered a trade-mark with the Madras Chamber of Commerce with the designation of "Sait Beedies" and subsequently began to sell some of his beedies under that label. He alleges in the plaint that he has been doing a large business in them and earned a "wide popularity and reputation," and the said designation of "Sait Beedies" has become identified with and come to denote his manufacture in the minds of the beedi-purchasing public. His case is that shortly before the suit the defendant started selling the beedies manufactured by him with the description of "Sait Beedies' or "Sait Jadi Beedies" (the word "Jadi" simply denoting that the ends are folded) on their wrappers and this is a

"bare-faced attempt on his part to cut into the trade of the plaintiff and fraudulently pass off beedies manufactured by him as plaintiff's beedies."

He therefore filed his suit for an injunction to restrain the defendant

"from selling any beedies as "Sait Beedies" or "Sait Jadi Beedies" or from impressing upon any wrappers of packets of beedies or individual beedies the trade name "Sait Beedies"or "Sait Jadi Beedis" in any colour or in any shape whatsoever"

and for damages."

The defendant's contention is this. He says that he came to Madras from Bombay over 40 years ago and commenced the manufacture of beedies which he called Hussain Mean Sait Beedies (Hussain Mean Sait being his own name) and

"in a short time the abbreviated name of "Sait Beedies" acquired a name and fame and became associated with the beedies of his manufacture"

and that in or about 1910 he .

"folded the ends of his beedies and made them thicker and longer and called them Hussain

Sait Jadi Beedies or "Sait Jadi Beedies" for brevity's sake ; that those "Sait beedies" and "Sait Jadi Beedies" have denoted his manufacture for a long time and it was the plaintiff who began to make beedies long after him; that he pirated the designation of "Sait Beedies" and fraudulently and dishonestly passed off his inferior goods as those of his own; that he was not aware of the registration by the plaintiff of the said designation with the Chamber of Commerce or of its use by the plaintiff, until the latter sent his notice shortly before his suit, that the registration by the plaintiff does not confer any right on him in law and that the plaintiff should be restrained by injunction from using the said name and directed to pay him damages."

The City Civil Judge who tried both the suits together granted an injunction in favour of the plaintiff and dismissed the suit of the defendant, who has therefore appealed in both.

Now, the first point which we propose to deal with is whether the defendant's beedies were called or known as "Sait Beedies" before the plaintiff registered that expression as a part of his trademark in the end of 1922 and began to use the same for the beedies manufactured by him. On this point it is an important circumstance, that the defendant, whether he strictly was or was not a Sait, was undoubtedly known as a Sait. The plaintiff denied this and even took an issue; but his own second witness speaks of the defendant as Hussain Mean Sait and Exs. 2 and 3, which are a memorandum of the Board of Revenue and a letter from the Collector of Madras addressed to the defendant in 1917 and 1918, that is, long before the plaintiff wanted to assume the designation of the Sait, conclusively show that the document went by that appellation. This makes it very probable that beedies munufactured by him were known as Hussain Meah Sait Beedies or shortly as "Sait Beedies" as alleged by him. It is also made out by the oral evidence on his side. The learned Judge has dealt with the evidence at length and mentioned some grounds of detraction with regard to the testimony of some of the witnesses but he concedes that at least two of them. namely D.Ws. 4 and 7, are quite respectable. He however suggests that these two witnesses have spoken falsehood because "the plaintiff is bidding fair to rival them in competition", but we think that the suggestion is unjustified and gratuitous. The plaintiff's witnesses are of much lower status and the learned Judge himself has observed about them that they

"are not respectable merchants of high status and some of them like P.Ws. 6, 7 and 8 seem to be intimate friends of the plaintiff, living very near the place of his residence".

Their evidence cannot therefore be implicitly accepted. Taking the oral evidence as a whole we are clear that the beedies manufactured and sold by the defendant were being called and were known as "Sait Beedies" from long before the plaintiff adopted that designation, and the latter's allegation that the defendant started selling beedies under that name and the name of "Sait Jadi Beedies" only shortly before his suit is untrue.

The next point is whether the plaintiff who registered the designation of " Sait Beedies" with the Chamber of Commerce in the end of 1922 himself invented it or only caught hold of an expression which was already in the market. The evidence shows, as already pointed out, that the defendant's beedies were being called and known as Sait Beedies and it is next to impossible to believe that the plaintiff was unaware of it. It has not been explained by what association of ideas the plaintiff, who was neither a Sait himself nor had so far as we can see, anything to do with that designation, otherwise happened to pitch upon that particular expression to denote his beedies for which he had two trade names already. It seems to us much more probable that he took an expression already in vogue in the market than that he coined a new one and it happened to coincide with a current designation. There was indeed ample motive for him to copy the name by which the defendant's beedies were known, for these were of superior quality as shown by the admitted fact that they sold at Rs. 2-3-0 or Rs. 2-4-0 per thousand whereas the price of his own beedies was Re. 1-13-0 or Re. 1-14-0 per thousand, and must consequently have had a high reputation. Under these circumstances we are of opinion that the plaintiff only took the designation in question from the description already current of the defendant's goods with the object of pushing up his trade with its aid.

The question now arises whether on these findings the plaintiff is entitled to get an injunction restraining the defendant from selling his beedies as "Sait

Beedies" or "Sait Jadi Beedies." Now, there is no statute in this country establishing registration of trade-marks and it is a matter of concession that the registration of a trade-mark or label with the Chamber of Commerce does not of itself give any exclusive right to it to the person who so registers it. The principle applicable to this class of cases has been laid down in several cases and is well settled:

"The fundamental rule is", said Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1) at p. 538 that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore in the words of Lord Langdale in the case of *Perry* v. *Truefitt* (2), be allowed to use names, marks, letters or other indicia, by which he may induce purchasers to believe that the goods he is selling are the manufacture of another person."

In the present case the question therefore comes to this : Did the defendant pass off his beedies as the beedies of the plaintiff by describing them as Sait Beedies on their wrappers ? To make this out the plaintiff has alleged and let in evidence to show that since the end of 1922 he has been selling a brand of his beedies under the designation of Sait Beedies and has established a reputation connecting that designation with his manufacture. The lower Court has upheld this position but we consider it unnecessary to go into it, for we are of opinion that, even assuming that the plaintiff has established a reputation as alleged by him, he is not entitled to have an injunction against the defendant because the latter's beedies were known as Sait Beedies even before the plaintiff adopted that designation and he has also continued to sell them as such even subsequently alongside the plaintiff. Several decisions were cited to us by the learned advocate for the plaintiff but our attention has not been called to any authority which goes the length of holding that a person who takes up a name associated with the goods of another can, by applying it to his own goods and building up a reputation in his own way, seek to restrain the person with whose goods the name was previously associated and who has not abandoned it, from continuing to use the same. We think that such a proposition is wholly untenable. For, in a case of that sort it will be impossible to say that the defendant passes his goods off as those of the plaintiff. In this particular case there is also the additional circumstance to contradict such a theory in that the defendant's goods have distinctly and admittedly been higher priced than those of the plaintiff by about 20 per cent.

For these reasons we differ from the decision of the learned City Civil Judge and hold that the plaintiff is not entitled to the injunction asked for by him.

It remains to consider whether the defendant is entitled to get an injunction against the plaintiff. As to this we think that, although the defendant's beedies were called and known as "Sait Beedies" even before the plaintiff took up that designation, the defendant has not succeeded in establishing that degree of reputation which would entitle him to get an injunction against the plaintiff. Further, the plaintiff took up that designation so early as the end of 1922 and has subsequently been doing large business with it and the defendant raised no objection until the plaintiff himself took time by the forelock and gave him notice of suit. It has been made to appear that the defendant was not aware of the use of the expression "Sait Beedies" by the plaintiff, but it is hardly credible. We hold therefore that the injunction asked for by the defendant in his belated suit cannot also be granted.

The result is that C. C. C. A. No. 4 of 1928 should be allowed and the plaintiff's suit should stand dismissed with costs in both Courts, and that C.C.C.A. No. 5 of 1923 should be dismissed with costs. We order accordingly. The memorandum of objections in C. C. C. A. No. 4 of 1928 should also fail and is dismissed.

P.R.S./B.V. *Order accordingly.*

(1) [1865] 11 H. L. C. 530.
(2) [1842] 6 Beav 66.

A. I. R. 1931 Madras 328

WALLACE AND PANDALAI, JJ.

Manavikrama Raja, the Zamorin of Calicut—Defendant—Appellant.

v.

Thattamangalath and *others*—Plaintiffs—Respondents.

Appeals Nos. 211 and 212 of 1930, Decided on 21st November 1930, against decree of Dist. Court, South Malabar, in O. S. Nos. 1 and 2 of 1929.

(a) Decree—Construction—Words capable of more than one meaning—To ascerta

meaning and effect of decree, Court can look to relevant papers and circumstances.

To ascertain the meaning and effect of a decree of any Court, it is permissible, where the words are capable of more than one meaning, to look at all relevant papers and circumstances which were before the Court, and the objects which the directions contained in the decree were aimed to achieve. Of two possible constructions, the Court will not accept the one which leads to plain injustice and make its own decree an instrument of depriving parties, whose case had not been heard and decided, of valuable and cherished rights, which no one had any intention to destroy. [P 331 C 2; P 332 C 1]

(b) Hindu Religious Endowments Act (1927), S. 63—Generally internal management of excepted temple should be left without interference by Board in hands of trustees.

The policy of the Act is to place mutts and excepted temples in normal conditions under much less direct and detailed interference from the Board in matters of internal management than ordinary temples. This does not mean that in cases of proved mismanagement or incapacity, or in the imperative interests of future good government, such interference may not have to be provided for in a scheme. But in the absence of such special grounds the proper aim in a scheme of administration for an excepted temple is to leave the internal management as much as possible to the trustees providing only such safeguards as are sufficient to prevent grave misgovernment and to make the power of superintendence of the Board effective. [P 332 C 2 ; P 333 C 1]

(c) Hindu Religious Endowments Act (1927), S. 63 — Suit for modification of scheme — Evidence to show how scheme worked is admissible.

In a suit under S. 63 for the modification of a scheme evidence to show how the scheme worked is admissible. The need to amend a scheme may arise as much from the fact that it does not work or has not been worked properly as from previously existing facts such as mismanagement. [P 333 C 1]

T. R. Venkatarama Sastri for *T. M. Krishnaswami Ayyar* and *A. Parameshwaran*—for Appellant.

P. Govinda Menon and *P. Narayanan Nair, K. P. Ramakrishna Ayyar, P. Venkataramana Rao* and *Anantarama Ayyar* —for Respondents.

Judgment.—These appeals are by the Zamorin of Calicut from decrees in two suits, O. S. Nos. 1 and 2 of 1929, in the District Court of South Malabar, in both of which he was defendant 2. Both suits were brought under S. 63 (4), Hindu Religious Endowments Act, to amend a scheme of administration settled by the Hindu Religious Endowment Board (defendant 1 in both suits) under S. 63 (1) of the Act in respect of the Guruvayur Devaswom of which the appellant is a trustee (uralan). The plaintiff in O. S. 1 was the Malliseri Namburi, respondent 1 in A. S. 211. His claim was that he also was an uralan of the Devaswom. His complaint was that the Board had in their scheme ignored his rights and he prayed that the scheme be amended in that respect. The plaintiffs in O. S. 2 were certain worshippers on whose petition the Board had started the enquiry, which led to the scheme. Their complaint was that the Board had accepted in toto the scheme put forward by the Zamorin and had not adopted sufficient safeguards for the proper management of the institution, and their chief prayer was that the scheme should be amended by adding to the number of trustees and placing the management in the hands of a Board of five trustees, three of whom were to be nominated, and a manager who was to be appointed by the Board. The appellant was the chief contesting defendant in both suits. He resisted the Malliseri Namburi's claim to uraima on certain technical grounds which will be explained more fully later, depending on the construction of this decree of this Court in A. S. 8 of 1917 and S. 73, Religious Endowments Act. He resisted the suit of the worshippers on the ground that the amendments in the scheme as proposed by them were unnecessary. The Board, while adopting an attitude of unconcern about the rights claimed by Malliseri Namburi, was inclined to favour the proposals of the worshippers as to future management because, in its opinion, the appellant had not worked the scheme already settled by it in the proper spirit and it was improper to leave any longer an important temple like Guruvayur in the sole management of a hereditary trustee like the appellant who could never pay personal attention to the temple affairs both by reason of the great age at which Zamorins usually attain the stanom and the distance of their residence from the temple.

Two groups of questions thus arose in the suits, the first, relating to the claim of the Malliseri Namburi and the second to the amendments of the scheme which were either proposed by the worshippers and the Board or became necessary by the Namburi s claim being allowed.

The learned Judge, in a very exhaustive judgment, upheld the claim of the Malliseri Namburi to be a hereditary trustee

of the temple with rights in the management as declared in the decree in A. S. 35 of 1887 of this Court. He also made certain amendments in the scheme of administration settled by the Board which were either necessitated by the Namburi also being recognized as a trustee or which in his view were required for the future good management of the institution.

In dealing with these appeals together it will be convenient to deal first with the questions relating to the Namburi's claim and then to deal with the scheme.

To understand the dispute about the Namburi's right it is enough to state the principal events in bare outline. In Appeal Suit 35 of 1887, in a suit between the Zamorin and the members of the Malliseri illom, this Court went elaborately into the dispute and declared both parties to be entitled to the joint uraima right of this Devaswom and also that, except so far as an agreement therein marked Ex. O (Ex. 1 in this case) describes special powers as vested in either party, both have equal powers to manage all the affairs in respect of the temple. There were also some specific declarations relating to specific matters which are not now material. In 1912 four persons as relators with the sanction of the Advocate-General filed a suit, afterward numbered as O. S. 27 of 1916, against both the uralans alleging mismanagement and praying for their removal and for a scheme. The suit ended in a rather curious manner in 1918. Pending the suit, the Court of Wards took charge of the estate of the Zamorin for 12 years and with it of the management of this Devaswom. The Namburi was also induced to grant a power of attorney to the Court of Wards to manage the temple. The management having thus got into capable hands for a considerable time the Subordinate Judge before whom the suit was pending thought it unnecessary to frame a scheme but directed that the Namburi was not to revoke the power-of-attorney as long as the Court of Wards was in management and otherwise dismissed the suit. The plaintiffs took the matter in appeal to this Court in A. S. 8 of 1917 and represented that it was in the power of the Namburi to revoke the power-of-attorney at any moment and that therefore some other safeguard should be provided for the management by the Court of Wards not being interfered with. This Court considered that in the interests of the Devaswom it was necessary that the Court of Wards should be sole trustee while in management and that it was not enough that it should hold a power-of-attorney from the Namburi. Therefore in order to provide for the undivided responsibility of the Court of Wards this Court removed the members of the Malliseri illom from trusteeship. In other respects the suit was dismissed. On an application for review by the Namburi who had not appeared at the first hearing and who complained that sufficient provision ought to have been made in the decree to safeguard the interest of the illom, after the expiry of the management by the Court of Wards, this Court held in effect that all that their previous judgment intended to do was to provide for the period of management by the Court of Wards, after the expiry of which liberty to apply to be put back into their respective rights was impliedly reserved for all parties, and in order to remove doubts made an express declaration that after the termination of the management by the Court of Wards, all parties to the suit should have liberty to apply to vary the decree with reference to the then existing facts.

The management of the estate of the Zamorin by the Court of Wards terminated in 1927 and the Devaswom was handed over by the Court to the Zamorin in September 1927. The Court of Wards naturally could not accede to the Namburi's request to be put into joint possession because technically it was not acting under the power-of-attorney of the Namburi after the decree of this Court above mentioned. The Zamorin, having thus got an unlooked-for advantage over the Namburi, was in no mood to part with it. By this time, the Hindu Religious Endowments Act had come into force and certain worshippers who wished to take advantage of its provisions applied to the Religious Endowment Board to hold an enquiry and settle a scheme. It is the scheme settled at that enquiry that is the subject of these appeals. So far as the Namburi's rights are concerned, he urged them before the Board. But they took the view that it was for him to establish his rights before the Court, and that they could not re-instate him. Thereupon he

started two proceedings. He filed Suit 1 of 1929 to amend the scheme which ignored his rights and he also filed a petition in the suit of 1912 asking to be recognized in or restored to the position which the illom occupied before the Court of Wards management began, in pursuance to the liberty to apply expressly reserved in A. S. 8 of 1917.

The Zamorin does not, as indeed he cannot after the decree in A. S. 35 of 1887 deny the right of the Namburi's illom to joint uraima with him. But he contended (1) that the decree in A. S. 8 of 1917 deprived the illom of the uraima till the Namburi became restored to it by appropriate proceedings and that no such proceedings have been taken; (2) that so far as the application of the Namburi in the suit of 1912 is concerned, it is ineffective because according to the Full Bench decision in *Veeraraghavachariar* v. *Advocate-General, Madras* (1) it was incompetent to this Court to reserve power to modify a scheme and therefore the power could not be used; and (3) that so far as Suit 1 of 1929 is concerned the Court has no power on a proper construction of the relevant provisions of the Hindu Religious Endowment Act to appoint in a suit brought under S. 63 (4) new trustees to an excepted temple.

The learned Judge on the strength of the decision in *Veeraraghavachariar* v. *Advocate-General Madras* (1) held that the direction in the judgment in review in A. S. 8 of 1917 reserving liberty to apply inter alia to the Namburi to be recognized as or restored to the trusteeship could not be given effect to. He therefore dismissed the Namburi's application in the suit of 1912 (M. P. 344 of 1929). The Namburi has acquiesced in that decision and has not appealed therefrom.

The learned Judge also held that in a suit brought under S. 63, Religious Endowments Act, to amend a scheme settled by the Board, the Court has only the powers of the Board which, according to him, do not include the right to appoint a new trustee in an excepted temple.

The learned Judge having thus accepted the two technical objections raised by the appellant was faced with the difficulty that the Namburi's suit if regarded as one to get himself appointed as trustee of the Devaswom would be incompetent under S. 73 of the Act as the consent of the Board had not been obtained for its institution. The learned Judge overcame this by holding that the Namburi's suit may be regarded as one for the vindication of his personal rights or the rights of his illom to the trusteeship and not one for any of the reliefs for which a suit under S. 73 is necessary. For the purpose of ascertaining the Namburi's rights in such a suit, the learned Judge held that he was at liberty to consider the effect of the decree in O. S. 27 of 1916. On this last point he came to the conclusion that on the decree ceasing to operate (by the termination of the management of the Court of Wards) the rights affected by the decree revived. The result was that the Namburi became automatically restored to his position before the suit began as a hereditary co-trustee with the Zamorin.

It is plain that if the opinion of the learned Judge about the meaning and effect of the decree in A. S. 8 of 1917 is right, the technical objections raised by the appellant in bar of the suit and upheld by the Judge together with the answer to them on which he found the Namburi's suit still maintainable, all become irrelevant as they would not arise at all. This was admitted by the learned advocate for the appellant.

We agree with the learned Judge in his construction of the decree in A. S. 8 of 1917. The appellant's advocate has drawn our attention to the judgments and decree in the appeal and urged that the removal of the Namburi, though only intended for a temporary purpose to prevent the power-of-attorney given by the illom to the Court of Wards from being revoked during its management—was still in terms neither temporary nor conditional but absolute and effective until altered as contemplated by subsequent application. We are unable to agree with this contention. To ascertain the meaning and effect of a decree of any Court, it is permissible, where the words are capable of more than one meaning, to look at all relevant papers and circumstances which were before the Court and the objects which the directions contained in the decree were aimed to achieve. Of two possible constructions, the Court will not accept the one which leads to

(1) A. I. R. 1227 Mad. 1073=106 I. C. 665=51 Mad. 31 (F. B.).

plain injustice and makes its own decree an instrument of depriving parties, whose case had not been heard and decided, of valuable and cherished rights which no one had any intention to destroy. That would be the effect of adopting the appellant's construction of this decree.

It is not necessary to repeat the considerations set out in paras. 28 to 30 of the judgment of the lower Court which deal with this question. It is sufficient to refer to the fact that removing the representatives of the Malliseri illom was only an expedient devised to ensure that the management by the Court of Wards should not be disturbed by the power-of-attorney given by the illom being revoked. It was not for any misconduct. In fact the only male member who had any subsisting rights in the illom was then a minor and therefore incapable of misconduct. As pointed out by the learned Judge, when this Court said in Ex. J that it would be open to the Sub-Judge to consider whether any change should be made in the management, it meant not the management of the Court of Wards, but the management before the Court of Wards—the management by both the trustees. The effect of this is that on the termination of the Court of Wards' management the previous state of affairs revived and Malliseri illom became restored to its previously existing rights.

In this view of the case the objection to the Namburi's suit as one under S. 73 of the Act, and as involving the appointment of a new trustee for which the Court has no power in a suit under S 63, does not arise. He is entitled as a trustee to sue under S. 63 (4) to have the scheme settled by the Board which ignore his rights so amended as to provide for them. The Board itself does not object to this and the worshippers also do not object. The main ground of appeal 211 therefore fails. The only matter left in it is whether the consequential amendments made by the learned Judge to the scheme are suitable. It is convenient to deal with this matter separately.

We shall deal now with the major objections and suggestions of the several parties before the Court to the scheme settled by the learned Judge. The minor objections can be dealt with in finally passing the draft scheme on the footing of our conclusions.

Objections and suggestions of the appellant (1).—Objection is taken to the manner of appointing the manager on the ground that it will in practice vest the real power of appointment in the Board and not in the trustees whose nomination the Board is empowered to veto. The procedure of the Zamorin submitting three successive names in three months to the Board is also criticized as cumbrous and likely only to result in much needless waste of time. Taking the scheme as a whole the learned Judge, while not acceding to the request of the Board and the worshippers to add new trustees as in his view the Court had no power to do so in a suit brought under S. 63, produced almost the same effect by taking the appointment of the manager, the chief executive officer, out of the hands of trustees. The elaborate procedure prescribed in Cl. 3 of the scheme of the Zamorin sending nominations to the Board, their consulting the Namburi and on the Board's disapproval of the nominated person itself calling for two more nominations one after the other after the interval of a month each time, and after all this the Board choosing its own man, really puts the appointment into the hands of the Board, and if we intended to uphold that principle we should adopt the more simple and direct method of empowering the Board to make the appointment in the first instance.

But we think the principle wrong. The duties and powers of trutees are generally laid down under S. 40 of the Act. The provisions of the other sections in Ch. 4 of the Act, which applies to all religious endowments impose specific duties on trustees and confer specific powers on the Board in respect of all religious endowments. Ch 5 relates to ordinary temples and Ch. 6 to mutts and excepted temples like Guruvayur. The policy of the Act, as seen from a comparison of these chapters, is to place mutts and excepted temples in normal conditions under much less direct and detailed interference from the Board in matters of internal management than ordinary temples. This does not mean that in cases of proved mismanagement or incapacity or in the imperative interests of future good government, such inter-

ference may not have to be provided for in a scheme. But in the absence of such special grounds we conceive that the proper aim in a scheme of administration for an excepted temple is to leave the internal management as much as possible to the trustees providing only such safeguards as are sufficient to prevent grave misgovernment and to make the power of superintendence of the Board effective.

There is absolutely no evidence in the case of any previous mismanagement by the present trustees in this case for the very good reason that for 12 years ending September 1927 the temple was in the hands of the Court of Wards. A scheme was settled by the Board on 3rd November 1928 leaving the power of appointing the manager to the existing trustee who was to consult the Board about it. These suits were filed within six months afterwards. The learned advocate for the worshippers complained that the learned Judge had shut out evidence of mismanagement. But the evidence which the learned Judge considered irrelevant and so excluded was not evidence of mismanagement before the date of the scheme but of evidence that the scheme had not worked sasisfactorily. We consider that the learned Judge's opinion that in a suit under S. 63 for the modification of a scheme evidence to show how the scheme worked, is inadmissible is wrong. Obviously the need to amend a scheme may arise as much from the fact that it does not work or has not been worked properly as from previously existing facts such as mismanagement. But we consider that this defect does not affect the case seriously because we agree with the learned Judge that the evidence which was intended to be offered and which the Board has by separate petition requested this Court to admit in appeal was not of great moment in the question of power of appointing the manager, but relates to suggested improvements in lighting, sanitation, custody of records and the like. There being thus no question of mismanagement, we think it appropriate that the appointment of manager should be with the trustees who are the persons really responsible. It is argued that Mr. Venkatarama Sastriar in the lower Court said that he did not object to a provision for the appointment being made with the previous consent of the Board. But having regard to the elaborate provisions found necessary by the learned Judge in the attempt to reconcile that consent with any real freedom of choice in the trustees which ends, as it must, in the Board really making the appointment, we think it proper to abandon the attempt and to give the power of appointment to the trustees themselves to be exercised as between themselves in the manner provided by the agreement, Ex. 1, after consultation with the Board.

We think the term of two years fixed by the scheme too short as it will fail to attract desirable persons and it is necessary to give more time for a new man to become proficient in his work. We fix the term as five years. The pay should, we think, be Rs. 200-10-250 ; the man if reappointed to start on the salary he had before re-appointment. The minimum qualification for appointment will also be prescribed by requiring that candidates must be at least holders of the B. A. degree of the Madras or any other recognized University in India and must possess experience of office management and knowledge of accounts unless the person appointed is a retired Government official who has held permanent office drawing a pay of not less than Rs. 250. Every appointment must be made after calling for applications by public advertisement.

The trustees will make rules prescribing the duties and powers of the manager in detail and submit them to the Board, and on failure of the trustees to do so in three months the Board will itself make such rules.

The powers of punishment and dismissal of the manager must be exercised by the trustees on the lines indicated in the agreement Ex. 1 as far as it goes and in matters not therein provided by the Zamorin in consultation with the Malliseri Namburi, the decision of the Zamorin to prevail in case of disagreement.

We understand that the manager who was in office when these suits began has been dispensed with by the appellant and that there is now an appeal pending before the Board by the manager. We do not wish in any way to interfere with the merits of that appeal, but we think it desirable that the appointments under this scheme should start independently of the result of it and therefore direct that

without prejudice to the appeal the term of that manager should terminate at the end of two years from his appointment which we understand expires in November 1930. The trustees will make arrangements for a fresh appointment from that date.

Objections and suggestions of the Malliseri Namburi.—His position as co-uralan having been upheld by the lower Court and by us, his chief concern in this part of the case has been to secure that his rights are practically preserved and given effect to in the scheme. The declaration contained in Cl. (1) of the scheme, as framed by the Judge, fully achieves this in theory. But his learned advocate has pointed out that some of the other clauses do not recognize his right to participate in the acts of the trustees in all of which he claims an equal right with the Zamorin. So far as his complaints relate to matters which are not specifically provided for in the agreement the two trustees must act together and the provisions in the scheme must be so drawn as to recognize this but so as to prevent a dead-lock in case of disagreement.

Objections and Suggestions of the Board and the Worshippers.—These may be dealt with together as the most important of them which relates to the appointment of new trustees or associates to the hereditary trustees, is common. Both the hereditary trustees naturally object to this proposal. The learned Judge did not appoint new trustees as he held that he had no power to do so in a suit under S. 63, para 36, and he declined to associate other persons with the trustees in the administration as contemplated by S. 63 (2) for the reason that it would probably lead to friction which would probably wreck the scheme, para 57. The ground on which the proposal for additional trustees or associates was made is, as the Judge puts it, that the public has been dissatisfied with the management of the temple and that there is a considerable body of feeling that the administration of the temple should not be left solely in the hands of hereditary trustees.

The question whether the Board in framing a scheme under S. 63 or the Court in a suit to amend a scheme so framed has the power to appoint new trustees in an excepted temple in view of S 73 of the Act which lays down that a suit under that section must be brought for appointing or removing the trustee of an excepted temple has been argued at some length. It is not necessary for us to express any opinion on these points in the view we take of the undesirability of exercising the power even if it exists. The Board itself did not exercise the power of appointing additional trustees in this case and therefore the question whether such power, if exercised would have been valid does not arise at all. So far as the Court is concerned the question does not arise as we do not think this a fit case to appoint new trustees for the reasons already mentioned in dealing with the appointment of the manager. The same remark applies to the appointment of persons or a separate body to associate with the hereditary trustees in the management. The power to do this in the case of excepted temples is not expressly conferred on the Board by any provision of the Act. But it is argued that it is implied by the language of S. 63 (2) which applies to mutts. Assuming that it is to be so implied, the Board which is so empowered has not exercised the power and no question arises whether the Board would have been entitled to exercise the power in the case of this temple So far as the Court is concerned we agree with the learned Judge that such a step would only lead to friction and would wreck the scheme. We may add that as at present advised we do not see any difference between the legal position of persons or bodies to be associated in the administration with hereditary trustees and those trustees themselves although it may be permissible to entrust them with specific duties or departments of the administration. Qua the duties entrusted to them, they would be subject to the same duties and possess the same powers as trustees. We see no ground at present to complicate the machinery of the administration in the way suggested.

The opening of the bhandarams has been made a point of complaint by the worshippers. There was no evidence whatever that the trustees or temple officials have been guilty of any malpractices during or after the counting. In this, as in other matters, the complaints appear to be due to suspicion engendered of the feeling that the administration

should not be left in the hands of hereditary trustees. We are bound to say that we have not found any justification for this suspicion in the case at any rate of the bhandarams. The directions of the learned Judge in this matter must therefore be simplified. It is not necessary, for the Inspector of the Board to have a key but the manager, the responsible official on the spot, must have one. Notice to individual worshippers is not necessary but a public notice of the opening may be put up. Those who care to attend may do so, and any two of them will attest the formal entries. The opening may take place on fixed occasions a certain number of days before and after each of the two principal festivals Ekadasi and Vaisakham when offerings are largely received.

All available surplus should be invested. But all mortgages and purchase of land and investments in non-trustee securities must have the previous sanction of the Board. All investments should be reported to the Board and should be in the name of both the trustees as such. All title-deeds and valuables shall be kept in a safe place in the Devaswom premises.

The other matters dealt with in the Judge's scheme were not objected to.

The parties will file in Court drafts embodying the above modifications in two weeks and they will furnish to the other parties copies of each other's drafts three days before the next hearing. The appeals will stand adjourned for final orders to 3rd November for being spoken to on the questions of the appointment of a treasurer.

These appeals and the memorandum of objections coming on for being spoken to the Court delivered the following:

Judgment.—Final scheme has been drawn up and passed today. Costs of all parties in Appeal 212 of 1930, will come out of the estate, Rs. 500 each to the four parties. Zamorin Raja defendant 2 Malliseri Illom defendant 1, Hindu Religious Endowments Board and plaintiffs. There will be no costs iu Appeal No. 211 of 1930. No orders are necessary on the memos of objections. Defendant 2 (Zamorin Raja) will get costs of printing out of the estate on presentation of vouchers accepted by the Deputy Registrar.

P.R.S./B.V. *Order accordingly,*

A. I. R. 1931 Madras 335

BEASLEY, C. J. AND CURGENVEN, J.

Ramanathan Chetti and *others*—Plaintiffs—Appellants.

v.

Delhi Badaha Tevar and *others*—Defendants—Respondents.

Appeal No. 403 of 1924, Decided on 11th February 1930, from decree of Sub-Judge, Ramnad, D/- 17th January 1924.

(a) Contract Act, S. 16—Gosha ladies—Evidence of execution must be certain—Pardanashin ladies.

Where executants to a document are gosha ladies, evidence of their having signed the document should be clear beyond reasonable doubt. [P 337 C 1]

(b) Registration Act, S. 28—Small item of property not belonging to mortgagor included in mortgage—Registration is valid unless there is proof of collusion.

There should be the strongest possible evidence of the fact that there was collusion between the mortgagors and the mortgagees before the mortgagees can be deprived of the mortgage amount owing under the mortgage by reason of its registration being invalid because of the inclusion of a small item of property not belonging to the mortgagors. It is not a question of negligence but of fraud and the burden of proving this lies upon the party alleging it. [P 339 C 2]

(c) Transfer of Property Act, S. 3 (as amended in 1927)—Attestation.

Where in the registration endorsement there is no statement to the effect that the identifying witnesses signed the document in the presence of the admitting executants, and there is no other evidence to prove this fact, the Court is not justified in drawing an inference that the document was properly attested : *A. I. R* 1928 *Cal.* 154 and *A I.R.* 1929 *Mad.* 1 (*F.B.*), *Ref.* [P 338 C 2 ; P 339 C 1]

Advocate-General, V. Rajagopala Aiyar and *T. V. Ramiah*—for Appellants.

S. Varadachariar and *T. M. Ramaswami Ayyar*—for Respondents.

Judgment.—The suit is to recover from defendants 1 to 3 the sum of Rs. 49,982-3-2 due on a mortgage executed by defendant 1 for himself and as guardian of his son since deceased, defendant 2, and Vengu Nachiar who is also dead. The other respondents are subsequent mortgagees. The mortgage is dated 20th January 1902 and was for a consideration of Rs. 7,500 payable within six years with compound interest at 1 per cent per mensem with ten months rests, and in default on demand with compound interest at the same rate with ten months rests. It is alleged that the debt was contracted for the expenses of a suit, O. S. No. 18 of 1901, on the file of the Sub-Court, East Madura, for household expenses and for discharg-

ing prior sundry debts. There are two items of property recited in the mortgage deed and item 1 is alleged to belong to defendant 2, but under the decree in the before-mentioned suit defendant 2 and the late Vengu Nachiar are each entitled to a quarter share. The plaintiffs, who are the appellants in this appeal, are content with a decree being passed against the half-share in that item, that is to say the defendant 2's quarter-share and Vengu Nachiar's quarter-share.

In the lower Court defendant 1 admitted execution of the mortgage bond, but denied that he had any interest in the mortgaged property, and alleged that the suit as against him was barred by limitation. Defendant 2 is a gosha lady. The defences raised were that the mortgage deed was not properly executed; that two of the executants, defendant 2 and Vengu Nachiar, being gosha ladies, had no knowledge of the contents of the deed. that it was not properly attested and that it was not validly registered. The defence also disputed the plaintiffs' claims to be entitled to a half-share in item 1, it being alleged that if the bond was good all that the plaintiffs would be entitled to was a quarter share. It was also alleged that there was no consideration for the deed.

A short statement of the facts is necessary. The late Zamindar of Sivaganga having made a gift of Tiruvottiyur village and four other villages, namely Pandugudi, Uruvatti, Koothanur and Pilar, and also the village of Vaniyankudi, to his wife Rakku Nachiar however looked after the village of Tiruvottiyur. Rakku Nachiar died in 1892 and it appears that after her death the late Zamindar put forward the plea that these villages were benami in Rakku Nachiar's name and not her stridhanam property. Then it appears that it was agreed that the Zamindar was during his lifetime to retain his interests in the property and that after his death it was to be distributed amongst the four daughters. Under this arrangement the village of Tiruvottiyur was to go to Boothaka Nachiar. He continued in possession of the property until his death in 1890, and immediately after his death his eldest daughter Vengu Nachiar took possession of Tiruvottiyur. Sundara Nachiar, another daughter, then filed a suit claiming exclusive right to all the properties. In the written statement filed in that suit Boothaka Nachiar and Vengu Nachiar pleaded the beforementioned arrangement. In order to finance that litigation and for other expenses the suit mortgage is alleged to have been executed. This suit was compromised on 10th March 1902 and as result of that compromise the four daughters agreed to divide the properties equally.

The chief points for consideration in this appeal are whether the document was properly attested and whether it was validly registered. The document is Ex. B and there were five witnesses to the document, namely Venkatachalam Chetty who is now dead; Subbayyan, P. W. 4; Ramaswami Ayyar now dead; Rama Rao, the writer of the document, P. W. 3; and Kaleeswara Ayyar who was not called as a witness. The learned Subordinate Judge does not believe the evidence of P. Ws. 3 and 4 and reject it as being entirely unreliable. The gosha ladies are said by these witnesses to have been behind the purdah, but P.W. 3, says that he was near the curtain and saw the ladies sign the document as there was a small space of two or three inches between the lower extremity of the curtain and the floor. He was sitting about six or seven feet from the entrance step, and obviously, without bending his head, could not have seen anything that went on behind the curtain. However that difficulty is got over by the witness as he states that he bent his head a little in order to see what was being done behind the curtain, and was able to see the ladies sign. P. W. 4's evidence is to the same effect as that of P. W. 3. The learned Subordinate Judge thinks that this evidence, besides being difficult to believe, was introduced in order to fulfil the requirements laid down by the Privy Council in *Shamu Pattar* v. *Abdul Khadir Ravuthan* (1). There it was held, affirming the decision of the Madras High Court, that attestation of a mortgage deed within the meaning of S. 55, T. P. Act (4 of 1882) must be made by the witnesses signing their names after seeing the actual execution of the deed, and that mere acknowledgment of his signature by the executant is not sufficient. The suit mortgage deed was executed

(1) [1912] 35 Mad. 607=39 I. A. 218=16 I. C. 250 (P.C.)

in the year 1902, ten years before the decision of the Privy Council in the before-mentioned case. Up to that time attestation according to that strict interpretation by the Privy Council was not ordinarily had. I agree with the learned Subordinate Judge that the evidence of these two witnesses is unreliable on this point and should be rejected. Therefore the two ladies being gosha ladies the evidence of their having signed the document should be clear beyond reasonable doubt. The Advocate General however contends that it is probable that the ladies did properly execute the document as they could read and write and were therefore fully capable of understanding what the document was about, and they have never until the present suit repudiated this mortgage. He refers also to Ex. D. That is a document executed in favour of one Annamalai Chettiyar. There were six executants to that document including Delhi Batcha, the husband of both Vengu Nachiar and Boothaka Nachiar, Vengu Nachiar herself and Boothaka Nachiar herself. This document is dated 14th March 1903 and in it the suit mortgage is set out.

In 1914 Vengu Nachiar wrote a letter, Ex. F, through a vakil to plaintiff 1's brother relating to an appeal to the Privy Council and for the purpose of getting all the mortgagees, including plaintiff 1's brother, to finance that appeal. This letter was written about four years before the present suit was filed, and this, the Advocate-General argues, shows that the suit mortgage was recognized by Vengu Nachiar. Then there is Ex. H, the judgment in a suit filed by the Court of Wards after the death of the Raja claiming the property on behalf of the present Raja. In that suit the plaintiffs were made party defendants as mortgagees and Boothaka Nachiar and Vengu Nachiar were also defendants, and it is argued that as Vengu Nachiar and Boothaka Nachiar did not raise any contention in that suit that the appellants here were not mortgagees, they must be taken to have accepted the position. All the arguments of the Advocate-General based upon the conduct of these gosha ladies subsequent to the suit mortgage lose much of their force by reason of the fact that the ladies are gosha and there is no satisfactory evidence that they knew anything more about the documents in the proceedings referred to than they did about the suit mortgage. It is however contended that by reason of S. 2, T. P. (Amendment) Act of 1926, the requirements as regards due attestation of a document required to be registered are satisfied in this case because the endorsements made by the Sub-Registrar, Sivaganga, show that the execution of the mortgage deed was admitted by defendant 1 Vengu Nachiar and Boothaka Nachiar, and that those admissions were witnessed by the two witnesses whose names are set out at the foot of the document. S. 2, T. P. (Amendment) Act of 1926, states that

"attested, in relation to an instrument, means attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

From this it is argued that all the requirements of this section have been fulfilled and that not only did Vengu Nachiar and Boothaka Nachiar admit the execution of the mortgage deed, but that they did so in the presence of two witnesses. It is further contended that it is not necessary to examine the Sub-Registrar as his endorsement is presumed to be correct and that the burden of proving that his endorsement is incorrect is cast upon the other side. In this connexion *Radha Mohan Dutt* v. *Nripendranath Nandy* (2), was referred to. In that case it was held that judicial notice should be taken of the endorsement of the Sub-Registrar and his signature. In that case there were two witnesses to the mortgage deed whose names appeared as attesting witnesses. In the registration office the mortgagor acknowledged execution of the deed before the Sub-Registrar, and the endorsement of the Sub-Registrar was to the effect that execution was admitted by the mortgagor. It was held that the acknowledgment before the Sub-Registrar and the signature below the endorsement on the deed amounted to sufficient attestation within the meaning of S. 3, T. P. Act, as amended by the Amendment Act 27 of 1926.

(2) A.I.R. 1928 Cal. 154=105 I.C. 422.

From a reading of the facts of the case it appears that the admission of the execution of the document was made to the Sub-Registrar only and he therefore was the only witness to that admission. The Calcutta High Court therefore considered that the endorsement by the Sub-Registrar, that the admission had been made in his presence, was sufficient compliance with the provisions of the Transfer of Property Act (Amendment) Act, and must be taken as being correct. But according to S. 2, T. P. (Amendment) Act, there must be two witnesses to the admission by the executant although they need not both be present at the same time. It is contended by the Advocate-General that his argument is supported by a decision of a Full Bench of this Court in *Veerappa Chettiar* v. *Subramania Ayyar* (3).

It was there held that Acts 27 of 1926, 10 of 1927 and 12 of 1927, relating to the attestation of certain documents, are retrospective in their nature, so as to apply to documents executed on a date prior to their coming into force, and further that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement under Ss. 58 and 59, Registration Act (16 of 1908), are a sufficient attestation within the meaning of S. 59, T. P. Act, and its amending Acts. This case originally came before a Bench consisting of the late Sir Murray Coutts-Trotter, J., and Srinivasa Iyengar, J., and they passed an order calling for findings on the three following matters:

"1. Whether the Sub-Registrar who registered the instrument Ex. A in the case, made his signature in the registration endorsement referring to the admission of execution by the executants of the document, in the presence of the executants? 2. Whether the witnesses who identified the executants before the Sub-Registrar were present when such admission of execution was made by the executant? and 3. Whether they or either of them made their signature in the presence of the executants?"

In compliance with this order the Subordinate Judge sent up the following findings. On issue 1 he found that the Sub-Registrar who registered Ex. A made his signature in the registration endorsement referring to the admission of the execution by the executants of the document in the presence of the executants; on issue 2 he found that the witnesses who identified the executants of Ex. A before the Sub-Registrar were present when the admission of execution of that document was made by the executants; and on issue 3, he found that both the identifying witnesses made their signatures in the presence of the executants of Ex. A. On these findings a reference was made to a Full Bench which answered the questions referred to it in the manner already stated. In my view, this case does not assist the appellants because, according to the findings of the Subordinate Judge in that case, the provisions of S. 2, T. P. (Amendment) Act, were strictly complied with. The difficulty with which the appellants are faced here is that there is no evidence on the face of the document to show that the signatures of both or either of the witnesses to the admission of execution by Vengu Nachiar and Boothaka Nachiar were affixed to the document in the presence of the admitting executants. That is what is required by the law and what was in fact actually done in the Full Bench case. All that appears from the endorsement of the Sub-Registrar is that two witnesses were examined and both of them being ladies of course were able to go behind the purdah.

The particulars endorsed on the mortgage bond are those required by Ss. 58 and 59, Registration Act. S. 58 requires that there shall be endorsed the following particulars, namely the signature and admission of every person admitting the execution of the document, the signature and admission of every person examined in reference to such document under the provisions of the Act and any payment of money or delivery of goods made in the presence of the registering officer or any admission of receipt of consideration made in his presence; and S. 59 requires that the registering officer shall affix the date and his signature to all endorsements made under Ss. 52 to 58 relating to the same document and made in his presence on the same day. But, as I have already stated, there is no evidence to show that there was sufficient attestation within the meaning of S. 59, T. P. Act, and its amending Acts. There is no endorsement to the effect that the two witnesses signed the document in the presence of the two admitting executants. Nevertheless we are asked to infer that they must have done so. If the Sub-Registrar could have been called as a

(3) A.I.R. 1929 Mad. 1=116 I.C. 367=52 Mad. 123 (F.B.).

witness in the Court below he might have been able to clear up the matter. It is pointed out that it was impossible or at the least very difficult to call him having regard to the fact that his whereabouts are not known after this lapse of time. That of course is quite true but it does not seem to me to be a reason for drawing any inference in his absence of proper attestation of the document, and I must therefore hold that it has not been properly attested.

In view of the above findings, it is not necessary to deal with any of the other defences raised in the suit but nevertheless I propose to deal with them though very briefly. With regard to the defence that the suit mortgage deed was not validly registered, it is based upon the inclusion in the suit mortgage of item 2. This, it is alleged, did not belong to defendant 1 but was sold away by defendant 1's father. This is clearly supported by Ex. 3 which is a sale-deed executed by Kulandaiswami Thevar, the father of defendant 1 to Annamalai Chettiar, and from which it appears that this item was sold in full settlement of the amount due under the decree in Regular Suit No. 27 of 1898 on the file of the Sub-Court of East Madura. It is dated 5th December 1898. This same property was subsequently under Ex. 2 sold by Annamalai Chettiar to Pichama Nachiar, the daughter of defendant 1's brother Udayanaswami. The appellants contend that the transactions evidenced by the exhibits were benami transactions and that defendant 1's father still had a title to the property. On this point the case does not seem to me to present any difficulty whatever. I see no reason whatever for supposing that the sale of the property by defendant 1's father to Annamalai Chettiar which was some four years before the suit mortgage was a benami transaction, and this is supported by the subsequent disposal of it to Pichama Nachiar. Defendant 1 had no title to item 2. This however does not dispose of the respondent's contention that its inclusion in the suit mortgage deed renders the mortgage invalid. This seems to me to depend upon whether it was included in the deed for the purpose of committing a fraud upon the registration laws and the mortgagees were parties to that fraud. If the property had been nonexistent, then it is clear that its inclusion would invalidate the mortgage.

But to argue that because defendant 1 had no title to it the mortgage is invalid is a totally different matter. The learned Subordinate Judge thinks that item 2 was inserted in order to enable the document to be registered in Sivaganga itself which is probable, and he says that there is no evidence in the case that the plaintiffs' father who took the suit mortgage ascertained after enquiry whether defendant 1's father had any right to the property. I do not think that that is the correct test to apply. In my view, there should be the strongest possible evidence of the fact that there was collusion between the mortgagors and the mortgagees before the mortgagees can be deprived of the mortgage amount owing under the mortgage by reason of its registration being invalid because of the inclusion of a small item of property not belonging to the mortgagors. The penalty is a very heavy one and I can see no evidence at all here that the appellants' father had any reason to suppose that defendant 1 had no title to the property. The appellants in fact did not carry through the transaction and it is not enough to say that he omitted to ascertain whether defendant 1 had a good title. It is not a question of negligence but of fraud and the burden of proving this lies upon the respondents. Defendant 1 who could have given evidence as to this was not examined as a witness in the case. I must hold therefore that the registration of the suit mortgage deed was not invalid on that account. With regard to the plea that there was no consideration on the mortgage although it is not one that need be decided now in view of the findings that the mortgage deed was not properly attested, I cannot see any grounds for upholding the respondent's contention that no consideration passed. In the circumstances it is not necessary to go into the question as to whether the appellants would be entitled to a half-share of the property or only a quarter. For the reasons already stated this appeal must be dismissed with costs throughout.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 340

WALLACE AND PANDALAI, JJ.

T. S. Lakshmana Ayyar and *others*—Plaintiffs—Appellants.

v.

R. S. Nayudu and *others* — Defendants—Respondents.

Appeal No. 191 of 1930, Decided on 20th November 1930, against decree of Dist. Judge, Madura, D/- 25th March 1930.

(a) Religious Endowments Act (1925), Ss. 79 (1), 16 and 5—Committee established under Act of 1863, and in existence at commencement of Act of 1925, is a committee constituted under S. 16 and within definition of S. 5 — Under S. 16 Local Government can abolish such a committee.

Section 79 (1) means that any committee established under the Act of 1863, and in existence at the commencement of the Act of 1925, is to be regarded by the law as if it were one constituted under the Act of 1925 and therefore is a committee which comes within the definition of " committee " under S. 5. S. 16 gives the Local Government power to vary or abolish such a committee. What both the sections really mean is that the Local Government takes power if it thinks fit to abolish the old committees under the Act of 1863 and put, in their place, new committees under the Act of 1925 and that for the transitory period Sch. 3 is to be in operation. [P 341 C 2, P 342 C 1]

(b) Religious Endowments Act (1927), Ss. 20 (1) (a), 21 and 22 — Strength of committee constituted under Act of 1863 interfered with and varied—This is valid under S. 20 (1) (c) and (a).

Where the strength of a certain Devasthan Committee constituted under the Act of 1863 is varied by certain Government notifications purporting to interfere with and vary the constitution of that committee under the Act of 1927 it means that it was abolished by one of the notifications validly under S. 20 (1) (c) and was reconstituted validly under a subsequent notification under S. 20 (1) (a) of the Act of 1927. [P 342 C 1]

K. V. Krishnaswamy Ayyar and *T. M. Ramaswami Ayyar*—for Appellants.

K. Rajah Ayyar, V. Ramaswami Ayyar and *V. Ratnam*—for Respondents.

Judgment.—The suit from which this appeal is presented was by representative worshippers of the Madura Devasthanam against the ten members of the Madura, etc. Devasthanams Committee, defendants 1 to 10, and the Secretary of State, defendant 11, for a declaration that the appointment by defendant 11 of defendants 1 to 10 as members of that committee is illegal and invalid because defendant 11 has no power to modify the scheme for these Devasthanams framed by the District Court of Madura in O. S. 4 of 1922, and for an injunction restraining defendants 1 to 10 from interfering with the management of the suit devasthanams. The District Court dismissed the suit and the plaintiffs appeal.

In O. S. 4 of 1922, which was a suit under S. 92, Civil P. C., the District Court, in its decree dated 12th April 1924, framed a scheme for the better administration of the suit devasthanams, appointing a committee of five members to be known as the Madura etc. Devasthanams Committee. The District Court decree was slightly modified by the High Court on appeal on 31st July 1925. It appears from the judgment in that suit, and is otherwise admitted, that on the date of that scheme there was already in existence a committee of five members known as the Madura, etc. Devasthanams Committee constituted and appointed under Act 20 of 1863. The District Court in its scheme seems to have adopted that committee as the committee appointed under its scheme. This explains what was at first a rather puzzling feature, namely that the District Court's scheme provided no way of filling up vacancies in the scheme committee. We take it that that was because the committee was really one constituted under Act 20 of 1863 and vacancies would therefore be filled up in the manner provided by that Act. Subsequent to the passing of Madras Acts 1 of 1925 and 2 of 1927 the Local Government by several notifications purported to interfere with and vary the constitution of the Madura, etc., Devasthanams Committee. Ex. B is a notification of 1st February 1927 under S. 16 (1) (b), Act 1 of 1925, varying the strength of the committee and fixing it at six members. Ex. B-1 dated 21st August 1928 is a notification under Ss. 20 (1) (a), 21 and 22, Madras Act 2 of 1927, which had by then superseded Act 1 of 1925, constituting a committee for the Madura Meenakshi Sundareswarar, etc. Devasthanams and fixing its strength at ten and appointing nine out of the ten members for a period of one year. Ex. B-2 is a notification dated 23rd October 1928 under S. 22, Act 2 of 1927, whereunder the Local Government appoints the tenth member. Under B-3, a notification dated 4th February 1930 under the proviso to S. 22, the Local Government appointed defendants 1 to 10 as members for one year.

Plaintiffs' general contention before us is that all variations of the original committee appointed under Act 20 of 1863 are ultra vires; that the notifications, B to B 3, are therefore illegal; and that defendants 1 to 10 are not validly appointed. The ground on which the plaint attack was based in the trial Court was that the Local Government's action was tantamount to a modification of the District Court's scheme, which fixed the committee at five and provided no method of filling up vacancies, and that any such modification of the scheme framed by the District Court was illegal, and that is the point which formed the subject of the main issues in the case. But, as the argument was developed before us, it appeared to us that such a contention was irrelevant since, as we have pointed out, the Madura, etc. Devasthanams Committee was not the creature of the District Court's scheme but owed its being to Act 20 of 1863. The plaintiffs have not attacked the authority of the Local Government to vary the constitution of the committee appointed under Act 20 of 1863, but only its authority to modify a scheme of the District Court. Any contention and issue framed, for example issues 2 to 4, as to the authority of the Local Government to alter the District Court's scheme therefore became irrelevant, and the parties and the lower Court therefore seem to have missed the real point when these issues were framed and tried.

The plaintiffs' attack on the committee's constitution, as set out in issues 2 to 4, therefore fails as irrelevant. The plaintiffs contend however that the general language of their plaint and the wording of issue 1 enable them to maintain, as a purely legal point, the contention that, even taking it that the District Court's scheme had nothing to do with the real points at issue, the Government notifications were invalid on other grounds. We allowed this matter to be argued as it seemed to us that such a contention would plausibly come within the terms of the plaint case, and it was inadvisable to continue the uncertainty in which the constitution of the committee seemed to be involved if it could be properly resolved in this case and save further litigation thereon. Had our considered opinion been in favour of the plaintiffs, it might have been only fair to the defendants to have raised fresh issues and to have sent the case down for further trial. But as we hold that even on the fresh contention the plaintiffs have made out no case, we proceed to deal at once with that contention.

Put shortly, it is this : Act 20 of 1863 was repealed by Act 1 of 1925. To provide for the transitory period between that repeal and the appointment of the new committee under Act 1 of 1925 to take the place of the old one, S. 79 of that Act was enacted which runs :

"(1) Every committee established under the Religious Endowments Act of 1863, which is in existence at the commencement of this Act shall be deemed to have been duly constituted under the provisions of this Act ; (2) In their application to the members and Presidents of Committees in office at the commencement of this Act and the first reconstitution of such committees in accordance with this Act, the provisions of this Act shall be read subject to the rules contained in Sch. 3."

The plaintiffs contend that S. 16, Act 1 of 1925, which deals with the constitution of committees, deals only with committees appointed under that Act since "committee" by definition, S. 5 (2), means a committee as constituted under S. 16, and S. 79 does not say that a committee established under the Religious Endowments Act of 1863 shall be a committee constituted under S. 16, but merely that it shall be deemed to have been constituted under Act 1 of 1925. We think however that S. 79 (1) means that any committee established under the Act of 1863, in existence at the commencement of Act 1 of 1925, is to be regarded by the law as if it were one constituted under Act 1 of 1925, that is, as if it were a committee constituted under S. 16 of that Act, and therefore is a committee which comes within the definition of "committee" under S. 5. S. 16 then gives the Local Government power to vary or abolish such a committee. If this interpretation is not right, then all the provisions in Ch. 3 of the Act regarding the establishment of temple committee are nugatory, wherever a committee appointed under Act 20 of 1863 holds jurisdiction, since such a committee would remain unassailable and unalterable for ever, it being impossible for the Local Government to abolish it under Act 20 of 1863 because that Act itself is now repealed and Government has not reserved to itself by legislation any power to abolish or modify such a committee. The scheme

of S. 79 with its specific mention in sub-S. (2) of "the first reconstitution of such committees in accordance with this Act," and the real meaning of the section obviously are that the Local Government takes power if it thinks fit to abolish the old committees under Act 20 of 1863 and put, in their place, new committees under Act 1 of 1925, and that for the transitory period Sch. 3 is to be in operation. When Act 1 of 1925 was in its turn repealed by Act 2 of 1927, S. 9 (2) then took the place of the definition in S. 5 (2) of the previous Act, and Ss. 20 and 83 the place of Ss. 16 and 79, the only change in language which is relevant here being that for the words "any such committee" in S. 16 (1) (b) and (c) of the former Act the words "any committee" are inserted in S. 20 (1) (b) and (c), a change which, if anything, is in favour of giving these words a wider application so as to include in them a committee "deemed to have been duly constituted" under the provisions of that Act. Even if we take it that the narrower wording of S. 16 (1) (b) and (c) did not empower the Local Government to vary or abolish the committee under Act 20 of 1863, the Local Government did not purport to abolish it during the currency of Act 1 of 1925. The old committee therefore continued until it was abolished by notification, we are told, dated 28th November 1927 and ceased to exist on 1st December 1927. Such abolition was under Act 2 of 1927 and is justified and valid under S. 20 (1) (c) of that Act, and the reconstitution of it under notification Ex. B, is also valid under sub-S. (1) (a).

We are bound to say that the strongest justification for the plaintiffs' suit is the extraordinary dilatoriness of the Local Government in giving effect to its own legislation Act 1 of 1925 and the consequent repeal under it of Act 20 of 1863 came into force on 27th January 1925. The transitory provisions of Sch. 3, Act 1 of 1925, gave to the Local Government three years within which to prepare the machinery for the electoral method of appointment of the temple committee designed under the Act. Not until two years after that Act came into force did it occur to the Local Government to vary the constitution of the committee of 1863 so as to increase the number to six and thus make it conform to S. 17, Act 1 of 1925. This was the purpose of the notification, Ex. B. Now from the date of the High Court decree in appeal from the judgment of the District Court, Madura, in O. S. 2 of 1921, a decree which was passed on 31st July 1925, and removed three of the then members of the committee, there had been three vacancies on the committee. No steps were taken to have these vacancies filled up until the notification Ex. B 18 months later. Presumably the committee was left to function for that period with only two members. By a notification dated 28th November 1927 the Local Government at last decided to abolish the existing committee from 1st December 1927 and it then came to an end.

Beyond that nothing was done and no committee was therefore functioning until the date of Ex. B, 21st August 1928, when the new committee of ten members was established. Under S. 20, Act 2 of 1927, nothing had yet been done towards bringing the electoral machinery into play. The transitory provision of that Act, which had to be resorted to, provided only one year from the date of the Act coming into force during which these provisions might operate. That year expired on 7th February 1928. S. 22 had therefore to be resorted to and Ex. B-1 is a notification under that section, which allows the Local Government to make appointments for one year. That year expired on 20th August 1929. No electoral machinery was even yet ready. So recourse was had to fresh legislation and Act 1 of 1928 enacted a proviso to S. 22, which came into force on 14th February 1928. The proviso allows Government to make appointments for another year. Whether that year is to date from the expiry of the one allowed under S. 22, which seems reasonable, or wheher it is to date from whatever date the Local Government chooses to fix, which does not seem reasonable, does not matter in this case. One year from 20th August 1929, brings us to 19th August 1930, and the suit was filed on 17th February 1930, so that on the date of the filing of the suit defendants 1 to 10 were legally in office appointed under the proviso to S. 22 by notification Ex. B-3 dated 4th February 1930. But it will be observed that there was another interregnum between 20th August 1929 and 4th Febru-

ary 1930 when no committee was functioning. We are informed that during the periods of interregnum when the committee was not functioning a trustee appointed by the District Court's scheme was in actual management ; but this seems doubtful as the District Court's judgment says that the trustee was removed on 16th July 1929. We have not gone further into this question. Such a record of dilatoriness appears on the face of it indefensible, and is bound to have been a source of exasperation to worshippers who were not in favour of the Local Government nominees or the Local Government methods by which these nominees attained to their office, and who are anxious to exercise the privileges which Act 2 of 1927 was designed to confer upon them. However for the reasons we have given it is clear to us that the plaintiffs' suit as framed cannot succeed even on the legal ground which we have allowed them to raise here, since defendants 1 to 10 were on the date of suit legally in office under the notification, Ex. B-3. It is unnecessary to deal with the other matters raised in the other issues and we have not had those fully argued before us. The appeal must therefore be dismissed. As the plaintiffs have failed they must pay the costs of the contesting defendants. One set to contesting defendants 1, 2, 5, 7 to 10 and one set to defendant 11. Rs. 200 each set for pleaders' fee.

P.R.S./R.K. *Appeal dismissed.*

A. I. R. 1931 Madras 343

BEASLEY, C. J. AND WALSH, J.

Arumilli Viramma—Appellant.

v.

Arumilli Seshamma and *another*—Respondents.

Civil Misc. Appeal No. 218 of 1930 and Civil Revn. Petn. No. 868 of 1930, Decided on 14th November 1930, from order of Dist. Judge, East Godaveri, D/- 13th November 1929, in Original Petn. No. 85 of 1929.

(a) Deed — Construction — Executor held appointed by implication — Succession Act (1925), S. 222.

The alleged will, stated as follows: "It is devised that my nephew is to discharge the debts due by me to the world."

Held : that the said nephew was appointed an executor of the will by implication and that probate should be granted to him.

[P 343 C 2, P 344 C 1]

(b) Succession Act (1925), S. 244 — Minor executors are solely and expressly provided by S. 244.

The minor executors are expressly and solely provided for by S. 244. Where a minor executor is appointed, it is open to his legal guardian or such other person as may seem to the Court fit, to have letters of administration issued to him. Before letters of administration can be granted to a legal guardian of a minor, the legal guardian must apply to be appointed the minor's guardian to enable him or her to obtain letters of administration for the use and benefit of the minor : 5 *Pat. L. J.* 347 and 34 *Cal.* 706, *Ref.*

[P 344 C 1]

A. Lakshmayyar—for Appellant.

N. Rama Rao—for Respondents.

Beasley, C. J. — In this case respondent 1, the grandmother of one Ramarayudu, a minor, applied to the lower Court for a limited grant to her of probate of a will asserting that a man named Krishnamurthi her son had died and that previous to his death he had made a will under the provisions of which she herself was a legatee and some of the property fell to her grandson, a minor. This alleged will effectively shut out the alleged testator's widow the counterpetitioner on the petition in the lower Court. Respondent 1 accordingly applied to have the will probated and eventually recognizing that she was not entitled to ask for probate changed the nature of her application and asked instead to have granted to her letters of administration. This application was refused; and on 13th November last the learned District Judge passed the following interim order:

"There is no ground to reject the application. This is really governed by S. 234. The alleged residuary legatee, granting he is one, is a minor."

That is the order appealed against here. The question which in my view, determines this matter is whether the minor was under the alleged will an executor by implication. The alleged will put forward states as follows:

"It is devised that my nephew Ramarayudu is to discharge the debts due by me to the world."

The question is whether that provision makes Ramarayudu an executor by implication. S. 222, Succession Act says that probate shall be granted only to an executor appointed by the will and that the appointment may be express or by necessary implication. Here of course no question arises as to whether there was an express appointment of Ramarayudu as an executor but the only ques-

tion is whether by necessary implication he was so appointed. To S. 222 there are three illustrations and illustration 3 seems to me to cover this case. There the words were :

"I appoint my nephew residuary legatee to discharge all lawful demands against my will and codicils signed on different dates"

and "my nephew" was held to be appointed an executor by implication. The wording there seems to me to be very similar to the wording in the present case and, in my view, the minor was clearly appointed an executor by implication. If that is so, the learned District Judge was wrong in saying that the application was covered by S. 234, Succession Act. It clearly was not. That section only deals with cases where no executor has been appointed or if an executor has been appointed he declines to act. Here an executor was appointed and it was not a case of his declining to act because in law he could not act. In my view, minor executors are expressly and solely provided for by S. 244 of the Act. Where a minor executor is appointed, then it is open to his legal guardian or such other person as may seem to the Court fit, to have letters of administration issued to him; and if there is any section at all in the Succession Act which enables the respondent in this case to apply for letters of administration it is S. 244. In *Bagwat Kuer* v. *Bahuria Ramakshi Kuer* (1) which followed the decision in *In the Goods of Nirojini Debi* (2) the corresponding S. 33 in the Probate and Administration Act 5 of 1881, was considered and it was held that before letters of administration can be granted to a legal guardian of a minor, the legal guardian must apply to be appointed the minor's guardian for the purpose of enabling him or her to obtain those letters of administration for the use and benefit of the minor. In this case there is no such application by the respondent and being of the opinion as I am that the only section under which this application can be made is S. 244, this appeal must be allowed. In doing so, we leave it open to the respondent to get herself appointed if she can as the guardian of the minor. Then, if the Court so thinks fit, she can obtain letters of administration.

This appeal must therefore be allowed with costs. No orders are necessary on the civil revision petition.

Walsh, J.—I agree.

P.R.S./B.V. *Appeal allowed.*

(1) [1920] 5 Pat. L. J. 347=57 I. C. 583.
(2) [1907] 34 Cal. 706=11 C. W. N. 697.

A. I. R. 1931 Madras 344

REILLY AND ANANTAKRISHNA AYYAR, JJ.

O. R. M. M. S. P. S. V. Sevugan Chettiar (dead) and *others*—Appellants.

v.

M. A. K. Kasi and *others*—Respondents.

Appeals Nos. 219 of 1927 and 361 of 1925, Decided on 3rd November 1930, against order of Dist. Judge, Ramnad, D/- 27th February 1925.

(a) Provincial Insolvency Act (1920), S. 38—Even if creditors consent to scheme, Court must exercise discretion before approving scheme.

The business of the Court in an insolvency is to see that the assets are administered through the ordinary and proper machinery of the Court, not to require nor even invite any creditor or other person to take over the estate on certain terms and carry out the functions of the Court for it. The wish of the creditors by itself is by no means a sufficient reason for approving of the scheme proposed. S. 38 restricts the power of the Court to approve a composition scheme on certain conditions. If those restrictive conditions are fulfilled, the last clause of the section provides that the Court may then either approve or disappreve of the scheme. That means that, although the section has provided that no scheme should be approved unless the requisite majority of the creditors consent, still, even if there is that consent of the creditors, the Court must exercise its judicial discretion before approving of the scheme, that is, a discretion founded on sufficient reasons after considering all aspects of the case and ascertaining the facts so far as possible. The wishes of the creditors, though undoubtedly an important matter to be taken into account, are by no means to be taken as conclusive or in any way as relieving the responsibility that rests upon the Court, that any order it passes, whether in the matter of approving a scheme or otherwise, is supported by the evidence on record and is clearly for the general benefit of the creditors of the insolvent: *In re Burr*, (1892) 2 *Q. B.* 467 and *Ex parte The Merchant Banking Co. of London* v. *Durham*, 16 *Ch. D.* 623, *Ref.* [P 345 C1, 2]

(b) Provincial Insolvency Act (1920), S. 38—Nonmaintaining of proper accounts should be considered while discharging insolvent or approving his scheme.

One of the most serious offences which have to be taken into consideration, when there is a question whether an insolvent should be discharged or a scheme should be approved, is the failure to maintain proper accounts. If as a matter of fact, the insolvent did not keep accounts that circumstance shows the recklessness of the person in the matter of carrying on his business. If, on the other hand, he kept

accounts but did not produce the same, then the Court should not be too ready to help such insolvents in the matter of getting their adjudications annulled: *In Ex parte Campbell*, 15 Q. B. D. 213, *Ref.* [P 347 C 1, 2]

(c) Provincial Insolvency Act (1920), S. 38 —Insolvent not assisting receiver when summoned—Fact should be considered in approving scheme.

Where the insolvent, after his adjudication, fails to appear before the Official Receiver, when summoned to do so to assist him in the administration of the estate, that is a very serious matter to be taken into consideration in sanctioning a proposed scheme. [P 367 C 1]

(d) Provincial Insolvency Act (1920), S. 38 —One creditor declining to accept offer to take insolvent's assets en bloc — Another creditor, relation of insolvent, accepting— Other creditors except one, accepting also —Proposed scheme is not necessarily beneficial to general body.

The fact that a creditor of the insolvent, to whom an offer was made to take over en bloc all the assets of the insolvent and pay to the insolvent's creditors six annas in the rupee, declined to accept the offer, while another creditor, a near relation of the insolvent, accepted it, which was approved of by all the other creditors except one, is by itself no ground for holding that the proposed scheme is beneficial to the general body of creditors. [P 349 C 1]

T. R. Ramachandra Ayyar and *S. R. Muthuswami Ayyar*—for Appellants.

S. Varadachariar, *N. Rajagopalan* and *R. Srinivasa Iyengar*—for Respondents.

Reilly, J.—This is an appeal against on order of the District Judge of Ramnad approving of a composition scheme under S. 38, Provincial Insolvency Act. The insolvent in this case was adjudicated on 31st August 1923. In December 1924 he submitted a draft scheme of composition, which was not approved. In September 1926 he submitted a second scheme with three alternative proposals, the third being that the whole of his property should be assigned to any person who agreed to pay six annas in the rupee to all the creditors. The 17th creditor in the case, who is the husband of the insolvent's paternal aunt, offered to take over the insolvent's assets on those terms The 6th creditor, who had obtained a decree against the insolvent for Rs. 51,000, objected to the proposed scheme; but the requisite majority of creditors in number and amount accepted the scheme. When the matter came before the District Judge, it appeared that claims amounting to Rs. 2,71,000 had been proved. In November 1926 the District Judge approved of the scheme after making a slight alteration about the calculation of interest due to the creditors and annulled the adjudication of the insolvent. He gave the 17th creditor, whose offer he accepted, two months to pay into Court an amount equivalent to six annas in the rupee on the proved claims. It now appears that the 17th creditor did not deposit the whole of the amount in Court; but within two months he deposited about a half of it and produced before the District Judge acknowledgments from the other creditors that they had been satisfied to the extent of six annas in the rupee. The 6th creditor, who objected to that scheme, has appealed against the District Judge's order, and he maintains that the scheme should not have been approved. A number of other creditors have appeared before us as respondents, and it is represented for them that they are still satisfied with the scheme and have no desire that it should be upset. The ex-insolvent and the 17th creditor also oppose the appeal.

Now, when we look at the learned District Judge's order in the matter, it appears that he took three points into consideration. The first was that the requisite majority of the creditors had approved of the scheme. The second was that it was represented for those creditors that, if the Official Receiver administered the estate of the insolvent under the Act, that would lead to considerable delay and expense. The third point was that in the course of the proceedings the learned District Judge offered the assets of the insolvent to the objecting creditor (the appellant here) on the same terms that he should take the whole of the assets and pay six annas in the rupee to the other creditors, and that he was not willing to accept that offer.

The learned District Judge was certainly right in taking into consideration as a matter of great weight the fact that the majority of the creditors were in favour of the scheme. It happens that in this case both the insolvent and all the creditors are Nattukottai Chettis; and, as has been represented for the respondents here, it may be supposed that they are persons quite capable of guarding their own interests. But against that we must notice that none of those creditors except one had a claim anywhere approaching that of the 6th credi-

tor in magnitude and we cannot ignore the possibility that the other Chetti creditors may have been influenced in accepting the scheme by pity or friendship or what they regarded as good policy in the matter. As for the suggestion that, if the Official Receiver had administered the estate there would have been great delay, that was a matter within the control of the Court and the Official Receiver as an officer of the Court. I do not think the learned District Judge should have paid very much attention to that. Nor should he have regarded it as of serious weight that, if the Official Receiver administered the estate, there would be a small commission to be paid upon his dividends. That is part of the ordinary machinery of the Court, which is not to be set aside for any such consideration. As for the offer which the learned District Judge made to the 6th creditor, it has been explained to us that in this particular case the 6th creditor was not in a position to take advantage of that offer. It is admitted that only one part of the assets of the insolvent was immovable property in this Presidency. That is a valuable house in Karaikudi. The rest of the assets were either land in Burma or amounts due from a business which the insolvent was carrying on in Burma or amounts due from another business in Guroon in the Malay States, in which he was the chief partner, having 5/8ths share, or, as is suggested for the 6th creditor, money which the insolvent had secreted somewhere.

It is quite, clear in the circumstances that the 6th creditor would have had very great difficulty in realizing any part of the assets except the house in Karaikudi, and possibly the land in Burma unless the insolvent was willing to help him, which it was not at all likely he would do. And apart from that I do not think that the learned District Judge was justified in putting the 6th creditor on any such terms, The 6th creditor made no offer to take over the assets on those terms, and he certainly could not be required to do so. The business of the Court in an insolvency is to see that the assets are administered through the ordinary and proper machinery of the Court, not to require nor even invite any creditor or other person to take over the estate on certain terms and carry out the functions of the Court for it.

These were the considerations which the learned District Judge took into account when he approved of the scheme. But, although it was quite proper for him to be influenced by the wish of the majority of the creditors in respect of this proposed scheme, he ought, I think, to have realized that the wish of the creditors by itself was by no means a sufficient reason for approving of the scheme in the circumstances. That was clearly brought out by the Court of appeal in *Ex parte the Merchant Banking Company of London* v. *Durham* (1) and *In re Burr* (2). Under our own Provincial Insolvency Act, S. 38 restricts the power of the Court to approve a compcsition scheme on certain conditions. If those restrictive conditions are fulfilled the last clause of the section provides that the Court may then either approve or disapprove of the scheme. That means that, although the section has provided that no scheme should be approved unless the requisite majority of the creditors consent, still, even if there is that consent of the creditors, the Court must exercise its judicial discretion before approving of the scheme, that is a discretion founded on sufficient reasons after considering all aspects of the case and ascertaining the facts so far as possible. Now it appears to me that in this case there were a number of circumstances which the learned District Judge overlooked. There is nothing in his order to suggest that he took into consideration the facts that the Official Receiver had reported against the scheme and had represented that it was not beneficial to the creditors and not a proper scheme to be approved. Nor is there anything, secondly, in the learned District Judge's order to show that he himself considered whether this was a fair scheme. The scheme was that the whole of the insolvent's assets should be assigned to the 17th creditor, who should pay the other creditors 6 annas in the rupee. Now the insolvent had represented that his assets were worth a lakh and a half. I do not think that, as has been suggested for him, we can take it that that is likely to have

(1) [1881] 16 Ch. D. 623=50 L. J. Ch. 606=29 W. R. 363=44 L. T. 358.
(2) [1892] 2 Q. B. 467=61 L. J. Q. B. 591=9 Morrell 133=66 L. T. 553.

been an exaggeration of the value of his assets as he gave that value not only at the beginning of the insolvency proceedings but when he was putting forward his first scheme. If his assets were worth a lakh and a half, they would have produced about 9 annas in the rupee on the proved debts. The learned District Judge does not appear to have observed that fact. Nor does he appear to have made any attempt to satisfy himself that the assets disclosed by the insolvent, making up a lakh and a half, were all the assets available. Thirdly, the learned District Judge has not commented upon the fact that the insolvent's conduct in connexion with the insolvency had been bad, and he does not appear to have taken it into consideration. The records show that after his adjudication the insolvent failed to appear before the Official Receiver when summoned to do so and assist him in the administration of the estate. That is a very serious matter. Besides that the insolvent professes not to have any aecounts or documents to show what was due to him from that Guroon business, in which he had a 5/8ths share. He said vaguely that about Rs. 25,000 was due from it.

It is very difficult indeed to believe that the insolvent, a Nattukottai Chetti money-lender, who had a preponderating share in a business in the Malay States, where he admits he never went himself, did not keep regular and complete accounts of what was due to him from that business and could not produced them before theOfficial Receiver. One of the most serious offences which have to be taken into consideration when there is a question whether an insolvent should be discharged or a scheme should be approved is the failure to maintain proper accounts. Apart from the Guroon business the insolvent, though he has produced accounts showing that about Rs. 46,000 were due to him from the business which he was conducting in Akyab, has produced no accounts of his receipts or expenditure at Karaikudi his headquarters. He maintains that he conducted no business at Karaikudi, and there is no evidence that he .actually did so. But it is highly improbable that he had no accounts of his receipts and expenditure there. The learned District Judge does not appear to have considered whether it was right that an insolvent who had behaved in this way should be rehabilitated by the approval of a scheme and the consequent annulment of his insolvency. It is certainly not for the Courts to whitewash an insolvent who behaves like that ;and to set him on his feet again, so that he may at once start a new business. Fouthly, the learned District Judge does not appear to me to have paid due attention to the fact that the 17th creditor, who has taken over the whole of the assets of the insolvent under this scheme, is a very near relation of the insolvent. In the circumstances that appears to me a very suspicious thing. Fifthly, the insolvent at a very early stage in the proceedings, when he propounded his first scheme, naively admitted that his purpose and hope was that he should be enabled to start business again.

Now it is one of the objects of insolvency legislation that an insolvent, who has placed the whole of his property at the disposal of his creditorsfor distribution in the insolvency proceedings, should after a due interval be discharged and have a chance of starting again in life, so that he can use his talents and knowledge and experience and, if he has the opportunity, start a new business. But what kind of business are we to suppose that this insolvent wanted to start? This insolvent is a money-lender, and, so far as I can gather, the business which he wanted to start as soon as this scheme was put through and his insolvency was annulled was a money-lending business. A man cannot start a money-lending business without some capital and some considerable amount of cash in hand. When we take those two things together, the fact that the creditor who has taken over all the assets is a very near relation of the insolvent and the fact that the insolvent proposed to start a new money-lending business, surely that raises a very grave suspicion that the 17th creditor was only a mask for the insolvent and that the insolvent was buying back his own assets at a profitable figure and was so making a profit out of his insolvency, the very trick against which James, L. J., in *Ex parte The Merchant Banking Co. of London* (1) said that Courts must be on their guard. Lastly, the learned District Judge does not appear to me to have asked him-

self the question: Of what profit would this proposed scheme be to the creditors? It would provide them with six-annas in the rupee. The house at Karaikudi was valued by the insolvent at from Rs. 75,000 to a lakh of rupees at that time. With the land in Burma and the amount of Rs. 25,000 which the insolvent said was due to him from his Guroon business, even if there had been nothing else of value in his estate, more than six annas in the rupee should have been paid by the Official Receiver. If the insolvent had remained an undischarged insolvent, he would have had an inducement to assist the Official Receiver in getting in the rest of his assets for the further benefit of the creditors, an inducement which disappeared entirely when the scheme was approved.

In those six respects it appears to me that the learned District Judge has failed to take into consideration important aspects of the matter ; and he has fallen into an error in looking at the case as if the approval of the creditors to the proposed scheme was an overmastering reason to influence him. In my opinion the learned District Judge was not well advised in approving of the scheme, and in the circumstances it was not a scheme which should have been approved.

If this appeal had come before us within a short time after the learned District Judge's order had been made I should have had no hesitation in expressing my opinion that his order should be set aside. But it happens that we are hearing this appeal four years after the learned District Judge's order. That unfortunate delay and its consequences cannot be ignored when we are considering what is the best course to be adopted now. All the creditors who have proved their claims except the appellant here, the 6th creditor, took their money under the scheme four years ago and have been enjoying it. The 17th creditor paid that money under the order of the Court, and if the District Judge's order is now set aside, he will be entitled to claim restitution with interest on the amounts that he paid. To upset the payments made to all those creditors four years ago in that way would be likely to lead to confusion and it is represented to us that there might be considerable difficulty in working it out. One of the creditors, we are told, has been adjudged an insolvent ; others are dead, and their representatives have not been brought on record. Obviously, there would be great difficulties and possibly considerable hardship if all that was now to be upset. But, if we were assured that the assets now available would produce six-annas in the rupee, I am not sure that I should think that enough to prevent me from proposing that the District Judge's order should be set aside. However we have to remember that all this time has elapsed and that claims, which the insolvent might have pursued in 1926 may not be of any avail at this date. And apart from that the main asset in this country, the house at Karaikudi, we may not unreasonably fear in consequence of unfavourable times has fallen very much in value, and we are not at all sure that it will realize anything like Rs. 75,000 today. So, whatever we may think about the propriety of the learned District Judge's order made in November 1926, there are obvious difficulties in trying to put the clock back; and, if we attempted it, we might be acting unjustly to the creditors in trying to put right what the learned District Judge did wrong in 1926. I regard it as a very unfortunate feature of the case that this insolvent should have been freed by reason of the annulment of his insolvency on the approval of such a scheme as this. But the law is that, if the scheme is approved, ipso facto the insolvency is ended, and, although the insolvent may have got a most undeserved advantage in that way by having his scheme approved, we could not properly at this date set that right by anything which would be unjust to his creditors. In the circumstances, though with considerable regret, it appears to me that we cannot properly interfere with the learned District Judge's order at this date. But I think it will be proper that we should require the costs of the 6th creditor in this appeal to be paid by the 17th creditor and the ex-insolvent.

Anantakrishna Ayyar, J.—I entirely agree. I wish however to add a few words of my own, because I think that the learned Judge's order does not disclose that due weight has been attached to the provision of law that the responsibility of sanctioning a composition is on the Court. The learned District Judge has given three reasons in

support of his order. The second of the reasons, namely that administration through the agency of the Official Receiver is likely to cause undue delay, should not be taken to be a circumstance peculiar to this case. If the learned Judge thought that any peculiar circumstances existed in this case, which were likely to cause undue delay, the remedy was in his own hands.

Another reason mentioned by the learned Judge, namely that defendant 6, to whom a similar offer was made, was not prepared to accept the same is in my opinion no ground at all by itself for approving the scheme proposed by the insolvent. Every creditor is prima facie entitled to have the estate of the insolvent administered in the manner prescribed by law through the agency of the Court. There are manifest advantages accruing to creditors by the said course being adopted. The Official Receiver is given special powers and facilities which are not available to the ordinary creditors. Therefore to draw any inference from the circumstance that a creditor of the insolvent to whom an offer was made to take over en bloc all the assets of the insolvent declined to accept such an offer is by itself no ground for holding that the proposed scheme is beneficial to the general body of creditors. I think that the main consideration which weighed with the learned Judge was the first reason assigned by him in his order, namely that the scheme was approved by a majority of the creditors of the insolvent. I think that the learned Judge has attached too much weight to that circumstance in this case. No doubt, in the absence of consent by the statutory majority with reference to the number and amount of the debt, an arrangement like the one mentioned in S. 38 could not be accepted by the Court. But such consent is only one of the many facts that the Court would have to take into consideration. No doubt it is an important circumstance to be taken into account. But at the same time it is material to remember that the consent of the majority of the creditors referred to in the section is not the consent of the majority of all the creditors to whom the insolvent owes debts.

It is only the consent of the majority in number and three-fourths in value of all the creditors whose debts are proved and who are present in person or by pleader before the Court. No doubt if all the creditors of an insolvent were to agree to any particular course, there is ordinarily an end of the matter. The Court may take it for granted that nothing better could possibly be done in the case, and may straightaway sanction the proposal, unless the insolvent had some very good grounds to urge to the contrary. But the consent of the statutory majority mentioned in the section is not the same as the consent of the real majority of all the creditors of the insolvent. Apathy of creditors to go to Court in matters relating to insolvency is well known. In fact, even in England, learned Judges had to remark that creditors generally would rather like to take the chance of getting whatever they could than take active steps and contest matters in Court. *In Ex parte Campbell, In re Wallace* (3), at p. 217—this is what Brett, M. R. said with reference to the general attitude taken by the creditors there:

"It is not generosity on the part of creditors, it is mere laziness; when they think a debt is a bad one they would rather write it off at once than take any trouble about the debtor's estate."

That being so the Indian Act specifically provides that the responsibility in the matter of approving composition proposed by the insolvent is upon the Court. It may be asked why the Court should trouble itself when the majority of creditors, as mentioned is S. 38, agree to a proposal. I have given one reason why the Court should judicially consider the matter in spite of the above circumstance. A statutory majority does not really mean a majority in fact of the number of creditors either as regards number or as regards the amount of their debts. In England I find that a notion prevailed at one time that if a majority of creditors agreed to composition the Court had nothing further to do in the matter but to sanction the same. *In Ex parte Merchant Banking Company of London, In re Durham* (1) that was the view entertained by Bacon C. J. At p. 630, we find the following:

"There is no part of the Act of Parliament, and no feature in the administration of bankruptcy, which says that the voice of a creditor voting in a majority shall be heard against a resolution of a majority. . . . . There is no

(3) [1886] 15 Q. B. D. 213=54 L. J. Q. B. 382=2 Morrell 167=53 L. T. 208.

principle, reason, or authority suggested why the unquestionable power of the majority to decide upon what is best for their interests should be overruled by the Court; or any notion that the Court can make a better bargain for them than they can make themselves."

The Court of appeal had to consider the correctness of that position on appeal from the decision of Bacon, C. J. In delivering the judgment of the Court of appeal, Jessel, M. R., observed at p. 635 that the rule laid down by the learned Chief Justice was not the correct rule. After observing the practice which prevailed in the Chancery Division, when the Court is called upon to administer estates of infants, or when it is called upon to approve or sanction arrangements come to under the Companies Act or under the Bankruptcy Act, the learned Master of the Rolls stated as follows:

"I never heard the proposition doubted that where the approval or sanction of the Court is required, whether in an administration suit on behalf of infants or persons incapacitated, or in a partnership suit where there is a sale of assets, or under the Companies Acts, where it is of constant occurrence to sell assets or to approve of arrangements—that it is the duty of the Judge fairly to investigate the objections brought before him to the proposed arrangements, and to give his opinion upon them judicially, of course, and with sufficient reasons. I never heard that proposition doubted. Therefore on general principles, unless there is some decision to the contrary, I should say that this section means what it says: that the resolution of the creditors is to be subject to the approval of the Court, to be given or withheld according to the weight and sufficiency of the reasons which are brought before the Judge to induce him to give or withhold that approval."

The other learned Lords also gave similar reasons why the Court should not blindly accept the proposal made by the majority. In Halsbury's Laws of England, Vol. II, p. 81, para. 125, this is how the law is stated:

"The wishes of the creditors may also be regarded, but they are not to override the discretion of the Court."

It therefore seems to me that in this, as in other matters that arise in the administration of an insolvent's estate, the wishes of the creditors, though undoutedly an important matter to be taken into account, are by no means to be taken as conclusive or in any way as relieving the responsibility that rests upon the Court that any order it passes, whether in the matter of approving a scheme or otherwise, is supported by the evidence on record and is clearly for the general benefit of the creditors of the insolvent. The same view was held in *In re Burr, Ex parte Board of Trade* (2), at pp. 473 and 477. I do not however propose to quote passages from that judgment.

It is thus clear that the learned Judge in this case has, in my opinion, attached too much weight to the circumstance that a majority of the creditors of the insolvent accepted the proposal before the Court, and did not duly consider the other circumstances in the case.

Having come to the conclusion that the Court has also to consider the other evidence in the case and the other circumstances disclosed by the record, I think it is clear that some prominent facts have not been duly considered by the learned Judge. The insolvent is a Nattukottai Chetti. He is a businessman. He has got money-lending, etc. business in Arakkan and Guroon. His case is that he never went outside the Madras Presidency, and yet he does not produce any accounts of the Guroon business. The business at Guroon is carried on in his name. He owns five out of eight shares in the same. It is absolutely certain that the insolvent would have received, in the usual course of business, statements of accounts from time to time with reference to the Guroon business. He has not produced any of those papers or accounts. He had the audacity to state, in the affidavit that he filed in Court, as follows :

" I apprehend that my agents and partners in Arakkan and Guroon will never show any response to the mere letters which the Official Receiver or I may write to them."

I think it is (to say the least) a most ill-advised statement made on behalf of the insolvent. Instead of assisting the Court he thought that he had discharged his duty by swearing to an affidavit like that and by not producing his accounts.

Again there is reference in the records that were read to us of transactions at Karaikudi. The insolvent himself admits that during the course of about four years he received Rs. 19,000 and odd at Karaikudi. The circumstance that no accounts of Guroon or Karaikudi are produced is a matter which ought to have been duly considered by the learned Judge before approving of the arrangement put forward by the insolvent. For ought one knows there may be or ought to have been some cash available at Karaikudi, if the accounts had been produced. Without knowing more about the state

of the business at Guroon, the Court could not properly pass an order approving or disapproving of the arrangement that was proposed by the insolvent. The creditor who agreed to purchase the whole concern was a near relation of the insolvent. In the absence of accounts, it was not possible to fix a fair price. The Official Receiver in his report had urged some reasons against accepting the proposal.

These are undoubtedly very relevant considerations if we look at the thing from the point of view of the creditors generally. In considering their effect on the insolvent, the debtor, it is necessary to see whether a person who has been carrying on large business, and who has not produced all the material accounts, should be given a discharge so that he may again set up business at once. The effect of accepting the composition arrangement would be, under S. 39, to annul the adjudication, with the results that would follow from the same. Non-production of accounts has been declared by Judges, time after time, to be the most serious offence that a trader could commit, especially in matters relating to insolvents : *In Ex parte Campbell In re Wallace* (3), Brett, M. R., made the following observations :

"In my opinion, the not keeping of books is one of the greatest offences which can be committed by a trader. It is said that it is a very common thing for traders not to keep books : it may be so in the case of traders who become bankrupt. It shows the utter recklessness of a man who does so : it shows that he is carrying on business with an utter disregard of the interests of anyone but himself."

Therefore if as a matter of fact the insolvent did not keep accounts, that circumstance shows the recklessness of the person in the matter of carrying on his business. If, on the other hand, he kept accounts but did not produce the same, then the Court should not be too ready to help such insolvent in the matter of getting their adjudications annulled. Having regard to the relationship between the insolvent and the 17th creditor, and having regard to the extreme anxiety shown by the insolvent to start a fresh trade which he could do only after the scheme is approved by the Court, it seems to me that the present is a case where the Court should very carefully scrutinize the proposal before sanctioning the same. That persons in the position of the present insolvent should not be too readily set at large, with a view to start a fresh trade at once, was the opinion entertained by some learned Judges in England ; and in *In re Burr Ex parte Board of Trade* (2) this is what Lord Esher, M. R., stated with reference to what should be the guiding principle of the Court in such matters, (though mere delay in granting discharge might not at all by itself be sufficient punishment to such insolvents):

"It would be of the worst possible example if he could escape from those consequences, and obtain his discharge without the delay which would be certainly imposed if the bankruptcy proceedings were to go on, even if he were to pay more than 7 sh. 6 d. in the pound."

Courts are entitled to have regard to commercial morality and general public interests in sanctioning composition and schemes of arrangement proposed by the insolvents : see *In re Flatau Ex parte Official Receiver* (4) and *In re Hester Ex parte Hester* (5) at p. 639 ; see also Halsbury's Laws of England, Vol. 2, p 80. For the above reasons, I am inclined to think that the order passed by the learned District Judge does not duly take into consideration those matters ; and under ordinary circumstances (not complicated by effects of delay and intervening circumstances), it seems to me that this is a case where we should interfere with the order passed by the lower Court. But in disposing of the appeal before us, we have to remember that four years have elapsed from the date of the lower Court's order, and in the interval defendant 17 would naturally have been dealing with the assets and business of the insolvent, and with the debts, etc. due to him. It is not clear to me that interfering with the lower Court's order at this stage in this case would ultimately materially benefit the general body of creditors. In these special circumstances the appeal has to be dismissed. I agree in the order as to costs proposed by my learned brother. C. M. A. 361 of 1925 will be dismissed with costs.

C. M. A. 361 *of* 1925 — There is another appeal connected with this C. M. A. 361 of 1925. That refers to an order made by the learned District Judge regarding a proposed sale of the house at Karaikudi. In the view we have

(4) [1893] 2 Q. B. 219=62 L. J. Q. B. 569=10 Morrell 151 = 41 W. R. 529 = 68 L. T. 740.

(5) [1889] 22 Q. B. D. 632=6 Morrell 85 =60 L. T. 943.

expressed, there is no point in that appeal now, and it should alao be dismised but without costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 352

VENKATASUBBA RAO, J.

A. S. Gnanaprakasam Pillai —Plaintiff.

v.

F. S. Vaz—Defendant.

Civil Suit No. 470 of 1930, Decided on 17th November 1930.

(a) Registration Act (1877), S. 49 — Lease embodied in document but effected orally with delivery of possession — Document is admissible for finding out terms of lease.

Where the terms of a lease have been embodied in a written document the lease having been effected by an oral agreement accompanied by possession, such a document is admissible in evidence for the purpose of finding out the terms of the lease: *A. I. R.* 1921 *Mad.* 337, *Ref.* [P 352 C 2]

(b) Transfer of Property Act (1882), S. 106 —Notice to quit sufficiently clear but not drawn with strict precision should be given rational interpretation.

Where a tenancy expires on a certain date but the notice to quit is given terminating the tenancy not on the expiry of that day but on the forenoon of the next day the notice to quit, strictly speaking is bad, but practically it is a good notice because it is not required that a notice should be worded with the accuracy of a plea. Where it is sufficiently clear though not drawn with strict accuracy it should be given a rational interpretation: *Sidebotham* v. *Holland*, (1895) 1 *Q.B.* 378, *Rel. on.*; *Harrey* v. *Copeland* (1892) 30 *L. R. Ir.* 412 and *A. I. R.* 1918 *P. C.* 102, *Ref.* [P 354 C 1]

A. Suryanarayanaiah and *A. Ramachandraiah* —for Plaintiff.

George Joseph for *K. Kuppuswami*— for Defendant.

Judgment.—The question raised is an important one and relates to the sufficiency of a notice to quit. The plaintiff's counsel tells me that although in the ordinary course he would have filed this suit in the City Civil Court he has chosen this forum anticipating that the defendant would raise the point he has now done. The terms of the lease are set forth in a writing dated 1st December 1924. It says:

"The landlord lets and the tenant takes the dwelling house . . . from 1st December 1924 to 1st January 1925 and thereafter unless and until the tenancy should be determined by a notice as hereinafter provided."

The only other paragraph which is relevant reads thus:

"The tenancy may be determined by either party giving to the other of them subsequent to 1st January 1925, fifteen days' notice in writing expiring within the calender month.,'

This agreement has not been registered and the first question that arises is whether it is admissble in evidence. S. 107, T. P. Act, provides :

"A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument.

All other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession."

The lease in question being for a month only it is para. 2 that applies. As both parties agree that there is a valid lease, I must assume that it was effected by an oral agreement accompanied by possession. Under the Transfer of Property Act, a registered instrument is not required to bring into existence such a lease as the one before me. A valid lease having come into existence independent of the document can it be received in evidence or not for the purpose of finding out the terms of the lease? To answer this question we must advert not to the Transfer of Property Act, which deals with transactions but to the Registration Act, which deals with documents. S. 49 of the latter Act forbids any document being received in evidence which contravenes the terms of S. 17. Under the last-mentioned section only certain leases are compulsorily registrable, namely, those from year to year or for any term exceeding one year or reserving a yearly rent. The agreement not being of this description, the Registration Act does not stand in the way of its being received in evidence. This view receives support from *Rama Sahu* v. *Gowro Ratho* (1).

The nctice to quit is dated 15th September 1930, and is in the following terms :

"Take notice that you are hereby called upon to vacate and deliver possession of our bungalow . . . on the forenoon of 1st October 1930."

For the defence two contentions are raised in the alternative, first, that it is too long a notice; second, that it is too short a one. Let me deal with the first contention. It is put thus. The tenancy under the agreement is to commence from 1st December 1924. S. 110, T. P. Act, says, that where the time limited by a lease is expressed as commencing from a particular day in comput-

(1) A. I. R 1921 Mad, 337=59 I. C. 350=44 Mad. 55 (F. B.).

ing that time, such day shall be excluded. Read in the light of this section the lease commences on 2nd December 1924, and terminates on 1st January 1925. The defendant's counsel then argues that on the termination of the period fixed, a new tenancy commences on 2nd January 1925. The month of the tenancy is therefore from 2nd January 1925 to 1st February 1925. This must be supposed to go on indefinitely. The period that matters therefore is from the 2nd of a month to the 1st of the succeeding month. The next step in the argument is that this is what the parties meant by the expression "the 'calendar month" in the agreement. If this be so, the notice to quit is bad terminating the tenancy as it does, not on the expiry of the 1st October but on the forenoon of that day ; in other words the notice is too short by about 12 hours. I am not prepared to accept this contention. A "calendar month" means according to the Oxford Dictionary one of the twelve months into which the year is divided; according to the calendar also the space of time from any day of any such month to the corresponding day of the next as opposed to a lunar month of four weeks. There can be no doubt that the parties understood the expression in the former sense. In this case the original lease came to an end on 1st January 1925. Thereafter the parties dealt with each other on the footing that the rent was to be paid and received for an English calendar month that is to say for January or February and so on.

Granting that the term "calendar month" is used in the sense I have ascribed to it, the question still arises: Is the notice to quit a good or a bad notice? Mr. George Joseph the defendant's counsel contends that it is bad because it terminates the tenancy on the forenoon of the 1st October whereas it ought to have terminated it on the midnight of the 30th September; in other words that the notice is too long by a few hours. This contention is strictly correct but the question is : Is the suit liable to be dismissed on that ground? On this point *Sidebotham* v. *Holland* (2) is a very useful case. By an agreement in writing the plaintiff agreed to let a house to the defendant as yearly tenant commencing on 19th May 1890. On 17th November 1893 the plaintiff gave the defendant notice calling upon him to quit on the 19th May following. It was held that a notice to quit on 18th May would have been good but nevertheless that the notice to quit on 19th May must not be treated as bad. Lindley, L. J., with whom Lord Halsbury concurred after stating that one year from the 19th would expire at midnight of the 18th of the next May observes as follows:

"But, although a half-year's notice to quit on the 18th would be correct it does not follow that a notice to quit on the 9th which is the anniversary of the day on which the tenancy commenced is bad and I am clearly of opinion that it is not. I have looked at all the decisions which were referred to in the argument and at many more and I can find none in which it has been held that a half-year's notice to quit on the anniversary of the day on which the tenancy commenced is bad. I should be very much surprised to find such a case."

It is obvious that, if notice to quit on the 18th is correct, notice to quit on the 19th is strictly speaking bad. But why does the learned Lord Justice say it is not bad ? I repeat his very words :

"The validity of a notice to quit ought not to turn on the splitting of a straw Moreover if hypercriticisms are to be indulged in, a notice to quit at the first moment of the anniversary ought to be just as good as a notice to quit on the last moment of the day before. But such subtleties ought to be and are disregarded as out of place."

In another place he remarks that the distinction is far too subtle for practical use. I am tempted to extract the following passage from the judgment of A. L. Smith, L. J. :

"It cannot be denied that the law upon notices to quit is highly technical, but the technicalities are too deeply rooted in our law to be now got rid of, and if any case had been found showing that a full six months notice to quit given, as in the present case, from the anniversary of the day of the commencement of the tenancy was bad I must have given effect to it, but as no such case has been found, I do not desire to add one more technicality to a notice to quit unless compelled to do so.

I would point out that the plaintiff has only himself to blame for the difficulties he is in in this case. Had be added the words which are very ordinarily inserted in a notice to quit, "or at the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice," and which are inserted to avoid such a point as that now taken, all would have been in order, but the words are not there If the notice to quit in this case had been for 20th or 21st May or any later day I should have had no doubt but that it was a bad notice, and I own that the

(2) [1895] 1 Q. B. 378=64 L. J. Q. B. 200=43 W. R. 228=72 L. T. 62.

inclination of my opinion is that the present notice is bad because it does not expire upon the last day of some year of the tenancy, but as Lord Halsbury and Lindley, L. J. are of opinion that, in asmuch as this was a full six months' notice given to quit upon the anniversary of the day upon which the tenancy commenced, it is good, though the tenancy expired at midnight the day before, I yield to what they say, and will not differ from them, and hold that this unmeritorious technicality must prevail, and I content myself with expressing what I have said. This appeal must be allowed."

Another instructive case on this point is *Harvey* v. *Copeland* (3). A weekly tenancy commencing on Thursday was held to have been duly determined by notice served on Thursday, the 5th November, to quit on or before Friday, the 13th November. A strict view of the law was taken by Gibson, J. The tenant ought to have been called on to quit on Thursday, but as he was entitled under the notice to remain until midnight on Friday that notice was bad. But the majority of the Court did not concur in this view. Referring to *Doe'd Spicer* v. *Lea* (4), O' Brien, J., thus remarks:

"But if ever there was a case in which, on account of the nature of it and the sense, the rule ought to be confined to the particular facts, it is *Doe'd Spicer* v. *Lea* (4). In that case however the designation was of a gale day. Here it is of a time when alone the right of the landlord could be enforced. He could not turn the tenant out of bed at 12 o' clock at night. Then is he not entitled to say, this is a notice to you to quit one minute after 12 o'clock on Thursday? If the notice had been to quit at the end of the week I apprehend that would be good."

Then in *Harihar Banerjee* v. *Ramsahi Roy* (5) it has been held by the Privy Council that a notice to quit should be construed *ut res magis valeat, quam pereat.* Among the observations approved in that case is the following of Patterson, J. :

"It is not required that a notice should be worded with the accurary of a plea. It is not drawn with strict precision but I think it is sufficient clear."

We must give the notice a rational interpretation. Following these decisions I am satisfied that the notice to quit in this case is a good notice.

I have so far dealt with the question on the footing that the document is admissible in evidence. But supposing I am wrong in that view, does a different result follow? Under S. 1/16, T. P. Act, dealing with holdings over tenancies, the lease, after the expiry of the original term, must be taken to have been renewed from month to month. Such a lease is terminable, under S. 106, by 15 days' notice expiring with the end of a month of the tenancy. The question is: What is the month of the tenancy in the present case? It is admitted that the rent receipts which the plaintiff passed and the defendant accepted were uniformly for English calendar months, such as January, February. If that is the month of the tenancy, the notice to quit, on the reasoning I have adopted, is good. The result is whether agreement is received in evidence or not, the notice is a valid notice and the tenancy has been properly terminated.

The only question that remains is as regards costs. Is this a case where I should not allow the plaintiff costs under S. 16, City Civil Courts Act? An important question has been raised and very fully argued. As a matter of fact, knowing that this defence was going to be raised, the plaintiff filed the suit in this Court, in the circumstances I am not prepared to deprive him of his costs.

The mesne profits up to date amount Rs. 274-2-0 and future mesne profits are allowed at the rate of Rs. 175 per month.

I pass a decree in favour of the plaintiff for possession with Rs. 274-2-0 for mesne profits up to date and future mesne profits at Rs. 175 per month and costs of suit. Time for delivery of possession till 5th December 1930.

P.R.S./B.V. *Decree accordingly.*

(3) [1892] 30 L. R. Ir. 412.
(4) [1809] 11 East. 312.
(5) A. I. R. 1918 P. C. 102=48 I. C. 277=45 I. A. 222=46 Cal. 458 (P. C.).

A. I. R. 1931 Madras 354

RAMESAM, J.

Nidamarthu Balasurya Bheemaraju—Defendant—Appellant.

v.

Changati Mrutyanjayudu and *another*—Plaintiffs—Respondents.

Second Appeal No. 1966 of 1927, Decided on 26th November 1930, against decree of Sub-Judge, Ellore, in A. S. No. 29 of 1926.

Evidence Act (1872), S. 115—Two brothers *B* and *V* jointly enjoying property as tenants-in-common — Before his death *B* by will giving his share to his daughter *M* and after her death to his grandson *P*—*V* dying leaving behind *D*—*M's* suit to recover her share against *D* compromised, compromise being in

P's handwriting—Under compromise decree D given certain property wholly — P then suing to recover half share wholly given to D who had notice of will—P is not estopped from so doing — M could not when suing to establish her claim represent interests in remainder.

If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of that act. [P 356 C 1]

Two brothers *B* and *V* were jointly enjoying as tenants-in-common certain property. *B* before his death, by will gave his share of property to his daughter *M* and after her death to his grandson *P*. *V* died leaving behind *D*. A suit by *M* for recovery of her share of property against *D* was compromised, the compromise deed being in the handwriting of *P* and under the decree passed in terms of compromise *M* was given her share in all family lands except one which was wholly given to *D*. A suit was subsequently brought by *P* on the basis of the will for recovery of his half share in the land wholly given to *D*. It was admitted that *D* knew of the contents of the will.

Held: that there was no act infringing upon *P's* rights as remainderman and the case of estoppel did not arise in the case. [P 356 C 1]

Held further: that there was no need to imply or infer that *M* when suing to establish her life estate sought to represent all the interests in remainder and she could not do so even if she wished to: *Savage* v. *Foster*, 88 *E. R.* 299; 4 *C. L. J.* 198; *De Bussche* v. *Alt*, 8 *Ch. D.* 286 and *Hunsden* v. *Chayney*, 23 *E. R.* 703, *Dist.*; 9 *M. I.A.* 539, *Expl.* and 4 *Cal.* 342, *Dist.* [P 357 C 1]

K. Kameswara Rao—for Appellant.

Ch. Raghava Rao—for Respondents.

Judgment.—The facts of this second appeal may be stated as follows: Bhujanga Rao and Veeresalingam were two cousins being grandsons of two brothers. They had a number of family lands which they were enjoying in common, the lands not being divided by metes and bounds but they were divided in interest and Bhujanga Rao was living in distant places and Veeresalingam was managing the family lands. Bhujanga Rao died in 1885. Before his death he left a will dated 24th December 1884 by which he gave his share of the property to his daughter Mahalakshmamma for life and after her death to his grandson the present plaintiff who was the son of another daughter of his, Kanakamma. After Bhujanga Rao's death apparently the joint possession and enjoyment continued. Veeresalingam died in 1896 leaving the defendant his son a boy of 13. The lands were being leased by the defendant's maternal uncle up to 1905 when the defendant refused to give Mahalakshmamma her share of the property. Then she filed O. S. No. 11 of 1905 to recover her share of the property. The plaint in that suit is now Ex. B. The written statement in that suit is not filed. The suit was compromised. Under this compromise Mahalakshmamma was given half-share of all the family lands except in the suit land which was wholly given away to the defendant. The draft of this compromise is Ex. 2 and Ex. 4 is a public copy of the petition filed in Court. Under Cl. 1 of this compromise the suit land was wholly given away to defendant 1. Ex. 2 seems to be in the handwriting of the present plaintiff. There is a decree in terms of the compromise. Mahalakshamamma died on 22nd August 1922. The present suit was brought by the plaintiff in December 1923 to recover half of the suit land from the defendant on the basis of Bhujanga Rao's will. Both the lower Courts have given a decree to the plaintiff. The defendant appeals.

Three points have been argued before me. The first is that the plaintiff is estopped from claiming the suit land as he was managing the litigation of 1905 on behalf of Mahalakshmamma, as he brought about the compromise and as he knew of it and actually wrote the draft Ex. 2. In support of this contention Mr. Kameswara Rao, the learned advocate for the appellant relied on *Savage* v. *Foster* (1) and other cases to be mentioned presently. In the case of *Savage* v. *Foster* (1), the person on whom the land was settled namely Williams did not know that Margaret had only a life interest and Mrs. Foster led him to believe that Margaret was competent to alienate the land. In the present case the defendant knew the contents of the will and he admits this in his deposition, and therefore there is no question of his being made to believe in the title of Mahalakshmamma by the conduct of the present plaintiff. But apart from this in that case Williams entered into a marriage alliance on account of the marriage settlement. But in this case there is nothing which the defendant did to his detriment on account of his belief. The decision in *Savage* v. *Foster* (1), was

(1) 88 E. R. 299.

distinguished on the ground mentioned in *Nicholl* v. *Jones* (2). Vice Chancellor Page says:

"Such was the case of *Savage* v. *Foster* (1) where a married woman, knowing that arrangements as to her property were being made, stood by, while the person making those arrangements did not know her position, but supposed that he was dealing with a person competent to deal with the whole estate etc."

The next case relied on by the learned advocate for the appellant is *Ananda Chandra Sen* v. *Parbati Nath Sen* (3), at p. 207. There one of the joint owners used the land in excess of his rights to the knowledge of the other and the other stood by, and it was held that he was bound by his implied assent and the decision in *De Bussche* v. *Alt* (4), at p. 314, was cited in support of the conclusion. In the present case we have not got any user of the land to the detriment of the real owner. In *De Bussche* v. *Alt* (4) the doctrine of estoppel is enunciated as follows:

"If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed he cannot afterwards be heard to complain of the act."

In the present case we have not got any act infringing upon the plaintiff's right as remainderman. Neither the decision in *Ananda Chandra Sen* v. *Parbati Nath Sen* (3), nor the decision in *De Bussche* v. *Alt* (4) applies to this case. The next case relied on is *Hunsden* v. *Chaynay* (5). There the son declared that he was entitled to certain land after the death of the mother. The mother was silent and did not repudiate this assertion and was a witness to the deed of marriage settlement by which the land was settled to the issue of the marriage. It was held that the mother was estopped. Clearly the issue of the marriage could not know that the son had only limited interest. I do not think therefore a case of estoppel has in this case been made out.

The second point raised by the learned advocate for the appellant relates to the title and possession of Bhujanga Rao to the suit land. So far as the title is concerned, the District Munsif finds it upon the evidence, and there is evidence to support the finding, that the suit land was ancestral family karnam service inam and that Bhujanga Rao and Veeresalingam were jointly enjoying it as tenants-in-common. The defendant's case is that Bhujanga Rao gave away the suit land to Veeresalingam to be enjoyed by him solely. The gift is oral and this was rightly discredited. On appeal this point as to title was not urged before the appellate Court. The fifth point before the lower appellate Court related only to possession. So far as possession is concerned, it is obvious that Bhujanga Rao and Veeresalingam were tenants-in-common and were enjoying them jointly, and until adverse possession is made out on the part of the defendant there is no question of Bhujanga Rao or persons claiming through him losing their rights. No doubt if at the time of a person's death adverse possession against him might have already begun and his heirs sue, they may have to show that the deceased was in possession up to the date of his death and the suit is thereby within time. But in the present case as already stated Bhujanga Rao and Veeresalingam being tenants-in-common, there can be no question of adverse possession and the possession of the other tenant is possession of Bhujanga Rao. I do not think there is anything in this point.

The third point argued by the learned advocate for the appellant is that in the litigation of 1905 Mahalakshmamma represented also the plaintiff and the compromise is a bona fide compromise and therefore binds also the plaintiff. It is true that in *Katama Nachiar* v. *The Rajah of Shivaganga* (6), it was held that a Hindu widow who represents the whole estate in a litigation represents also the reversioners and at p. 604 Turner, L. J. says that her position is like the position of tenants-in-tail in Courts in England. This very observation of the Lord Justice shows that a life tenant is incapable of representing the remainderman. This case therefore does not help the appellant. The other case relied on is *Prosunno Chunder Bhuttacharjee* v. *Kristo Chyunno Pal* (7). In that case a person in possession of a deceased's estate was sued as represent-

(2) [1867] 3 Eq. 709.
(3) [1906] 4 C. L. J. 198.
(4) [1878] 8 Ch. D. 286=47 L. J. Ch. 281=38 L. T. 379.
(5) 23 E. R. 703.
(6) [1862] 9 M. I. A. 539=2 W. R. 31 (P. C.).
(7) [1878] 4 Cal. 342=3 C. L. R. 154.

ing the estate by some person to whom a debt was due from the estate. It was held that the executor is bound by that judgment as one representing the whole estate In the present case there is no need to imply or infer that Mahalakshmamma when suing to establish her life estate sought to represent all the interests in remainder and it is doubtful whether she can do so even if she wishes to. There is no resemblance between the facts of this case and the case in *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (7). In that case the person representing the estate was defendant and he was sued and could be sued only as a person representing the estate. Otherwise the suit could not lie. Therefore that case does not help the appellant. I think all the points urged by the learned advocate for the appellant have been disposed of. The second appeal fails and is dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

A. I. R. 1931 Madras 357

EDDY, J.

Ramaswami Chettiar—Plaintiff.

v.

P. M. A. Vellayappa Chettiar and *others*—Defendants—Applicants.

Original Civil Suit No. 762 of 1926, and Applications Nos. 2842 of 1929 and 104 of 1930, Decided on 17th January 1930.

(a) Madras High Court Rules (Original Side), O. 31, R. 5—Partition suit—Application by worshippers of temple for declaration that certain fund was held by family in trust for temple—Court not having directed notice to be issued to persons having claims against family — Application could not be entertained under R. 5.

During the pendency of a suit for partition of a joint family, certain worshippers of a temple applied to the Court alleging that a large fund was held by the family as trust fund for the benefit of the deity. But the Court had not directed a notice to be issued to all persons having claims against the family and in fact no such notice was given.

Held : that the applicants could not avail of R. 5 and that therefore the applications could not be entertained. [P 358 C 1]

(b) Civil P. C. (1908), O. 1, R. 10 (2)—Partition suit—Commission issued for taking accounts of family property - Worshippers of certain temple applying to be made parties alleging that certain fund was held by family in trust for deity should be added as parties.

Where in a suit for partition a commission was issued for taking accounts of the property, credit and effects of the joint family, and certain persons applied, as worshippers of a temple, to be made parties to the suit, alleging that a large fund in the hands of the family was really a fund held in trust for the benefit of the deity :

Held : that R. 10 (2) applied to their application and they could and ought to be added as parties to the suit because the Court would not be able to decide all the questions arising in the suit without joining them as parties : 5 *Mad.* 52 ; *A. I. R.* 1918 *Mad.* 735 ; *A. I. R.* 1929 *Mad.* 443, *Foll.*; 2 *All* 738, *Expl.* ; *Montgomery* v. *Foy Morgon & Co.* 2 *Q. B.* 321, *Cons.* [P 359 C 2, P 361 C 2]

T. M. Krishnaswamy Iyer and *S. Thyagaraja Ayyar*—for Applicants,

S. Duraiswami Iyer and *T. V. Vishwanatha Ayyar*—for Defendants.

Judgment.—It is a tribute to the learned counsel who have appeared before me that my mind has fluctuated a good deal during the course of their arguments. Rightly or wrongly my mind is now stabilized. There are before me two applications. Both applications are made in a suit for partition entitled C. S. 762 of 1926 relating to a joint family known as the P. M. A. firm. In that suit a preliminary decree was passed on 22nd November 1928. By that preliminary decree it was ordered and decreed that the suit be and thereby was referred to a commission to take the following accounts :

"(a) An account of the property, credit and effects of the said joint family (inclusive of the assets, profits, and liabilities of the said P.M.A. firm belonging to the said joint family) as on the institution of the suit ;

(b) an account of the debts and liabilities of the said family outstanding, and,

(c) an account of all moneys of the joint family which have come into the hands of both or either of defendants 1 and 3 herein not on the ground of wilful default, but in the ordinary course of management of the said family."

and to make an enquiry whether the compromise set up by defendants 11 to 13 herein is true, valid and binding on the plaintiff or any members of the family herein.

The joint family referred to therein as the P. M. A. firm is I am told, one of the leading families of the class to which they belong. I am told that they took an active part in relation to the conduct of a saivite temple at Elamayankottur. It is alleged that they were in possession of funds amounting to Rs. 1,38,000. It is alleged that that fund was a trust fund. It is alleged that the family itself regarded that money as the money of the deity. Those being the allegations an application taken out on 17th

September 1929 was made to me asking for the following relief :

"(a) Why the amount standing in the accounts of the P.M.A. firm, Madras to the credit of Sri Elamayankottur Deivanayagaswami should not be declared to be a trust fund payable by the receivers of the estate Messrs. Frasor & Ross, in full.

(b) Why the said receivers should not be directed to retain out of the realisation made by them a sum sufficent to pay in full the said amount.

(c) Why costs of the application should not come out of the estate.

(d) Why such further or other order should not be passed as may be necessary in the interests of justice and in the circumstances of the case."

That application was made in this partition suit by two persons who were described as worshippers at the temple in question. When that application came before me I expressed some surprise that persons, strangers to the suit, should try to come in and make an application of this sort. I was told by Mr. T. M. Krishnaswamy Iyer who appeared on behalf of the applicant that he rested his application on O 31, R. 5, Original Side Rules of this High Court. R. 5 provides as follows :

"If it appears to the Court that there are outstanding debts or liabilities of the family, and that the same cannot then be ascertained, the Court may direct an account to be taken thereof, and may, in its discretion, direct notice to be given to all persons having claims against the family, or its property by advertisement in the newspapers or otherwise, to bring their claims into Court before a fixed day."

Order 31 is dealing solely with partition suits. It was conceded before me that the right of the applicants to come under that rule depended upon whether or not the Court had directed notice to be given to all persons having claims against the family and whether in fact such notice had been given. I am told by Mr. Duraiswami Iyer who appeared on behalf of the respondents that the Court did not direct notice to be given to all persons having claims against the family and that in truth no such notice had been given. That being so it appears to me that the applicant cannot avail himself of that rule. I doubt very much whether the rule in any case would entitle strangers to come in and make substantive applications in such a suit as this. However it is unnecessary for me to decide that. It is sufficient for me to say that the rule itself not having been complied with the application fails and is dismissed. The respondents will have their costs of this application in any event, such costs to be taxed.

I now turn to the second application. Mr Krishnaswami Iyer, feeling that he was in some difficulty and knowing the doubts I entertained with regard to his first application asked for leave to take out an application to make the applicants parties to the suit. That he did in the second application. The original applicants were the applicants in this also, and a third applicant was added who I am told, is the manager of the temple. These three persons on the second application sought the following reliefs :

"(a) Why the applicants herein should not be added as party defendants in C. S. 762 of 1926, and

(b) Why such further or other orders should not be made as may be necessary in the circumstances of the case and in the interests of justice."

Upon what does the second application depend ? It depends, as is admitted, upon O. 1, R. 10 (2), Civil P. C. That rule provides as follows :

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

Now the first matter I have to put to myself is this : what are the questions involved in this suit ? I look at the decree and I see that a commissioner has been appointed: (a) to take an account of the property, credit and effects of the said joint family, (b) an account of the debts and liabilities of the said family outstanding.

There can be no question at all that if in truth this is a trust fund and I do not propose to decide that one way or the other here then this family is liable to account for it. If it had held these moneys in trust for various persons connected with this temple then that must be regarded as one of the liabilities of the family.

It has been argued by Mr. Doraiswami Iyer on behalf of the respondents that the substantial question involved in this suit must relate to questions upon which the parties themselves are at issue. It is obvious that the members of this

family are not at issue upon this question. It is not part of their case that this money is trust money. In fact it is their case and I have no doubt that they do say that this money belongs to their family. So says Mr. Duraiswami Iyer, this is not a question involved in this suit. Let us see ; is it not involved in this suit ? Supposing the commissioner finds this family is in possession of an amount in excess of Rs. 1,38,000. He is directed to ascertain what are the debts and liabilities of the family. Unless these persons (applicants) are before the Court it is admitted that in no sense would the commissioner take cognizance of the allegations made in respect of this alleged trust fund. He would know nothing about it ; he would regard all the moneys in the hands of the receiver as being moneys of the family. He would regard those moneys as being available and completely available for distribution among the creditors. It may very well be that there is no issue between the parties. But is this a question entirely for them ? O. 1, R. 10 (2), says that the Court may at any stage of the proceeding order that the name of any party improperly joined, whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined, whether as plaintiff or as defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit be added.

Why is the Court empowered to do that ? It is empowered to do that in order to enable the Court "effectually and completely to adjudicate upon and settle all the questions in the suit." How can the Court completely adjudicate upon and settle all the questions involved in this suit if it shuts its eyes to the persons who are making this application ? Can the Court entirely disregard the allegation that Rs. 1,38,000 out of the moneys in the hands of the receiver is trustmoney? Can the Court completely decide what are the debts and liabilities of the family if it wholly ignores this question of the alleged trust fund ? It is said, rather it is contended before me, that if in fact it is held to be trust money there may be nothing for the creditors. That may very well be but if this is trust money and there are no other available assets then plainly the creditors are entitled to nothing. That is not an argument to sway my mind upon an issue such as this. I simply ask myself this question : Here are the rules framed giving the widest possible discretion to the Court. I have to ask myself can the Court completely settle all the questions involved in this suit without adding these persons as parties ? In my opinion it cannot.

Now a number of authorities have been cited before me and I propose to refer to only a few. The question which I am now considering was considered by this Court in *Vydiananda* v. *Sitaram* (1) by Sir Charles Turner, C, J., and Muthuswami Iyer, J. In construing the words which I am called on to construe, the Court in that case said :

"Is it meant by these words that a person not originally impleaded is to be made a party only if the questions raised in the suit cannot otherwise be completely and effectually determined between the parties to the suit ? Or is it meant completely and effectually determined so that they shall not be again raised in that or in any other suit between the parties to the suit or any of them and third parties ? To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely "between the parties to the suit" and there can be a few, if any questions, which cannot be determined between the parties to the suit one way or the other, and of which the determination, if they be material, will as between the parties to the suit not be final. On the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same question which would work injustice to a party to the suit, and finally and effectually to put an end to litigation respecting them."

To the same effect is a judgment of Ramesam, J. *In the matter of Baluswami Iyer* (2). There. referring to a partition suit such as this (that case being a case of insolvency) the learned Judge in the course of his judgment said that the Official Assignee can apply for all the creditors to be made parties so that the findings as to the nature of the debts may bind all.

To the same effect is a judgment of Vedkatasubba Rao, J., in *Secretary of State* v. *M. Murugesa Mudaliar* reported in *A. I. R* 1929 *Madras* at p. 443. There dealing with the rule the learned Judge says :

"The first part deals with necessary parties and the second, with proper parties. True, a

(1) [1882] 5 Mad. 52.
(2) A.I.R. 1928 Mad. 735=112 I.C. 541=51 Mad. 417 (F.B.).

decision is binding only on the parties to the suit ; but does it follow that a Court is bound to decide a dispute in the absence of those persons whom it most vitally concerned."

The learned Judge in the course of his judgment referred to a number of authorities and among them is a case reported in *Esquimalt and Naimo Ry. Co.* v. *Wilson* (3). That is a decision of the Privy Council. The head-note says this :

" When an action if successful will affect rights claimed by the Crown but the plaintiff has against the Crown no claim to which the procedure by petition of rights is applicable the Attorney-General is a necessary and proper party and may be joined as a defendant by the plaintiff."

In the course of the judgment Lord Buckmaster says at p. 363 with regard to the contention that there is no need to make the Attorney-General a party :

" With regard to the first of these contentions their Lordships are clearly of opinion that the Attorney-General ought to be before the Court. It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege ; but in the event of the plaintiff' success the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as defendant and that is the best means of testing the necessity of the attendance of the Crown."

Mr. Duraiswami Iyer sought to distinguish that case from this upon the footing that there some interest of the Crown was affected. Personally I fail to see the distinction between that case and this. In the case now before me it is not true to say that this Court has appointed a commissioner to ascertain what are the debts and liabilities of this family. Is it not true to say that the interests of the present applicants who are saying that a large portion of the available assets represent trust money are vitally concerned ?

Mr. Duraiswami Iyer drew my attention to a number of cases which he says point the other way. He directed my attention this morning to a case reported in *Narain Kuar* v. *Piary Lal* (4). The head-note says this :

" Where an application is made under S. 32 (that corresponds to O. 1, R. 10 (2) of the present Civil Procedure Code) for the addition of a person whether as plaintiff or defendant, such persons should as a general rule, be added only where there are questions directly arising out of and incidental to the original cause of action, in which such person has an identity or community of interest with the original plaintiff or defendant."

I look at the judgment of Straight, J. at p. 741 There I read this :

" No doubt it is most desirable when litigation has been instituted in respect of a particular subject-matter or specific contract, that the Court having cognizance of it should see that all questions directly springing out of it should be raised and dealt with once and for all and that all persons naturally concerned in and likely to be legally affected by the determination of those questions should be joined as parties."

I do not want to deal with the particular facts of that case but I see nothing generally in the judgment of Straight, J. which is inconsistent with the view I am now taking. I pause here and ask myself the question as to what is the alternative suggested. The alternative suggested here is that the present applicants should bring an independent suit. There is much to be said in favour of that suggestion and prima facie I should say that that is the right course. But supposing that they do in fact bring an independent suit, what would be the position ? Two suits would be proceeding in this Court and in both of them this question would be involved as to what are the liabilities of this family. In Suit No. 1, a decision would be reached without any reference whatever to the question of whether this money is trust money or not. In suit No. 2, a decision would be reached only solely with reference to this question. Is it not obvious that the effect of these two decisions would be that in all probability if the present applicants are right in their contention, they may be wrong, but if they are right there would be two conflicting decisions.

Mr. Duraiswami Iyer referred me also to certain English cases and among them is one reported in *Montgomery* v. *Foy, Morgan & Co.* (5). There a shipowner brought an action against certain consignees and an application was made that the shippers of the cargo should be added as defendants in the action in order that they might counterclaim against the plaintiff damages for short delivery and injury to cargo. The matter went up to the Court of appeal and there Lord Esher said this :

" Here the matter before the Court is the contract of affrightment and there are disputes arising out of that matter as between the plaintiff and the defendants and the company whom

(3) [1920] A.C. 558.
(4) [1879] 2 All. 738.
(5) [1895] 2 Q.B. 321=65 L.J. Q.B. 18=8 Asp. M.C. 36=43 W.R. 691=73 L.T. 12.

it is sought to add as defendants and who are defendants principals in the matter. I can find no case which decides that we cannot construe the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicature Acts, namely that where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court and all these disputes may be determined at the same time without the delay and expense of several actions and trials."

In these circumstances although there is much to be said both ways, the conclusion to which I have come is that this application falls within O. 1, R. 10 (2), Civil P. C., by which the Court may at any stage of the proceedings add a party to the suit and I see no difficulty about that at all. I am told that the commissioner will not report for about twelve months. Whether that be so or not I am satisfied that he ought not to report in this Court as to what are the debts and liabilities of this family without regard to the contentions put forward by the present applicants. I think their presence before the Court is necessary to enable the Court effectively and completely to adjudicate and settle all the questions involved in this suit.

In these circumstances I direct that these three applicants be added as party defendants in C. S. 762 of 1926 and that all proceedings therein be amended accordingly. I do not propose to put the applicants on any terms in making this order and they will have their costs of this application in any event, such costs to be taxed. I direct that there be liberty to both sides to apply. I direct that the receivers do retain in their hands the sum of Rs. 1,38,000 until further order.

P.R.S./S.N. *Appeal allowed.*

A. I. R. 1931 Madras 361

SUNDARAM CHETTY, J.

Ramaswami Ayyar—Plaintiff—Appellant.

v.

Secy. of State—Defendant—Respondent.

Second Appeal No. 278 of 1928, Decided on 25th November 1930, from decree of Sub-Judge, Negapatam, in Appeal Suit No. 100 of 1925.

(a) Land Acquisition Act (1894), S. 3 (f)—Acquisition of house site for Panchams is public purpose.

Even if only a section of the public is benefited by such acquisition, the purpose would still be a public purpose and hence acquisition of house sites for Panchamas is for public purpose : *A. I. R.* 1925 *Mad.* 837; *A. I. R.* 1930 *Mad.* 798; and *A. I. R.* 1930 *Mad.* 248, *Rel. on.* [P 362 C 1]

(b) Land Acquisition Act (1894), S. 6 (1)—20 per cent of cost of acquisition levied on applicants for sites and the remaining 80 per cent to be paid out by Government from public revenues to be recouped by instalments from assignees of sites—In this case provision of Act is properly complied with.

A notification was published in the Official Gazette that certain land was needed for a public purpose and that the compensation to be awarded for such property had to be paid, 20 per cent. by the applicants, after grant of sites to them and 80 per cent. by Government from the public revenues to be recouped by instalments from the assignees of the sites. On a question whether this was a strict compliance with the section

Held : that the provision of the Act had been strictly complied with and it was not correct to say that what the Government had paid was only a loan to the assignees and that as such it was only a nominal compliance with the proviso of the statute. The conditions prescribed by the Act for the exercise of the statutory rights of an exceptional character had been strictly fulfilled and not only nominally complied with: 6 *I. C.* 457, *Ref.*; *A. I. R.* 1930 *Mad.* 798, *Rel.on.*; *A.I.R.* 1921 *Cal.* 159; *Denman and Co. Ltd.* v. *Westminster Corporation*, (1906) 1 *Ch.* 404, *Dist.* [P 362 C 2]

S. Varadachariar and *T. M. Ramaswami Iyer*—for Appellant.

Govt. Pleader—for Respondent.

Judgment—This second appeal arises out of a suit filed by the deceased father of the appellant in respect of the proposed acquisition of a plot of land belonging to him by the Government under the provisions of the Land Acquisition Act 1 of 1894. The plaintiff was served with notice as required by the Act and a notification to the effect that the land is needed for a public purpose was also published in the Official Gazette. Alleging that the proposed acquisition is illegal, the plaintiff filed the suit for a declaration and for an injunction restraining defendant 1 (the Government) from acquiring the suit land. Both the lower Courts have held that the proposed acquisition is for a public purpose and it is legal and valid. The contentions put forward by the plaintiff in the lower Courts are also pressed in this second appeal.

On the report of the Deputy Collector on special duty, who was ordered to examine the subject of providing the Panchamas of the Tanjore District with house sites and on the recommendation of the Board of Revenue, the Government issued an order dated 10th November

1917 sanctioning the acquisition of sites for the benefit of the Panchamas : vide Ex. 1. In the present case, it is found by both the Courts below that the site in question was acquired for providing house sites to Panchamas and also a school for them. This acquisition seems to have been intended for the benefit of defendants 5 to 23 who are poor Panchama labourers suffering inconveniences without pemanent dwelling houses. As to the question whether an acquisition for such a purpose is really one for a public purpose within the meaning of the Act, it has been held by Devadoss, J., in *Veeraraghavachariar* v. *Secy. of State* (1) that in accordance with S 3, Cl.(f), Land Acquisition Act, the Government of Madras declared by a notification in 1895 in favour of acquisition of village sites in the Tanjore District and that the acquisition of house sites for Panchamas is a public purpose within the meaning of S. 3 (f) of the Act. Even if only a section of the public is benefited by this acquisition, the purpose would still be a public purpose as held by Venkatasubba Rao, J., in a recent case reported in *Secy. of State* v. *Gopal Ayyar* (2).

The facts of the present case are exactly on all fours with the facts of the case decided by me in *Secy. of State* v. *Murugesam Pillai* (3) and the facts of the case in *Secy. of State* v. *Gopala Ayyar* (2), decided by Venkatasubba Rao, J., Objections now raised against the validity of the acquisition are almost similar to those raised in the said two cases. The conslusions arrived at in those decisions after a due consideration of these objections, should in my opinion govern the present case also.

Mr. Varadachariar for the appellant concedes that if the declaration made under S. 6 of the Act is valid, it would then be conclusive evidence that the land is needed for a public purpose. But what he is trying to urge is that the Court should be satisfied as to the validity of the steps leading up to the recommendation for the acquisition and that the acquisition itself is within the scope of the real object which the legislature had in view for the passing of this Act. He relied on the decision of the Calcutta High Court reported in *Raghunath Das* v. *Collector of Dacca* (4) in which the learned Judges have observed that when statutory rights of an exceptional character have been created, the conditions prescribed by the statute for the exercise of such rights must be strictly fulfilled, and if a mere nominal compliance with the provisions of the statute was made, the civil Courts can afford relief to a person who is aggrieved by the adoption of such a course. The question for consideration is, whether in the present case there was only a nominal compliance with any vital provision of the Act.

The proviso to S. 6 (1) of the Act lays down that no such declaration shall be made unless the compensation to be awarded for such property is to be paid wholly or partly out of public revenues or some fund controlled or managed by a local authority. In the present case, the proposal of the Government is that 20 per cent of the cost of the acquisition should be levied in the first instance from the applicants for the grant of house sites after the acquisition and the remaining cost namely 80 per cent. should be paid out of the public revenues by the Government which should subsequently be recouped from the persons to whom the sites are assigned, in instalments to be spread over a period of 20 years. It is contended that this course is not a real or substantial compliance with the direction in the aforesaid proviso and therefore the declaration under S.6 is not legal and valid. There is no doubt that four-fifths of the compensation to be awarded for the acquisition of the property is first paid out of the public revenues. It is conceded, that if soon after the payment by the Government for the acquisition without any such previous understanding, they recoup the same by collecting it from the assignees of the several parcels of land in proportion to their shares, there would be no violation of the proviso. Does such payment out of public revenues when made on an understanding with the applicants or future grantees that they should repay the same in the course of 20 years in certain instalments, become only a nominal compliance with the proviso as contended for by the appellant ? I think not. In *Secy. of*

(1) A. I. R. 1925 Mad. 837=83 I. C. 485=49 Mad. 237.
(2) A. I. R. 1930 Mad. 798=127 I. C. 609.
(3) A. I. R. 1930 Mad. 248=124 I. C. 158.
(4) [1913] 6 I. C. 457.

State v. *Gopala Ayyar* (2) Venkatasubba Rao, J. has also observed that the validity of the declaration under S. 6 cannot be made to depend upon some future contingent event, and what the section says is that some portion of the cost must be paid out of the public revenue and that condition is literally complied with by the payment in question. When as a matter of fact, the Government pays 80 per cent of the cost from the public revenue, the provision of the Act is complied with and it is not correct to say that what the Government has paid is only a loan to the Panchamas. Reliance is placed upon the decision of Greaves, J., in *In re Manick Chand Mahata* v. *Corporation of Calcutta* (5) and also the decision in *J. L. Denman & Co. Ltd.* v. *Westminister Corporation* (6).

In the former case, it has been held that though the notification under S. 6, Land Acquisition Act, is conclusive for showing that the land is needed for public purpose, yet the Court is entitled to enquire into the validity of the steps leading up to the recommendation. In that case, it was found that the acquisition by the Corporation was not really for purposes for which the power to acquire was vested in it by the legislature, but it was made merely to enable another body to acquire land through the medium of the Corporation. In the latter case also, it was found that though the acquisition of land necessarily required for the purpose of the widening of the thoroughfare would be within the scope of the powers conferred by the Act, the statutory authority was misused for the purpose of acquiring other and additional land in order to benefit the syndicate. They are cases where the acquisitions have been proved to have been made with an indirect or ulterior object, extraneous to the scope of the Acts conferring powers of acquisition on those bodies and such acquisitions were held to be outside the scope of those Acts and therefore illegal. In the present case, there is absolutely nothing to show that the acquisition in question is not one contemplated by the Land Acquisition Act. On the other hand, the purpose for which this acquisition is made is a public purpose within the meaning of the Act and there is also a substantial compliance with the requisites laid down in the Act for making the declaration under S. 6. An enforcement of the powers vested in the Government under the Act for the purpose of securing benefit to the public or a section of the public, may be felt as a hardship by an individual who is affected by the acquisition, but the very scheme of the Act in providing for compulsory acquisition is based on the principle that individual interest should give way to the general interests of the public or a section of the public.

For the foregoing reasons, I have no hesitation in holding that the acquisition in question is in accordance with the scheme of the Act and the requisites laid down by the Act for the acquisition have also been substantially complied with. In the result, the second appeal fails and is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

(5) A. I. R. 1921 Cal. 159=48 Cal. 916.
(6) [1906] 1 Ch. 464=75 L. J. Ch. 272=22 T. L. R. 270=54 W. R. 345=4 L. G. R. 442=70 J. P. 185=94 L. T. 370.

A. I. R. 1931 Madras 363

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Paredath Chori George—Plaintiff—Appellant.

v.

Thithi Umma and *others*—Defendants—Respondents.

Appeal No. 228 of 1929, Decided on 7th October 1930, against order of Dist. Judge, South Malabar, D/- 29th September 1928.

Malabar Compensation for Tenant's Improvement Act (1900), S. 3 (1)—Application.

The Act applies not only to agricultural tenancies but also to kudiyiruppus (house-site). *A.I.R.* 1927 *Mad.* 776, *Foll.*; *S. A. No.* 1532 of 1915, *Expl*; *S. A. No.* 1445 of 1889, *Dist.* [P 364 C 2]

B. Sitaramrao—for Appellant.

N. A. Krishna Ayyar—for Respondents.

Reilly, J.—In this case the plaintiff sued to recover what he called a "house site" in Cochin town from the defendants and prayed that the defendants might be ordered to pay the arrears of rent due and to demolish the house built on the land. The Subordinate Judge who tried the case made a decree for the plaintiff, rejecting defendant 6's claim that she was entitled to compensation for the house under the Malabar Compensation for Tenants' Improvements Act. The learned District Judge of South Malabar on appeal held that defendant 6 was en-

titled to compensation for the house and remanded the suit to the Subordinate Judge. This appeal is against the order of remand.

Exhibit F is the lease counterpart executed by defendant 6's predecessor-in-title. It is dated 29th October 1911. It shows that he had been in possession under a previous lease for a short period and had built a house on the site. In Ex. F he agreed that, if he was required to surrender the property for any of certain reasons specified, including default in payment of rent, he was to demolish the house. It was contended for defendant 6 that the Malabar Compensation for Tenants' Improvements Act applied to the case and therefore the agreement that the original lessee would demolish the house and not claim compensation for it was invalid. The learned District Judge found that what was let by the plaintiff's predecessor to defendant 6's predecessor was a kudiyiruppu, in which he had built a house, and that the Act applied and therefore for that house defendant 6 was entitled to compensation.

It has been contended before us first that what was let was the house. That is obviously incorrect because Ex. F makes it clear that the house was built by the lessee; the rent was made a charge upon the house as the lessee's, and the lessee was to demolish it. It cannot be suggested that the house was ever the landlord's or that it was a house that was let under Ex. F.

Then more reasonably it was contended that what was let was the actual area of land upon which the house stood and no more, that the land concerned was merely the site upon which the house stood. When we examine Ex. F and the schedule attached to it, it is clear, I think, that that is not correct. The boundaries given in the schedule show that something more than the land upon which the house actually stood was let. What was let was a compound or paramba or kudiyiruppu, within which the house had been built. Unfortunately the measurements of that compound are not given in the deed; but it is clear from the boundaries, a lane on one side, a lane on the other, two parambas on another side and a neerthodu on the remaining side, that the compound, of whatever size it is, includes something more than the actual area on which the house stands. Moreover Ex. F refers to araichas in that area, which the tenant is to protect. That also shows that there must be some compound round the house. In my opinion the learned District Judge was right in finding that what was let to the tenant was a kudiyiruppu, in which he had built a house.

The only question then is whether that is a case to which the Malabar Compensation for Tenants' Improvements Act applies. It has sometimes been contended that that Act applies only to agricultural holdings. That question was recently considered by a Bench of this Court in S. A. No. 1532 of 1925, and after an examination of the Act, the previous law and all the relevant cases it was decided that the Act applies not only to agricultural tenancies but also to building leases. That would cover the present case. Indeed it would more than cover the present case, in which it is not necessary to go so far. In *Chathukutty* v. *Kunhappan* (1), Jackson, J., expressed the opinion that the Act was confined to agricultural holdings and kudiyiruppus. The decision of the Bench in *S. A. No.* 1532 *of* 1925, though it goes further, agrees with Jackson, J's view that the Act applies to kudiyiruppus, about which, speaking for myself, I have never felt any doubt. That being so, in the present case it appears to me that the learned District Judge was right and that defendant 6 is entitled to compensation for this particular house.

I may add that I do not wish on this occasion to express any opinion whether a tenant, to whom a building is let, can claim compensation for any improvements made to that building on the ground that the building itself must stand upon land and therefore he is a tenant of land within the meaning of the Act. That is a question into which it is unnecessary to go at present. In my opinion this appeal should be dismissed with costs.

Anantakrishna Ayyar, J.—I agree.

The learned District Judge's finding is that the present is a case of a lease of vacant kudiyiruppu house site to defendant 6 who built a house thereon, and that though in a subsequent renewal of the lease there was a provision that defendant 6 would on ejectment demolish the building and restore the site to the

(1) A.I.R. 1927 Mad. 776=103 I.C. 677=50 Mad. 813.

plaintiff, the stipulation is not binding on defendant 6 having regard to the provisions of the Malabar Compensation for Tenants' Improvements Act. Reading the document Ex. F as a whole, I agree with the learned District Judge that what was leased to defendant 6 was not merely the actual site on which the house was built, but the paramba within the four boundaries mentioned in Ex. F; and this is what usually happens in such cases, the tenant putting up a building in a portion of the paramba leased and making, kuikurs &c, in the other portion of his holding: see Logan's Malabar Law, Vol. 2, 199. I am unable to accept the contention of the learned advocate for the appellant that what was leased to the defendant was a building with only the actual site on which the building stands The building admittedly belongs to defendant 6, and if the building belonged to the landlord there is no meaning in the provision that on ejectment defendant 6 (tenant) would demolish the building (according to the assumption, the landlord's) and restore the paramba only to the landlord.

I proceed on the footing that what was leased was a paramba and that the building stands only on a portion of the property leased. In *Chathukutty* v. *Kunhappan* (1), it was observed by Jackson, J., that the Malabar Act applied to improvements effected by lessees of the agricultural holdings and vacant kudiyiruppus. In *Sabju Sahab* v. *Malabar District Board* (2) I had a case where the District Board of Malabar leased certain land forming road side poramboke to a person under an express condition that he should quit the land without claiming any compensation for improvements of any sort that might be effected by him thereon. I held that the road side poramboke in question could not be said to be either agricultural land or kudiyiruppu site. I also held that a substantial building put upon that roadside poramboke by the defendant was inconsistent with the purpose for which the land was let. I accordingly held that the defendant was not entitled to claim any compensation under the Act in the circumstances. The decision of two learned Judges in *S. A. No.* 1445 *of* 1889 (unreported) was quoted before me, where the Court held that the lease of a dwelling-house within the limits of a town, for purposes of residence only, did not come under the Act of 1887. The case before me not being one of a lease of a dwelling-house, but only of a vacant land (roadside poramboke), it was pressed upon me that the observations of the learned Judge in *Chathukutty* v. *Kunhappan* (1) relating to lease of vacant kudiyiruppu required reconsideration; but, having regard to what I understood to be the practice obtaining with reference to leases of vacant kudiyiruppus, viz., that the tenant in such cases ordinarily puts up a house on a portion of the paramba and makes kuikurs on the other portions convenient for the purpose, thus converting the paramba into a sort of garden-house (garden with a house therein), I stated that absolutely no grounds had been made out why I should not follow the same. The question has been again raised before us whether Act 1 of 1900 applies to leases other than leases for agricultural purposes.

It is not necessary in this case to go into that larger question, since the present is a case of a lease of vacant kudiyiruppu as described already, and a Bench of two learned Judges of this Court has very recently held in *S. A. No.* 1532 *of* 1925, that the Act applies to leases of vacant kudiyiruppus. The present is, if anything, a stronger case in favour of the tenant than the one before the learned Judges. Defendant 6, a lessee of a vacant kudiyiruppu paramba has put up a house on a portion of the paramba included in his holding; he is entitled to compensation in respect thereof, as held by the learned District Judge. As I said already, it is not necessary in this case to say anything on the other question which was argued before us, whether a lessee of a dwelling-house in a town (the lease being unconnected with agriculture) would be entitled, under Madras Act 1 of 1900, to claim compensation for improvements effected by him in respect of the building leased out to him. I agree that the civil miscellaneous appeal should be dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

(2) A.I.R. 1930 Mad. 16=120 I.C. 561=58 Mad. 54.

A. I. R. 1931 Madras 366

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

(*Kokku*) *Rama Row* and *another*—Appellants.

v.

Official Assignee of Madras—Respondent.

Original Side Appeal No. 9 of 1930, Decided on 14th October 1930, against judgment of Waller, J., D/- 12th November 1929.

(a) Presidency Towns Insolvency Act (1909), Ss. 55 and 56—Act of insolvency only affords ground for adjudication and is not ipso facto void.

An act of insolvency only affords ground for adjudication and is not ipso facto void and unless it be a fraudulent transaction the lapse of the period within which it can be availed of to support an application for adjudication will place it beyond attack : 19 *Cal.* 223; *Dutton* v. *Morrison*, 34 *E. R.* 75; 26 *Bom.* 765; *A. I. R.* 1927 *Mad.* 526, *Rel. on.* [P 367 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 55—Debtor creating trust for creditors of whole of his property—Burden of proving bona fides is on trustee.

The burden of proving the bona fides of a trust viz., that the trustee is a purchaser in good faith and for valuable consideration is on the trustee in case of a trust created by the insolvent for his creditors of his property prior to his adjudication : 43 *Mad.* 739, *Rel. on.* [P 368 C 1]

V. V. Srinivasa Iyengar for *S.G. Satagopa Mudaliar*—for Appellants.

K. Krishnaswami Iyengar for *M. P. Sundararaja Ayyar*—for Respondent.

Bhashyam Ayyangar, J.—In this case two persons, Kasi Viswanatha Mudali and Balasundram, were adjudicated insolvents on 22nd July 1929 on a creditors' petition presented on 2nd March 1929. Some time before the presentation of that petition, that is on 23rd August 1928, the first insolvent, Kasi Viswanatha Mudali, had transferred all his property to himself and two of his numerous creditors, namely K. Rama Rao and B. Kottayya, jointly, on trust for the benefit of his creditors. The deed of trust recites that the arrangement evidenced by it was come to and settled by the six creditors specified in list A thereof after looking into the accounts of the transferor and

"a discussion amongst themselves and with the transferor, of the financial position of the transferor "and that the transferor" intimated unto the said creditors in list A that the other creditors (of whom there were more than 60 as specified in list C) would not disturb the arrangement now come to."

After the adjudication, the Official Assignee applied by a notice of motion dated 23rd August 1929 to declare that the said deed of trust was void as against him under S. 55, Presidency Towns Insolvency Act 3 of 1909 and to direct the trustees to deliver over to him all the properties of the insolvent in their possession and for other ancillary reliefs. This application was contested by the two co-trustees of the insolvent but was granted by the learned trial Judge. The trustees have appealed.

Now the ground on which the learned trial Judge has held that the trust in question is voidable by the Official Assignee is that it is an act of insolvency and opposed to the spirit and policy of the law of insolvency. The debtor having transferred all his property under the said trust for the benefit of his creditors generally, it was undoubtedly an act of insolvency [S. 9 (a) of the Act.] But it had been effected more than three months before the presentation of the insolvency petition. The insolvency petition could not be and was not therefore grounded on it. It was based on a later and different act of the debtor. The learned Judge however thought that this did not make a difference. He held "that an act of insolvency is an act of insolvency whenever it is committed" and that once an adjudication was made on some act of insolvency the Official Assignee was entitled to have any earlier act of insolvency set aside. He relied in support of this on the observation of Lord Hobhouse in *Khoo Kwat Siew* v. *Wooi Taik Hwat* (1), namely, at p. 231:

"the well-known rule of law is that if a trader assigns all his property . . . that is an act of bankruptcy and is void against the creditors and the assignee simply because nothing is left with which to carry on his business,"

and also the remarks of Lord Eldon to the same effect in *Dutton* v. *Morrison* (2).

It is contended before us that the view taken by the learned Judge is not correct. The argument is that apart from Ss. 55 and 56 of the Act an act of insolvency can only be avoided if the adjudication is based on it or it is affected by a relation back of the assignee's title provided in S. 51. It is urged that as in this case the adjudication is not based on the making of the transfer in question and the transfer was effected more than the full

(1) [1892] 19 Cal. 223=19 I. A. 15=6 Sar. 98 (P.C.).

(2) 34 E. R. 75.

period of three months referred to in S. 51, previous to the presentation of the insolvency petition, the Official Assignee is not entitled to avoid it except under the two sections mentioned above.

I think this contention is valid. Neither of the authorities cited by the learned Judge appears to bear out the conclusion that an act of insolvency is ipso facto void. What all was laid down in *Dutton* v. *Morrison* (2) was that a conveyance by a trader of all his estate and effects was an act of bankruptcy. It does not follow from it that such a conveyance, whatever its nature, can be avoided by the Assignee in bankruptcy either when it does not form the basis of adjudication or after any length of time. In the other case the Privy Council have no doubt observed that such a conveyance except when made

"on some substantially contemporaneous payment or some substantial undertaking to make payment in future".

was void against the creditors and the assignee, but the particular conveyance which was before them in that case was one in favour of a creditor and not a trust for the benefit of all creditors generally. It has been held in several cases decided by the English Courts subsequent to *Dutton* v. *Morrison* (2) that

"conveyances, transfers etc., which are merely void as acts of bankruptcy (and not only as against creditors, irrespective of bankruptcy, such as conveyance fraudulent by the Statute of Elizabeth) will not be treated as void unless executed within the time to which the title of the trustee relates, that is, under the present Act within three months of the presentation of the petition: see William on Bankruptcy Edn. 13, p. 15, where the cases are referred to: see also Hobson on Bankruptcy, Edn. 7, p 173.

Thus, an act of bankruptcy is not ipso facto void and unless it be a fraudulent transaction, the lapse of the period within which it can be availed of to support an application for adjudication will place it beyond attack.

This being so under the Euglish law itself, we have to see if a different view can be justified on the provisions or the spirit of the Indian law which has to be applied in this case, that is, the Presidency Towns Insolvency Act, 3 of 1909. Now taking this Act, we find that S. 9 describes what are acts of insolvency, and one of such acts is no doubt a transfer by a debtor of all or substantially all his property to a third person for the benefit of his creditors generally. S. 10 lays down that if a debtor commits an act of insolvency

"an insolvency petition may be presented either by the creditor or by the debtor"

on which he may be adjudged an insolvent and S. 12 provides inter alia that the act of insolvency on which the creditor grounds his petition should have occurred within three months before the presentation of the petition. There is nothing in these sections to show that beyond furnishing ground for the presentation of a petition within three months to obtain an order of adjudication, an act of insolvency has in itself any other legal consequence. The only other material sections which have to be considered in this connexion are Ss. 51 and 52. The first of these sections deals with the subject of relation back. It provides in brief that the insolvency of a debtor shall be deemed to have relation back to and to commence at the time of commission of the earliest act of insolvency proved to have been committed by the insolvent within three months next preceding the date of the presentation of the insolvency petition. The next section lays down, so far as it is relevant at present, that the property of the insolvent divisible amongst his creditors shall comprise

"all such property as may belong to or be vested in the insolvent at the commencement of the insolvency."

The combined effect of these two sections is to invalidate or render ineffectual the transactions entered into by the insolvent with reference to his property during the period of the relation back. But neither of these sections nor the others already referred to have any bearing on the transactions entered into and completed before that period.

Our attention has been drawn to the case of *Manmohan Doss* v. *N. C. Macleor* (3). In that case two debtors assigned the whole of their property to trustees for the benefit of such of their creditors as should accept and sign the deed within two months from the date thereof. This was held to be an act of insolvency and the debtors were adjudicated insolvents on its basis on the application of certain creditors who had not signed that deed. The Official Assignee having then applied to avoid the said deed it was considered that the application did not fall under S. 24, Insolvency Act (11 and 12 Vic.

(3) [1902] 26 Bom. 765=4 Bom. L. R. 154.

Ch. 21) then in force, but it was still granted on general principles. This decision cannot however he held to apply to the present case, for, firstly, it was given under the old Act, in which there was no provision corresponding to S. 55 of the present Act, and secondly, it was a case of an act of bankruptcy on which the adjudication was obtained. That an act of insolvency only affords ground for adjudication and is not ipso facto void has also been held in the *Official Assignee of Madras* v. *O. R. M. O. R. S. Firm* (4).

As regards the spirit and policy of the insolvency law referred to by the learned Judge it may be observed that whatever justification there might have been under the old Act to have recourse to it for setting aside transfers made by insolvents prior to their adjudication, there appears to be none such under the present Act, for this has been modelled after the later Bankruptcy Acts of England and contains specific provisions to meet all cases of avoidable transfers. No decision under the present Act has been cited to us in which any transfer not falling under any of its specific provisions (Ss. 51, 52, 55 and 56) was set aside as opposed to its spirit or policy.

The order of the learned Judge does not therefore appear to be supportable on the grounds on which it is rested, but, this does not dispose of the matter, for it is contended for the respondent that the trust in question is void as against him under S. 55 of the Act. Indeed, this, as stated already, is the specific ground on which he sought its avoidance. Now, applying that section to the facts of this case, the point is whether the disputed deed of trust which came into existence within two years prior to the adjudication is a transfer of property in favour of (1) a purchaser, (2) in good faith, and (3) for valuable consideration. The burden is undoubtedly on the trustees-appellants to make out that the transfer satisfies all the three conditions just mentioned : see *The Official Assignee of Madras* v. *Sambanda Mudaliar* (5). Now, I think it unnecessary to consider in this case whether the trustees are purchasers and whether the transfer was for valuable consideration within the meaning of the said section, for I am quite satisfied on the evidence that it is entirely lacking in good faith.

It will be seen in the first place that although the debtor, Kasi Viswanatha Mudali was according to the deed of trust itself indebted to nearly 70 persons, the trust was arranged and come to between six only of those creditors namely those specified in list A and the debtor. There is no evidence that any notice was given to the other creditors or that they were consulted in the matter. The deed recites that the debtor transferor

"intimated unto the said creditors in list A that the other creditors would not disturb the arrangement now come to."

But it does not appear on what basis the debtor gave that "intimation," and it is obvious that no value of significance can be attached to a recital of that sort. The six creditors referred to in list A are said to have signified their assent to the deed of trusts but even that assent was not taken and does not appear on the deed. The man who is stated to have looked into the accounts of the debtor on behalf of himself and the other five creditors in list A and ascertained the financial position of the debtor is K. Rama Rao who was appointed one of the trustees, but this man is, for all that his evidence shows, an undischarged insolvent and it is also more than doubtful whether he was a creditor at all in any substantial sense. Another trustee was the debtor himself, a circumstance which is certainly not calculated to inspire confidence in the bona fides of the transaction, especially taking into consideration that it was made

"lawful for the trustees to appoint any two of them to be in charge of the cash and account books."

There is a letter referred to in the deposition of Mr. S. G. Sadagopa Mudaliar, the attorney who drafted the trust deed in question, which shows that those who arranged this transaction were more concerned with seeing that somehow or other nobody jeopardized it within the space of three months than with trying to notify it to all the creditors and obtaining their assent thereto. This is accentuated by the admitted conduct of the trustees with reference to the Multanese creditors (one of whom filed the petition on which the adjudication was made) who did not consent to the trust and actually

(4) A. I. R. 1927 Mad. 526=101 I. C. 12=50 Mad. 541.
(5) [1920] 43 Mad. 739=60 I.C. 205.

repudiated it. It is apparent from the evidence of K. Rama Rao himself that those creditors were inveigled into inaction by a promise to pay up their debts by weekly instalments and by actual payments from time to time which were however abruptly stopped immediately on the expiry of the period of three months. One does not wonder, under these circumstances that the administration of the estate by the trustees, so far as it went was by no means fair. They distributed some moneys among the creditors but it was not rateable, one of the creditors having admittedly been paid 13 annas in the rupee whereas others were paid very much less and some nothing at all. There are also other circumstances which cast suspicion on the deed of trust but it does not appear necessary to dilate on them. I am clear on the evidence as a whole that the deed of trust was not entered into in good faith for the benefit of all the creditors and it was only a hole and corner affair.

On this footing it is clearly not binding on the Official Assignee and must be set aside as against him. The appeal thus fails and is dismissed with costs.

Curgenven, J.—My learned brother, whose judgment I have had the advantage of reading, has dealt with this case so fully that I wish only to add a few words with regard to *Official Receiver of Cuddappah* v. *Subbiah* (6), to which I was a party. That case, which arose under the Provincial Insolvency Act 5 of 1920, related to a deed of trust executed by a debtor with a view to the distribution of his assets among his creditors, and much the same questions arose then as now for decision. I think however that in the present case it is unnecessary to deal with the matter in its broader aspects because on the special facts the appellants have conspicuously failed to prove that the transfer, granting that it was in favour of a purchaser for valuable consideration, was made in good faith. I agree that for this reason alone the transfer is, under S. 55, Presidency Towns Insolvency Act 3 of 1909, not binding upon the Official Assignee. The appeal is dismissed with taxed costs on the original side scale.

P.R.S./B.V. *Appeal dismissed.*

(6) A.I.R. 1927 Mad. 869=105 I.C. 138=50 Mad. 815.

A. I. R. 1931 Madras 369

CURGENVEN, J.

Pinnamaneni Gopalakrishnayya and *others*—Defendants—Petitioners.

v.

Veeramachunemi Ramaswami—Plaintiff—Respondent.

Civil Revn. Petn. No. 1475 of 1928, Decided on 25th September 1929, against order of Sub-Judge, Masulipatam, D/- 1st May 1928.

Civil P. C. (1908), O. 6, R. 17 — Plaintiff suing defendants 1 to 4, partners of a firm, and others—Latter in original plaint alleged to be liable as they were under obligation to pay debts incurred by defendants 1 to 4—Application for amendment that they were also liable as partners of firm—Amendment wes allowed.

It is not an inflexible rule to disallow an amendment which modifies to some extent the original cause of action or adds another.

Plaintiff who was the creditor of a firm composed of defendants 1 to 4, sued them and various members of their family. In the original plaint the other defendants were joined not as partners but because some of them after attaining majority had executed letters undertaking to discharge the debts, while others were under a pious obligation to pay their father's debts. Subsequently plaintiff applied for amendment so as to hold those other defendants also liable as partners.

Held : that as the change was only in the nature of the liability to pay the debts the amendment could be allowed; *A. I. R.* 1922 *P. C.* 249; *A. I. R.* 1927 *Mad.* 212 and 25 *I. C.* 945 and *A. I. R.* 1925 *Cal.* 419, *Rel. on.*

[P 370 C 1, 2]

P. Satyanarayana Rao — for Petitioners.

Ch. Raghava Rao—for Respondent.

Judgment. — This petition is preferred against an order allowing the plaintiff to amend his plaint. He was a creditor of a firm composed of defendants 1 to 4 and sued them and various members of their family upon the debt, alleging that each of these four defendants was a managing member and therefore that the several family properties were liable. The amendment was sought with reference to the alleged liability of defendants 5, 6, 9 and 10. As regards defendants 5 and 6 the plaintiff's original case was not that they were partners but that after they had attained majority they executed letters undertaking to discharge the debt. As regards defendants 9 and 10 the original allegation was that they were members of a joint family with their father and elder brother, defendant 2, and that the father had agreed to be bound by the debt and

therefore that they were under a pious obligation to discharge it. In the case of all these four defendants, (the amendment which it was desired to make was on attaining majority, which events took place prior to 1924 when the debt was contracted), they had been admitted as partners to the firm. The plaintiff explains that subsequent to filing his suit he obtained this information, various proceedings having taken place elsewhere in which these defendants had appeared or been treated as partners.

I think it is clear that the alternative relief asked for in each of the two cases is to add another ground of liability to that already existing in the case of these defendants, and that it is not inconsistent with the original case. Defendants 5 and 6 may have executed letters making themselves liable, and defendants 9 and 10 may be under a pious obligation to discharge the debt, as well as being partners. It may be that the cause of action against them as partners differs technically from that which was originally alleged against them. I have not been shown that it is an inflexible rule to disallow an amendment which modifies to some extent the original cause of action or adds another. The petitioners have relied upon the Privy Council judgment in *Ma Shwe Mya* v. *Maung Mo Hnaung* (1), but I think that that decision is as much against them as in their favour. It was to begin with an extreme case, the substitution of an agreement entered into in 1903 for one alleged in 1912 and their Lordships say :

"When once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would in their Lordships' opinion be to go outside the provisions established by the Code of Civil Procedure."

It is in no respect a case parallel with the present one but the judgment is instructive, because it shows clearly that in their Lordships' opinion the powers of amendment should be liberally exercised and they add :

"It would be a regrettable thing if when in fact the whole of a controversy between two parties was properly open rigid rules prevent its determination."

Several other cases have been cited, but I am unable to derive much assistance from them. In *Sobhanadri Appa Rao* v. *Venkataramayya Appa Rao* (2), Krishnan, J., allowed an amendment which introduced an alternative case with reference to a question of partition. The plaint originally alleged that there was an invalid partition and the amendment was to the effect that the partition not only was invalid but was incomplete. That was an instance in which this Court actually interfered in revision of a refusal to amend. Several cases relate to the substitution of one capacity for another in the person of the plaintiff. In *Rajam Aiyangar* v. *Muthu Krishna Pillai* (3), Hannay, J., had to deal with a plaint filed by the plaintiff in his private capacity. He decided that an amendment should be allowed describing him as managing director of a company. The case is noticed in *Naba Kumar Choudhury* v. *Higheazany* (4), where a plaintiff who originally sued in his personal capacity was allowed to amend his plaint by adding himself in his capacity as an administrator. The learned Judges say that no change in person had taken place, but that the change was in the basis on which the debt was due, and so here, the change is in the nature of the liability to pay the debt. The application to amend was made at an early stage of the suit before the issues had been framed and it has not been alleged that the defendants have suffered prejudice thereby. I am quite clear, therefore, that this is not a fit case for interference in revision and I dismiss the petition with costs.

P.R.S./S N. *Revision dismissed.*

(1) A. I. R. 1922 P. C. 249=66 I. C. 914=48 I. A. 214=48 Cal. 832 (P. C.).

(2) A. I. R. 1927 Mad. 212=98 I. C. 458.

(3) [1914] 25 I. C. 945.

(4) A. I. R. 1925 Cal. 419=79 I. C. 403=51 Cal. 845.

A. I. R. 1931 Madras 370

ANANTAKRISHNA AYYAR, J.

Sri Mahant Prayag Doss Jeevaru—Plaintiff—Appellant.

v.

Abbupillai and *others*—Defendants—Respondents.

Second Appeals Nos. 1877 to 1881 of 1925, Decided on 26th February 1929, against the decrees of Dist. Judge, Chingleput, in Appeal Suits No. 192 of 1923, and Nos. 64, 65, 70 and 74 of 1924.

(a) Grant—Inam—Sagubadi Inams—Inams granted on condition that inamdars should keep all village lands cultivated—No land

remaining uncultivated—Inams cannot be resumed.

Sagubadi inams were granted to the original inamdars on condition that they should keep all the lands of the village cultivated, but the services long ceased to be performed for the simple reason that there was little or no cultivable land yet remaining to be cultivated:

Held: that the zamindar was not entitled to resume the inams and to levy full ayan thirva: 13 *M. I. A.* 438; 29 *Mad.* 52, *Rel. on. A. I. R.* 1922 *P. C.* 168, *Dist.* [P 372 C 2 P 373 C 1]

(b) Grant — Inam — Vinayaka inam and astrologer inam are not resumble if service is regularly rendered.

Vinayaka inam and nalluva or astrologer inam are public service inams not resumable by the zamindar if the service is regularly rendered. [P 373 C 2]

T. Kumaraswami Iyer—for Appellant.

K. Muthuswami Chetty—for Respondents.

Judgment.—This plaintiff is the appellant in all these second appeals. He filed five suits in the Court of the Deputy Collector of Trivellore under S. 77, Madras Estates Land Act 1 of 1908, to recover rent due. The defendants in some of the suits pleaded that they were bound to pay only a small amount as jodi and road cess, and that they were not bound to pay the ayan thirva claimed by the plaintiff, and that the suits to recover the ayan thirva were not maintainable. The defendants in the other suits pleaded that they had been enjoying the lands as sagubadi manyam for generations, free of thirva as inam, and that the claim made now for the first time that they were bound to pay ayan thirva was unsustainable.

Both the lower Courts dismissed the suits, and the plaintiff has preferred the second appeals. It was explained that the suit lands were situated within the zamindari of Kalahasti, that the villages were purchased by the plaintiff, and that the plaintiff stands in the position of the zamindar. It is admitted that the lands concerned in three of the suits are sagubadi inams, in the fourth, vinayaka inam, and in the fifth, valluva or astrologer inam. The Deputy Collector who tried these suits observed as follows in his judgment in S. S. No. 628 of 1922 (S. A. No. 1880 of 1925):

"It is admitted that no original grant or other fact is available as regards the genesis or nature of inam and that for over 40 years (to the knowledge of D. W. 1) only a jodi is being paid to the zamindar."

Again in para. 5 it is stated that

"the suit land is sagubadi inam and no evidence has been adduced that it ever paid full assessment. The available evidence is that it has always been paying only a small jodi of Rs. 2."

Some documents relating to sagubadi inams in other villages were produced by the plaintiff. With reference to the same, this is what the Deputy Collector stated in para. 3 of his judgment:

"none of these documents relates to the inam in question and the nature of the sagubadi inams in other villages does not appear to be uniform."

After noticing the difference in the various documents filed by the plaintiff, the learned Deputy Collector concluded para. 3 of his judgment as follows:

"The plaintiff's vakil admitted as stated by P. W. 3 that the inam was for the encouragement, and spread of cultivation. It is admitted also that no such service is done or is necessary under modern conditions. The inference therefore is that the inam is a personal inam granted for past services. In that case, its resumption by the proprietor would be unauthorized."

On appeal the learned District Judge of Chingleput, found that these inams were very old ones and that it was not disputed before him by the plaintiff that in one case the defendants were in possession free of rent and in the other cases on favourable rent, ever since the grant of these inams some generations ago. After referring to the fact that no deed of grant had been produced in two of the cases of sagubadi inams, and that according to Ex. 1 produced in the third suit the inamdar was

"given a portion of land free of rent and that he should see that no land in the village was left waste"

he proceeded to discuss the question that the kararnamas relating to the other villages could not in the circumstances be of any real help in these cases; he held that the burden of proving an inam to be resumable rests upon the persons who assert it. He observed as follows:

"Three of the inams are sagubadi inams which were granted to the original inamdars on condition that they should keep all the lands of the village cultivated. These services have long ceased to be performed for the simple reason that there is little or no cultivable land yet remaining to be cultivated."

He came to the conclusion that the land was granted, and that it was a "grant burdened with sagubadi service" and that the terms of the grant had not been violated. He further came to the conclusion that the plaintiff had not proved his right to resume the sagubadi

inams, and dismissed the three appeals relating to the sagubadi inams.

It was contended before me by the appellant's learned advocate that the services in these three cases are personal to the zamindar and not public services, and that it was open to the zamindars to resume the inams and to levy full or ayan thirva.

As regards the nature of sagubadi inams, the evidence is very meagre; but we have got the following admission made on the side of the plaintiff as mentioned in para. 3 of the Deputy Collector's judgment

"the plaintiff's vakil admitted as stated by (P. W. 3) that the inam was for the encouragement and spread of cultivation. It is admitted also that no such service is done or is necessary under modern conditions."

The learned District Judge, as mentioned already, in para. 3 of his judgment remarked as follows:

"Three of the inams are sagubadi inams which were granted to the original inamdars on condition that they should keep all the lands of the village cultivated. These services have long ceased to be performed for the simple reason that there is little or no cultivable land yet remaining to be cultivated."

The learned District Judge after referring to Ex. 1 filed in one of the three cases and noting that the inamdar was given a land free of rent and that he should see that no land in the village was left waste, and after observing that the wordings of other documents relating to other villages filed by the plaintiff were different, came to the conclusion that the land in suit was granted, burdened with sagubadi service. As observed by the Deputy Collector

"no original grant or other fact is available as regards the genesis or nature of these inams"

and the plaintiff's witnesses, naturally enough could not speak under what conditions the suit inam was granted to defendant's ancestors. In these circumstances I think that the lower Courts were justified in proceeding on the basis of the admissions made on behalf of the plaintiff that the inam was for the encouragement and spread of cultivation. In Vol. 3 of "the Manual of Administration of the Madras Presidency" by Dr. Maclean . . . Glossary, p. 356. "sagubadi inam" is described as

"inam granted to head ryots with a view to their encouraging the cultivation of Government lands."

When lands are thus granted as sagubadi inams, it seems to me that the lands are granted burdened with the sagubadi service. If the inamdar to whom such a grant has been made should fail to perform that service when the service was performable, it would be open to the zamindar to resume the inam but if as the District Judge finds

"the services have long ceased to be performed for the simple reason that there is little or no cultivable land yet remaining to be cultivated and the terms of the grant have not been violated"

then it seems to me that the zamindar is not entitled to resume these inams. As remarked by the Privy Council in the case reported as *Forbes* v. *Meer Mahomed Tuquee* (1) the inamdars would still be bound to render the services should by any chance occasion and necessity for the rendering of the same should arise in future, and on failure to perform the duties the inams could be resumed. The case before the Privy Council was one where a grant of land was made for keeping up of a body of men to repel the excursions of wild elephants. Their Lordships held :

"If the operation of any natural cause (as, for example, the practice of cultivation which has caused the wild elephants to clear out of the land) removes the necessity for the services, the grantee will hold the lands practically freed from the condition originally imposed upon him; their Lordships are therefore of opinion that upon the true construction of these sanads, the grantees though bound to protect the pergannah from the excursions of wild elephants, so long as those incursions last, and though still bound to do so should by any chance these incursions be renewed, and though they may be liable to forfeit the tenure if they wilfully failed in the performance of these duties, are not liable to have their lands resumed because there is no longer any occasion for the performance of this particular service, there being no fear of the depredations of elephants in those places."

As their Lordships remarked at p. 466 "it emphatically lay upon the appellant, who is seeking to dispossess, or to rack-rent, the respondents, who by themselves or their ancestors have brought these lands into cultivation, and enjoyed them for so long a period ; who must have been permitted by former zamindars to continue undisturbed in such enjoyment long after the incursion of wild elephants had become a mere matter of tradition to make out a clear title to resumption."

Both the lower Courts have held that the plaintiff has not made out his title

(1) [1871] 13 M. I. A, 438=14 W. R. 28=2 Sar 588 (P.C.).

to resume and levy full ayan thirva, and I am not satisfied that they were wrong.

The case of *Thiruvencatacharlu* v. *Sheikh Altoo Sahib* (2) and the case of *Rajah of Vizianagaram* v. *Y. Ramaswami* (3) were brought to my notice, as also the case of *Secretary of State* v. *Rajah of Venkatagiri* (4).

In *Secretary of State* v. *Rajah of Venkatagiri* (4) the Privy Council held that having regard to the terms of the sanad granted to the Rajah of Venkatagiri and the circumstances in which it was issued, the Government was not entitled to resume certain inam lands within the zamindari. The only question that arose for decision was, who had the right to resume certain inams, whether the zamindar or the Government, it being assumed that the inams were resumable. The question that arises in these second appeals before me is whether any right of resumption has been made out. Therefore the decision in *Secretary of State* v. *Rajah of Venkatagiri* (4) is not of any real guidance to me in these cases. Some arguments were advanced whether the inams in the present case are personal inams or public inams. In the view I take, it is not necessary to record a definite opinion on that question. Assuming they are public inams then prima facie the zamindar could not claim to resume, them. If however they are assumed to be personal inams then there are findings by the lower appellate Court that these lands were granted to the inamdars burdened with particular service and that these services are not required by the zamindar, and that there has been no violation of the terms of the grant by the inamdars nor any default on their part in the rendering of the services. As remarked by the Privy Council in the case *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (5):

"Where a grant of land is subject to a burden of service, and is not a mere grant in lieu of wages the grantor has no right to put an end to the tenure, whether the services are performed or not, as long as the grantees are willing and able to perform the services": see also the case of *Forbes* v. *Meer Mahomed Tuquee* (1) already referred to."

(2) A. I. R. 1926 Mad. 511=94 I. C. 458.
(3) A. I. R. 1927 Mad. 448=101 I. C. 49.
(4) A. I. R. 1922 P. C. 168 = 73 I. C. 741=48 I. A. 415=44 Mad. 864 (P.C.).
(5) [1906] 29 Mad. 52=33 I. A. 46=16 M.L.J. 1 (P. C.).

It could not be contended that all inams granted for personal services are always resumable. There is no necessity to decide these cases on the theory of presumption only. There seems to be some difference of opinion as to what the presumption in such cases is: see *Kandada Thiruvenkatacharlu* v. *Shaik Altoo Sahib* (2) and *Rajah of Vizianagaram* v. *Y. Ramaswami* (3). But we have got Ex. I, in one of the cases, and other circumstances already mentioned, and referred to by the lower Courts. It was open to the lower appellate Court, on the materials before it, to come to a finding that the lands in these three cases were granted burdened with particular services and that there was no violation by the inamdars of the terms of the grant. That being so, the plaintiff is not entitled to resume the inams and levy full ayan thirva; these three suits were rightly dismissed by the lower Courts. I accordingly dismiss these three second appeals (Nos. 1877, 1878 and 1880 of 1925) with costs.

Second Appeal No. 1879 of 1925 related to vinayaka inam. It was not contended that the finding that the inam concerned in this suit was a grant of lands burdened with the vinayaka services to be rendered in connexion with the temple was wrong. Vinayaka service is a public service rendered to the whole Hindu community and the service to the deity is being regularly rendered ; the plaintiff is not entitled to resume this inam. Similarly in Second Appeal No. 1881 of 1925, the inam relates to a valluva or astrologer inam. It is admitted that the service is still performed and that it is a public service enjoyed by the whole community. The plaintiff is not entitled to resume this inam either.

In fact the learned advocate who appeared for the appellant, did not impugn the correctness of the decision of the lower appellate Court in these two cases. These second appeals (Nos. 1879 and 1881 of 1925) are also dismissed with costs. As regards Second Appeals Nos. 1877, 1878 and 1880 of 1925 as it is said that there are other similar inams in the zamindari, I declare that these are fit cases for appeal under S. 15, Letters Patent.

P.R.S./S.N. *Appeals dismissed.*

A. I. R. 1931 Madras 374

SUNDARAM CHETTY, J.

Varalakshmi Ammal — Defendant—Appellant.

v.

Venkammal —Plaintiff—Respondent.

Second Appeal No. 1763 of 1925, Decided on 9th August 1929, against decree of Addl. Sub-Judge, Trichinopoly, in Appeal Suit No. 67 of 1925.

Deed — Construction — Settlement deed giving settlor's wife right to enjoy property till death—Thereafter settlor's heirs to take property absolutely —Settlor held to have made disposition in favour of heirs absolutely.

Where a settlor gave his wife a right to enjoy the house along with himself during his lifetime and after his death to enjoy the house till the end of her lifetime, and thereafter it should be taken by his heirs absolutely,

Held : that the settlor made a disposition of the remainder in favour of his heirs absolutely on the termination of the life-estate conferred on his wife. Such a disposition was perfectly valid. After execution of this deed, he had no disposing power over the property : *A. I. R.* 1928 *P. C.* 33 and *A. I. R* 1925 *Mad.* 61, *Relon.* ; 20 *W. R.* 472 and 33 *Cal.* 180, *Dist.*

[P 374 C 2]

S. Varadachariar and *S. V. Venugopalachari*—for Appellant.

B. Sitarama Rao—for Respondent.

Judgment.—This second appeal arises out of a suit brought by the plaintiff-respondent, for a declaration that the will Ex. 3, alleged to have been executed by her deceased father, one Krishna Ayyar, is not genuine and that, even if it be found to be genuine, it is invalid. The defendant is the widow of Krishna Iyer, and was his third wife. The plaintiff is her step-daughter. The main point for consideration is whether the deceased Krishna Ayyar had any disposing power over the suit house after the execution of the registered settlement deed by him on 10th April 1920 : vide Ex 1. This question turns upon a proper construction of the terms of Ex. 1. By this deed the settlor gave his wife (the defendant) a right to enjoy the house along with him during his lifetime and after his death to enjoy the house till the end of her lifetime and thereafter the house should be taken by his heirs absolutely. There is no doubt that he intended to confer a life-estate on his wife in this house. The point in dispute is as to what he did with the remainder. The lower appellate Court held that under this deed the deceased made a disposition of the remainder in favour of his heirs absolutely on the termination of the life-estate conferred on his wife. In this view, it held that the subsequent disposal of the house under the will Ex. 3 is ineffectual.

It is contended for the appellant that the lower Court has misconstrued Ex. 1 and that the words in Ex. 1 relating to the devolution of the property on the settlor's heirs after the wife's lifetime indicate merely that she should take only a life-interest. On a careful consideration I find it difficult to accede to this contention. The words in Ex. 1, namely "after my wife's lifetime my heirs should take the property absolutely" indicate to my mind a disposition of the remainder in favour of those who would be his heirs at the time of his wife's death. In order to make this clearer there are words to the effect that he would not make any alienation of the property during his lifetime and that even, if he made any, it would not be valid. This is consistent with the idea that he had divested himself even of the remainder. There is also a direction that those heirs should take the property with absolute rights. Even if the heir happens to be a female, she takes this property absolutely by virtue of this clause. Some meaning or significance has to be attached to the word "absolutely" and if the settlor did not intend to make a disposition of the remainder in favour of his heirs there would be no need for him to say that they must take it with absolute rights. Under Ex. 2 which was executed by him on the same day, he gave some lands to his wife with absolute rights, but as regards the suit house he restricted her right to life enjoyment under Ex. 1, giving the remainder to his own heirs absolutely. Even considering Exs. 1 and 2 together, it is difficult to hold that there was no idea of disposition of the remainder in the suit house, in the mind of the deceased. The construction of the terms of Ex. I made by the lower appellate Court is correct.

The next contention is, that the gift of the remainder in favour of his own heirs is not legal and valid. It seems to me that after the termination of the life-estate given to the widow, the remainder should go to the heirs of the settlor who would be in existence at the time of the widow's death and they must take the property absolutely. In a recent deci-

sion of the Privy Council reported as *Madhavrao Ganpatrao* v. *Balabhai Raghunath* (1) it was held upon a construction of a deed, similarly worded, that the intention was to make an independent gift to those persons who should be the male heirs of the daughter on her death, to whom a life-estate was given : vide also *Periyanayaki Ammal* v. *Ratnavelu Mudaliar* (2). In the present case the gift of the remainder is to the settlor's own heirs, who happen to be alive on the date of his wife's death and they take a contingent estate. The decision in *Ramguttee Acharjee* v. *Kristo Soonduree Debia* (3), relied on by the learned vakil for the appellant is clearly distinguishable, for in that case, the testator attempted to effect a disposition of the property in his own way, if the adopted son in whom the property vested absolutely should die unmarried. It was held that this bequest offended the rule laid down in *Jatindra Mohan Tagore* v. *Gnendra Mohan Tagore* (4). Even the decision in *Benode Behari Bose* v. *Nistarini Dassi* (5) does not materially help the appellant's contention in this case. It seems to me that the settlor had no disposing power over the suit property after the execution of Ex. 1. The plaintiff as a holder of a contingent estate at least, is entitled to maintain the suit for declaration. The decision of the lower appellate Court is correct and this appeal is dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

(1) A. I. R. 1928 P. C. 33=107 I. C. 119=55 I. A. 71=52 Bom. 176 (P. C.).
(2) A. I. R. 1925 Mad. 61=83 I. C. 23.
(3) 20 W. R. 472.
(4) [1873] 1 I. A. Sup. Vol. 47=18 W. R. 359 =2 Suther 692=3 Sar. 82 (P. C.).
(5) [1906] 33 Cal. 180=32 I. A. 193 =2 C.L.J. 189 (P. C.).

A. I. R. 1931 Madras 375

RAMESAM, J.

Achattil Balakrishna Nair and *others* —Petitioners.

v.

Vishnu Nambudiri and *others*—Respondents.

Civil Revn. Petn. No. 242 of 1929, Decided on 21st March 1930, against order of Sub-Judge, South Malabar, at Calicut.

(a) Court-fees Act (7 of 1870), S. 7 (4)— Suit by minor members of tarwad for declaration that decree passed against karnavan is not binding on them and for recovery of property sold in execution of that decree is one for declaration and consequential relief.

Certain minor members of a Malabar tarwad brought a suit for declaration that a certain decree obtained against the karnavan and other minor members represented by the karnavan as guardian was not binding on them and for recovery of the tarwad properties sold in execution of that decree.

Held: that the suit was one for declaration and consequential relief. Plaintiffs were therefore entitled to value consequential relief in any way they chose subject to the recent proviso that in the case of immovable properties the value should be at least half the value as arrived at by applying the rules of Cl. 5: *A.I.R.* 1926 *Mad.* 96 and *A.I.R.* 1925 *Mad.* 1248, *Dist.*; *A.I.R.* 1927 *Mad.* 825, *Expl.* and *Rel. on.* [P 375 C 2; P 376 C 1]

(b) Suits Valuation Act (7 of 1887), S. 4— Value for jurisdiction.

The value for purposes of jurisdiction cannot exceed the value as arrived at by applying the rules under the Court-fees Act. [P 376 C 1]

P. Govinda Menon – for Petitioners.

K. P. Krishna Menon and *K. Krishna Menon*—for Respondents.

Judgment.—This is a revision petition by the plaintiffs in an original suit in the Subordinate Court of Calicut against an order of the Subordinate Judge directing them to pay additional court-fee. The suit was brought by certain minor members of a Malabar tarwad for a declaration that a certain decree obtained against the karnavan and other minor members represented by the karnavan as guardian is not binding on them and for recovery of the tarwad properties sold in execution of that decree. The decree was a mortgage decree and not only the mortgaged properties, but other properties of the tarwad, were sold in execution of the decree, as it was found that the mortgaged properties were not sufficient to pay off the mortgage. The court-fee paid is Rs. 100 for a declaration and ad valorem court-fee on Rs. 414-6-0, which represents ten times the annual assessment of Rs. 41-7-0 on the properties. Then there is a note added that the value for purposes of jurisdiction is Rs. 9,485-14-3. The Subordinate Judge first refers to some decisions which have no bearing on court-fees. Then he refers to *Lakshmi Ammal In re* (1); *V. N. Alagar Ayyangar* v. *Srinivasa Ayyangar* (2) and *D Venkata-*

(1) A.I.R. 1926 Mad. 96=91 I.C. 729.
(2) A.I.R. 1925 Mad. 1248=91 I.C. 709.

narasimharaju v. *D. Chandrayya* (3). In the first two of these decisions there were no decrees sought to be set aside. What were sought to be set aside in those cases were sale deeds executed by the plaintiffs and they were cases in which the plaintiffs cannot recover the properties unless the sale deeds are got over, that is, set aside. But here all that is sought to be got over are decrees, and in the case of decrees the proper prayer is not to set aside the decrees, but one for a declaration that the decrees are not binding on the plaintiffs, and the suit is therefore for a declaration and consequential relief.

The decision in *D. Venkatanarasimharaju* v. *Chandrayya* (3) is really in favour of the petitioners. The suit filed under S. 7 (4), Court-fees' Act, is a suit for declaration with consequential relief. The plaintiff has got the right to value consequential relief in any way he chooses, subject to the proviso added by the recent amendment, that in the case of immovable properties the value should be at least half the value as arrived at by applying the rules of Cl. 5. The valuation in the plaint before me satisfies this requirement of the proviso. The result is that the court-fee by the plaintiffs is correct and the order of the Subordinate Judge has got to be set aside.

But it must be pointed out that as a result of this the plaintiffs cannot have the benefit of going on with this suit before the Subordinate Judge. S. 4, Suits Valuation Act, says that the value for purposes of jurisdiction cannot exceed the value as arrived at by applying the rules under the Court-fees Act. If the plaintiffs want to proceed with the suit with a lower court-fee, they cannot have the benefit of having the suit before the Subordinate Judge. While setting aside the order of the Subordinate Judge, I merely point out that the plaint will have to be returned to the proper Court as he is not the Court of the lowest jurisdiction before which it ought to be presented. With these remarks, I set aside the Subordinate Judge's order. Each party will bear his own costs in this petition.

P.R.S./S.N. *Order set aside.*

(3) A.I.R. 1927 Mad. 825=105 I.C. 171.

A. I. R. 1931 Madras 376

SUNDARAM CHETTY, J.

A. T. Pannirselvam—Petitioner.

v.

A. Veeriah Vendayar—Respondent.

Civil Revn. Petn No. 780 of 1930, Decided on 14th April 1930, against order of Sub-Judge, Tanjore, D/- 10th April 1930.

Practice—Adjournment—Court has jurisdiction to advance hearing of case without consent of both parties—Civil P. C. (1908), S. 115.

A Court has jurisdiction to advance the hearing of the case, without the consent of both parties. But at the same time it should afford full opportunity to either party, for establishing his contention on an issue, and if any party should desire that any documentary or other evidence has to be taken, before deciding this question the Court should give facilities for this purpose for the sake of completeness and to prevent a remand, on the ground that material evidence was shut out. [P 376 C 2]

P. Venkataramana Rao — for Petitioner.

T. Rangachariar—for Respondent.

Judgment.—In this case, it cannot be said that the lower Court had no jurisdiction to advance the hearing of the case, without the consent of both parties. The Civil Procedure Code is silent on this point, but R. 28 of the Civil Rules of Practice provides for the advancement of the hearing and the procedure to be followed. The Subordinate Judge has, in the exercise of his discretion under the aforesaid rule, advanced the hearing to 16th April 1930, for the consideration of one point, which he says is a pure question of law. I hold that he has jurisdiction to advance the hearing date.

It is strenuously contended that much is the hardship or inconvenience caused to the petitioner by this advancement of the hearing. I do not think fit to interfere in revision when there is no illegal exercise of jurisdiction. But I am sure that the learned Subordinate Judge would afford full opportunity to either party, for establishing his contention on this issue, and if any party should desire that any documentary or other evidence has to be taken, before deciding this question, the Subordinate Judge would do well to give facilities for this purpose, for the sake of completeness, and to prevent a remand, on the ground that material evidence was shut out. With these observations, I dismiss this petition.

P.R.S./V.S. *Petition dismissed.*

A. I. R. 1931 Madras 377

RAMESAM, J.

In re *Appavu Naicken* and *others*—Defendants—Appellants.

Second Appeal No. 13 of 1930, Decided on 19th February 1930, against decree of Sub-Judge, Salem, in A. S. No. 181 of 1928.

Hindu Law—Widow's estate — Nature of —Gift by widow.

The true nature of a Hindu widow's estate is that it is not an estate for life in the sense in which that term is understood in English law. It is not an estate terminable on the death of the widow. If she makes a gift or alienation otherwise than for necessity, neither the gift nor the alienation is void. It is true that the transaction will be useless against the reversioner but as against all persons other than reversioners the gift or alienation is perfectly valid, and the donee or alienee can maintain an action against a person resisting him, provided he is not a reversioner and provided there is no question of limitation. [P 378 C 1]

There is nothing in law to compel the reversioner to take any action and so long as he is silent and has done nothing to treat the gift or alienation as a nullity the title of the donee or alienee continues even beyond the lifetime of the widow. [P 378 C 1]

The words "void" and "voidable" have to be carefully used in connexion with the rights of the reversioners as against a Hindu widow's alienations. A Hindu widow's gift or alienation without necessity is void as against the reversioner in the sense that he need not set it aside. A mere disaffirmation is enough. But such a transaction is also voidable in the sense that only the reversioner can treat it as a nullity and if he chooses to remain silent nobody else can question it and it therefore remains valid. The transaction has the character of a transaction which is not void as against the rest of the world. It has the character of a void transaction only as against the reversioner. It is unsafe to apply the word "voidable" to such a transaction in the usual sense of the term : 25 *Cal.* 1 (*P.C.*); 34 *Cal.* 329 (*P.C.*); 3 *I.C.* 78; *A. I. R.* 1923 *Pat.* 122, *Foll.*; 1 *C. L. J.* 408; 13 *I. C.* 191; *A. I. R.* 1927 *Nag.* 354; *A. I. R.* 1924 *Mad.* 676; 21 *I. C.* 714; *A. I. R.* 1923 *Mad.* 367; 4 *M. L. J.* 88; *A. I. R.* 1926 *Cal.* 121, *Dist.* [P 379 C 2]

G. Lakshmanna and *T. V. Srinivasachari*—for Appellants.

Judgment.—The defendants are the appellants before me in this second appeal. The suit properties, a house and land, belonged to one Angammal, maternal aunt of the plaintiff. She gave them to the plaintiff and his brother Maria Pillai by a registered deed, dated 25th October 1925, Ex. A. Maria Pillai is dead and the plaintiff is his heir. The plaintiff filed the suit within 12 years after the date of the gift. The defendants pleaded that the gift is fraudulent, whatever that may mean. They also pleaded that they were reversioners to Angammal. The District Munsif found that neither Angammal nor her donees were in possession of the property within 12 years prior to suit and, therefore, dismissed the suit. On appeal the Subordinate Judge found that Angammal was in possession until the date of the gift deed and there was therefore no question of adverse possession. He also found that the gift deed was a genuine transaction intended to be given effect to, and given effect to and that the defendants are not reversioners of Angammal. On these findings he decreed the plaintiff's suit. The defendants filed this second appeal.

In second appeal it has been contended before me that the plaintiff being a mere donee from a Hindu widow possessing the limited interest of a widow in the properties, he has not got such a title after her death as would enable him to maintain a suit for ejectment. It seems to me that the opposite proposition is so well established that I have no hesitation in deciding against the appellants.

In *Madho Sudan Singh* v. *Rooke* (1), a Hindu widow made a putni lease of two villages. After the widow's death the reversioner accepted rent from the putnidar. The High Court found that though the putni was void, the acceptance of rent constituted him a tenant from year to year and dismissed the suit. On appeal the Judicial Committee affirmed the High Court's judgment on an even stronger ground. They said:

"It must be observed that the putni was not void; it was only voidable; the Raja might elect to assent to it and treat it as valid . . . . The learned Judges of the High Court appear to have fallen into the error of treating the putni as if it absolutely came to an end at the death of the widow . . . . Their Lordships think there is sufficient prima facie case of an election by the Raja to affirm the validity of the putni."

They dismissed the appeal. In *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2), the suit was by a reversioner to recover property leased by a Hindu widow for a term of 60 years (which extended beyond her life) from the lessees. The suit was brought within 12 years. The High Court applied Art. 91 and dismissed the suit. On appeal to the Judicial Committee it was held that in such a case

(1) [1898] 25 Cal. 1=24 I. A. 164=7 Sar. 194 (P.C.).

(2) [1907] 34 Cal. 329=34 I. A. 87 (P.C.).

the reversioner has not got to set aside the transaction by the Hindu widow and Art. 149 would apply. In describing the nature of a Hindu widow's estate Lord Davey said:

"A Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir."

Ever since this decision, it has been generally regarded as defining the true nature of a Hindu widow's estate. It is not an estate for life in the sense in which that term is understood in the English law. It is not an estate terminable on the death of the widow. If she makes a gift or alienation otherwise than for necessity, neither the gift nor the alienation is void. It is true that the transaction will be useless against the reversioner but as against all persons other than reversioners the gift or alienation is perfectly valid, and the donee or alienee can maintain an action against a person resisting him, provided he is not a reversioner and provided there is no question of limitation. It may be that the trouble may turn out to be a thankless task, for after the plaintiff succeeds in his action the reversioner may step in and take away the property from him. But he may not. There is nothing in law to compel the reversioner to take any action and so long as he is silent and has done nothing to treat the gift or alienation as a nullity the title of the donee or alienee continues even beyond the lifetime of the widow. This is the ground of the decision of Sir Lawrence Jenkins, C. J., and Caspersz, J., in *Kishori Pal* v. *Bhusai Bhuiya* (3). There it was held that a transferee from a Hindu widow without any legal necessity was entitled to maintain a suit for ejectment. The second appeal was first heard by Brett, J. He said:

"Whether or not it was within the rights of the widow to transfer the entire interest in the property sold, such a sale, under the law, cannot be held to be ipso facto void, but it is only voidable at the instance of the reversioners. In the present case, there is nothing whatever in the judgments of the lower Courts to indicate that the reversioners appeared in the suit or that they in any way showed that they wished to avoid the transaction. That being the case I am of opinion that the view taken by the lower appellate Court is not correct and that for the purpose of the present suit, the plaintiff has sufficiently established his title."

There was a Letters Patent Appeal in which Sir Lawrence Jenkins, C. J., observed:

"Now, how do the authorities stand? It seems to me that the matter is placed beyond doubt by what was decided and said in *Bejoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2). It was there pointed out that an alienation by a widow, even though there may not be legal necessity or consent, was not void and could not be regarded as void, because the established law that such transfer was capable of affirmation after the death of the widow, and that which is capable of affirmation cannot possibly be void. If not void, it is clear that the transfer even after the death of the widow had a qualified operation. It is quite true that to nullify such a transfer a suit is not necessary: disaffirmation would be sufficient. But as the transaction is capable of disaffirmation, so it is also capable of affirmation; and while there is nothing decisive one way or the other, it seems to me that we cannot say that the transfer even after the death of the widow is incapable of operation as against a third party in the position of the defendant-respondent in this appeal. I therefore agree with the conclusion at which Brett, J., has arrived."

In my opinion this case establishes that where the reversioner is silent, a transferee from a Hindu widow, whether a donee or alienee, has got some qualified title to enable him to maintain a suit for ejectment. If I may humbly say so, I entirely agree with this decision and I think that the proposition is so well established that I regard the attempt to argue this appeal as rather a bold attempt on the part of the learned advocate.

The same conclusion was arrived at in *Maharaja Kesho Prasad Singh* v. *Chandrika Prasad Singh* (4). In that case there was a gift by a Hindu widow. Two of the reversioners did not dispute the gift after her death in 1880. But the third reversioner did not consent to the gift and sued to recover his one-third share and succeeded after going up to the Privy Council. The donee, Sheo Lochan Sing, sold the other two-thirds share to the plaintiff and he

(3) [1909] 8 I. C. 78.

(4) A. I. R. 1923 Pat. 122=69 I. C. 394=2 Pat. 217.

brought a suit to redeem two zurpeshgi mortgages effected by the widow and to which the properties were subject. One of the contentions in the appeal was that the interest of the plaintiff's vendor Sheo Lochan, although valid during the life-time of the widow, terminated on the death of that lady notwithstanding that the reversioners of the two-thirds share have never from the year 1880, when the widow died, up to the present, elected to treat the transfer as void. After stating this contention, Dawson-Miller, C. J., says :

"It is not disputed that a sale or mortgage by a Hindu widow which purports to pass or hypothecate the absolute title is valid against every one except the reversioners and that unless the reversioners elect to treat it as a nullity it subsists as against every one else. In the present case the gift as to the two-thirds share was never challenged by the reversioners interested in that share. It is argued however that a gift stands on a different footing from a sale or mortgage and certain authorities have been relied on in support of this contention. The general rule was clearly laid down by Lord Davey in delivering the judgment of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2)."

The alienation in question in that case was an ijara lease but there is nothing in the judgment to suggest that any other form of alienation would not come within the doctrine applied, and it is difficult to see upon what principle a distinction can be drawn between a gift and any other form of transfer. He then refers to a number of cases and observes:

"None of these cases however in my opinion forms a guide to the determination of the exact question we are now called upon to decide. It is not a question between presumptive and remote reversioners. The question is whether a gift of the whole of her husband's property made by a Hindu widow, not challenged by the reversioners during her lifetime and acquiesced in by those who would take a vested interest after her death can be challenged by anyone else. In my opinion there can be only one answer to this question. It is the reversioners and the reversioners alone who can dispute the gift. If they choose to allow the property to which they are entitled to remain in the possession of the donee that is their affair and no one else can object. If the donee remains in possession under a claim of right for twelve years he will acquire an indefeasible title even against the reversioner."

He then discusses the decision in *Nata Krishna Roy* v. *Hem Lal Roy* (5) where it was contended that the alienation must be first set aside before the reversioner can sue for possession. Then he observes:

"Such expressions must be regarded in connexion with the context and the subject-matter of the suit. It is in a sense permissible, though perhaps not strictly accurate, to say that the gift is void when considering its validity as against the reversioner. He may treat it as a nullity and need not sue to have it set aside before claiming possession. The true view appears to be that it is not binding upon him and he can elect to treat it as a nullity and sue for possession at any time within 12 years of his interest becoming vested without first suing to have it set aside notwithstanding Art. 91, Lim. Act. He may, on the other hand, elect to treat it as valid but no third person can claim his option or set up the plea that such a gift is void merely because it may have been but was not so treated by the reversioner. The judgment of the Calcutta High Court in *Kishori Pal* v. *Sheikh Bhusai Bhuiya* (3) is, I think, an authority for this view. In my opinion the respondent's plea that the gift was void cannot be supported."

If I may humbly say so, I agree with every word of the above opinion of Dawson-Miller, C. J. The words "void" and "voidable" have to be carefully used in connexion with the rights of the reversioners as against a Hindu widow's alienations. A Hindu widow's gift or alienation without necessity is void as against the reversioner in the sense that he need not set it aside. A mere disaffirmation is enough. But such a transaction is also voidable in the sense that only a reversioner can treat it as a nullity and if he chooses to remain silent nobody else can question it and it therefore remains valid. The transaction has the character of a transaction which is not void as against the rest of the world. It has the character of a void transaction only as against the reversioner. It is unsafe to apply the word "voidable" to such a transaction in the usual sense of the term. Hence all the confusion that now and then arises, if still such confusion exists after Lord Davey's judgment in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (2). It is true that in *Maharaja Kesho Prasad Singh* v. *Chandrikar Prasad Singh* (4) the donee's title to two-thirds became completely indefeasible on account of the acquiescence of the two reversioners for more than 12 years, but the judgment does not rest on that ground. Even if the suit was filed within 12 years, the whole reasoning of Dawson-Miller, C. J., applies. Mr. Lakshmanna relied on another decision in *Harihar* v. *Dasarathi Misra* (6). There

(5) [1905] 2 C. L. J. 144.

(6) [1905] 33 Cal. 257=1 C. L. J. 408=9 C. W. N. 633.

the plaintiff was the reversioner and it was held that Art. 141 applied to the suit and that he need not sue to set aside the widow's sale. At p. 416, Woodroffe, J., observes:

"As I have pointed out, a Hindu widow stands midway between the cases I have referred to, having neither an absolute nor yet a life-interest in the property, but having a conditional authority only to absolutely dispose of it."

This sentence, in my opinion, correctly describes the position of a Hindu widow's estate. The further sentences that follow were used by Woodroffe, J., from the point of view of the reversioner. Expressions which suggest that the alienation is good for the lifetime only of the alienor and not valid beyond her death must be understood from the point of view of the reversioner. As Dawson-Miller, C. J., observes in *Maharaja Kesho Prasad Singh* v. *Chandrikar Prasad Singh* (4):

"Such expressions must be regarded in connexion with the context and the subject matter of the suit. It is in a sense permissible, though perhaps not strictly accurate, to say that the gift is void when considering the validity as against the reversioner."

I do not think the decision in *Harihar* v. *Dasarathi Misra* (6), helps the appellant. The case of *Ghansham Singh* v. *Tej Bahadur Singh* (7) also in which the suit was by a presumptive reversioner for a declaration, has no bearing on the present question. The case in *Dashrath* v. *Tarachand* (8), is a case of a donee on the one hand and an alienee for consideration on the other. In that case the defendant was not a person who had no title of any kind in the property. It is unnecessary for me either to agree with that decision or dissent from it at present. It is distinguishable and cannot help the appellant in this case.

The learned advocate for the appellant then relied on a group of cases which seem to hold that a will by a widow does not confer such title on a devisee as to maintain a suit for ejectment. The first decision so relied on is a decision of my brother Wallace, J., in *Srinivasachariar* v. *Raghavachariar* (9). That decision does not apply to the case of gift or alienation intended to be operative during the widow's lifetime. Either the case of a will stands on a different footing from that of a gift or alienation--then this decision must be distinguished on that ground—or there is no distinction on principle between a will and a gift or alienation—then this decision must be regarded as erroneous. I am inclined to be of the latter opinion. But it is unnecessary for me to say so for this case. It is enough for the decision of this case to say that cases of gifts or alienations are so clear having regard to the decisions that I have cited above that they cannot be disturbed by any decision relating to a will. I am unable to see any distinction on principle between the case of a will and that of an alienation, if we start with the position that a Hindu widow's estate is not a life-estate as Lord Davey has said. The decision in *Durga Sundari* v. *Ramakrishna Poddar* (10) does not really support the decision in *Srinivasachariar* v. *Raghavachariar* (9).

In *Durga Sundari* v. *Ramakrishna Poddar* (10) obviously defendants 2 to 5 were the reversioners and the property had been treated as theirs in the prior transactions. A devisee from the widow preferred a claim and it was held by N. Chatterjee, J., that his claim did not prevail. On Letters Patent appeal, Sir Lawrence Jenkins, C. J., and Mookerjee, J., dismissed the appeal. It cannot be said that Sir Lawrence Jenkins, C. J., intended to differ from his former view in *Kishori Pal* v. *Sheik Bhusai Bhuiya* (3) whether it is a will or a gift or alienation, as against the reversioners it is a nullity. Some of the defendants in *Durga Sundari* v. *Ramakrishna Poddar* (10) were the reversioners. It is not that a will stands on a lesser footing than a gift or alienation. In *P. Mahalakshmamma* v. *Vemi Reddi Babu Reddi* (11) referred to in *Srinivasachariar* v. *Raghavachariar* (9) it was not argued for the appellant that the will by the widow was valid against persons other than the reversioners. If that contention had been expressly raised I think a different view would have prevailed. The head-note shows that the only point that was argued was that the appeal having been allowed by an earlier order to continue, the objection that it abated cannot be taken at a later stage. If the decision cannot be so distinguished I am now inclined to dissent from it . . . . . The decision in *Raghava Mudaliar* v. *Narayana-*

(7) [1912] 13 I. C. 191.
(8) A. I. R. 1927 Nag. 354=105 I. C. 379.
(9) A. I. R. 1924 Mad. 676=79 I. C. 1011.
(10) [1913] 21 I. C. 714.
(11) A. I. R. 1923 Mad. 367=69 I. C. 529.

swami Mudaliar (12) is of no value after the decision of the Privy Council, *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (3) and must be regarded as overruled by it. Anyhow Wallace, J., himself in *Srinivasachariar* v. *Raghavachariar* (9) recognizes that the case of a transaction during the lifetime of the widow intended to take effect inter vivos stands on a different footing. The case in *Prafulla Kamini Roy* v. *Bhabani Nath Roy* (13) is a case where the conflict is between a donee from a widow and the reversioner and such a case cannot be affected by the principle in *Bijoy Gopal Mukerjee* v. *Krishna Mahishi Debi* (3). In my opinion, the matter is so plain that this appeal must be dismissed.

P.R.S./K.N. *Appeal dismissed.*

(12) [1894] 4 M.L.J. 88.
(13) A.I.R. 1926 Cal. 121=91 I.C. 897=52 Cal. 1018.

A. I. R. 1931 Madras 381

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Adaikappa Chettiar—Defendant—Appellant.

v.

Natesan Chettiar — Assignee-Decree-holder and Petitioner—Respondent.

Appeal No. 121 of 1929, Decided on 26th November 1929, from order of Sub-Judge, Tuticorin, D/- 18th January 1929.

(a) Civil P. C. (1908), S. 11, Expl. 4—Doctrine of constructive res judicata applies to execution proceedings when person sought to be bound had notice of point previously decided and had opportunity to contend against it.

Though neither S. 11, nor any of its explanations can in terms apply to an execution proceeding because the question arises in a proceeding which is a continuation of the same suit and not in a second suit, yet where a point has been decided in execution by a competent Court after notice to the counter-petitioner either expressly or by necessary implication that decision is binding upon the parties in subsequent execution proceedings. And when applying this principle it must be steadily kept in view that the party who is sought to be affected by the bar of res judicata should have notice of the point likely to be decided against him and should have an opportunity of putting forward his contentions against such decision: (*Case law discussed*). [P 396 C 1]

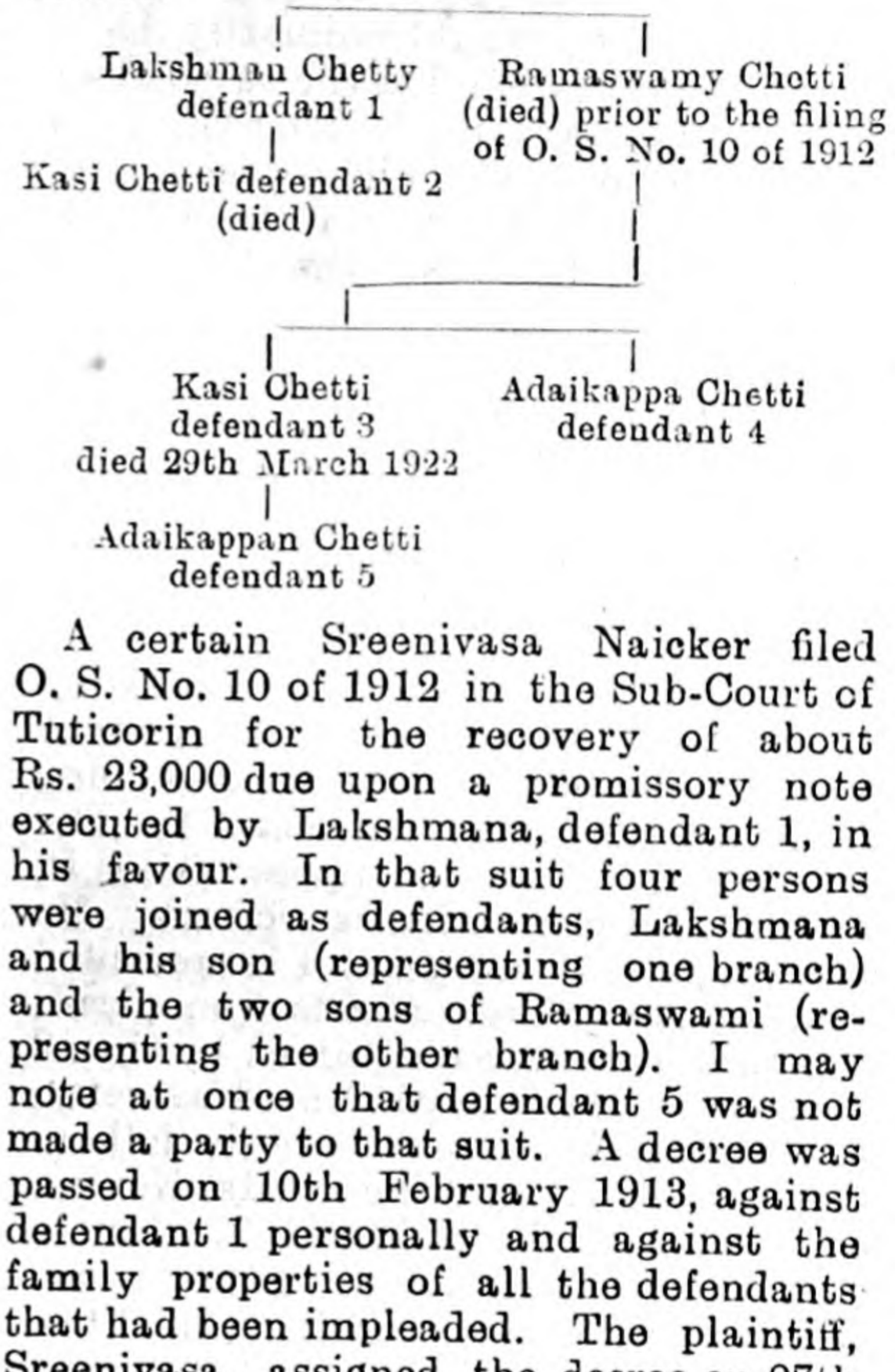
(b) Civil P. C. (1908), S. 48—Fraud of co-judgment-debtor is of no avail in obtaining extension against other co-judgment-debtor.

The fraud of one co-judgment-debtor cannot be availed of by the decree-holder under S. 48 (2) to claim exemption against other co-judgment-debtors from the bar of the limitation enacted by S. 48 (1): (*Case law discussed.*) [P 383 C 1]

K. Rajah Ayyar and *V. Ramaswami Iyer*—for Appellant.

T. M. Ramaswami Iyer—for Respondents.

Venkatasubba Rao, J.—The lower Court made an order transmitting the decree for execution as against defendants 4 and 5. This appeal has been filed by defendant 5 who impeaches that order. The following pedigree may be found useful:



A certain Sreenivasa Naicker filed O. S. No. 10 of 1912 in the Sub-Court of Tuticorin for the recovery of about Rs. 23,000 due upon a promissory note executed by Lakshmana, defendant 1, in his favour. In that suit four persons were joined as defendants, Lakshmana and his son (representing one branch) and the two sons of Ramaswami (representing the other branch). I may note at once that defendant 5 was not made a party to that suit. A decree was passed on 10th February 1913, against defendant 1 personally and against the family properties of all the defendants that had been impleaded. The plaintiff, Sreenivasa, assigned the decree on 27th July 1914, in favour of the respondent Natesa Chetti. His right as assignee-decree-holder was recognized by the High Court on 23rd January 1917. On 28th November 1924, defendants 1 and 4 were respectively brought on the record as the legal representatives of the second and third, who had in the meantime died. Several execution applications were from time to time filed, so that the decree might not get barred under the three years rule. The respondent filed the execution application (E. A. No. 1028 of 1928) which is the subject of this appeal in the usual form, on 1st October 1928. In addition to that application, he filed on the same date a separate petition for bringing defendant 5 on the record, in

the place of his deceased father, defendant 3. The two applications were resisted by both defendants 4 and 5, but their objections were overruled by the learned Subordinate Judge, who directed the decree to be transmitted for execution as against them.

From this statement, it is clear that when the execution application in question was filed, more than 12 years had elapsed from the date of the decree. S. 48, Civil P. C., would ordinarily be a bar to the execution, but the respondent relies upon certain fraud, under Cl. 2 (a) of that section, which he contends prevents the running of the Statute of Limitation. That clause runs thus:

> Nothing in this section shall be deemed
> (a) "to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application."

He admits that the fraud alleged by him is that of defendant 1, but says that it enables him to treat the decree as being alive even as against defendant 4. The first question that this appeal raises is, whether this contention is correct. He next urges that defendant 4 is prevented on the ground of res judicata from pleading that the decree is barred by the 12 year rule. The facts that need be referred to in this connexion are the following. The respondent filed on 1st November 1927, E. A. No. 1509 of 1927. Defendant 4 did not appear to contest it and an order was made on 18th April 1928, transmitting the decree for execution. It will be seen that this application of November 1927, was itself filed after the lapse of 12 years from the date of the decree. What the respondent urges is, that the order then made, involves the decision that the decree was nevertheless in force and that defendant 4 is precluded from now raising the plea that it is barred by the twelve year rule. I may observe that the question of res judicata is a new point raised by the respondent for the first time in appeal. He next contends that if defendant 4 is barred by res judicata, defendant 5 is equally barred on the principle of representation. The latter, besides controverting each of these positions, further asserts that the application as against him is in any event barred as it was filed more than three years after his father's death.

The facts which are said to constitute fraud on the part of defendant 1 are these. I have said that the plaintiff, Sreenivasa assigned his decree to the respondent on 24th July 1914. Two petitions were subsequently filed, one by the respondent and the other by Lakshmana, defendant 1. The former applied that the transfer to him should be recognized ; Lakshmana prayed that satisfaction of the decree should be recorded. His case was shortly this. He executed a mortgage in favour of one Ramanatha, allowing a part of the consideration to remain in his hands, with that part, Ramanatha discharged the decree but he fraudulently obtained its transfer in favour of the respondent. This was his case and the first Court believing it, refused to recognize the transfer in favour of the respondent and dismissed his application, but somewhat strangely rejected also the application of Lakshmana. Both Lakshmana and the respondent being dissatisfied with these orders, filed appeals to the High Court. It found that defendant 1 did not make out his case and rejected his application and as a necessary consequence, recognized the transfer in favour of the respondent. The application for recording satisfaction was made on 31st July 1914, and the judgment of the High Court was pronounced on 23rd January 1917. The respondent contends that the fraud of defendant 1 having been only then discovered, the time began to run under S. 48, Cl. 2 (a), from that date.

I think I have stated the material facts and shall now proceed to consider the legal contentions raised.

Numerous cases have held that the word "fraud" in this provision should be liberally interpreted. In *Visalakshi Ammal* v. *Sivasankara Taker* (1), a fictitious transfer of his property made by a judgment-debtor, was held to amount to "fraud". In *Annamalai Goundan* v. *Rangaswami Chetti* (2), eluding service of warrant and making applications which had the effect of staying execution, was held to be "fraud." In *Venkayya* v. *Raghavacharlu* (3) lock-

(1) [1882] 4 Mad. 292.
(2) [1883] 6 Mad. 365.
(3) [1899] 22 Mad. 320=8 M. L. J. 79.

ing up the house so as to prevent attachment of moveable property was similarly held to be "fraud." In *Ramanathan Chettiar* v. *Mohideen Sahib* (4) it was again held that the evasion of arrest was "fraud" within the meaning of S. 48. Having regard to these and other similar rulings, the appellant's learned counsel did not contest the position that defendant 1's conduct in pleading a payment, found not to have been made, amounts to "fraud" under this section.

The question then is, does the fraud of defendant 1 extend the time even as against defendant 4 ? S. 48 cannot, in my opinion, mean that the fraud on the part of one judgment-debtor, gives a new starting point as against his co-debtors. The construction suggested for the respondent leads to manifest injustice. It is enacted by way of exception, that the judgment-debtor guilty of fraud cannot avail himself of the rule which says, that a decree shall not be executed after the lapse of the 12 years. Why should an innocent judgment-debtor suffer for the fraud of his co-debtor ? The view of Sundara Iyer, J., in *Abdul Khadir* v. *Ahammad Shaiwa Rowther* (5) which differed from that of Phillips, J., was upheld in the Letters Patent appeal by a Bench of three Judges : *Abdul Khadir* v. *Ahammad Shaiwa Rowther* (6). The following sentence embodies the opinion of Sundara Aiyar, J.:

"At any time, I am unable, against what appears to me to be the plain meaning of the words of the section, to hold that fraud by one judgment-debtor would give relief to the decree-holder against his co-judgment-debtor."

Sir Arnold White, C. J., says in his judgment at p. 423 in the Letters Patent appeal, in which the other two Judges concurred:

"It seems to me that there is not only no equity in favour of the judgment-creditor but that it would be inequitable that a judgment-debtor should be deprived of the benefit of the prescribed limitation by reason of acts done by his joint judgment-debtor, over whom he has presumably no control and for whose action he is not responsible."

It is argued for the respondent that the fraud here being of a different kind, the present case is distinguishable from the case cited. Defendant 1 in that case evaded arrest and it was held that his fraud did not give a fresh starting point as against defendant 2. The fraudulent act there could benefit only the party who committed it. But in the present case, it was falsely asserted that the decree became satisfied and that plea would enure to the benefit of not only the party who put it forward but also his cojudgment-debtors. This is the contention advanced, but the distinction adverted to does not affect the principle, namely, that it would be unjust that one party should suffer for the wrongdoing of another.

I may cite a Privy Council case *John* v. *Dodwell & Co.* (7) which though not a decision on the Limitation Act, is yet very instructive by analogy.

The respondents authorized the manager of their business at Colombo to draw cheques in their names upon their banking account for the purpose of the business. In 1909 and 1910 the manager bought shares on his own behalf through the appellants as brokers, and in payment of the price fraudulently gave them cheques drawn by him upon the respondent's account. The appellants received the amount of the cheques without fraud but with knowledge that the manager without apparent authority, was drawing for his own purposes upon the respondents' funds. The appellants paid over the proceeds of the cheques (except a small part) to the sellers of the shares. The respondents did not discover the fraud of their manager until October 1911. In January 1913, they sued the appellants in Ceylon to recover the amount of the cheques.

It was held that the claim fell within S. 11 of the Prescription Ordinance of Ceylon which allows a three year period in cases not expressly provided for, and that whether under English law or Roman — Dutch law as administered in Ceylon no new cause of action arose when the fraud was discovered, since the fraud was not that of the appellants nor of any person for whom the they were responsible. Viscount Haldane observes in his judgment thus :

"Mr. Upjohn, in arguing the case of the respondents with conspicuous fairness, drew their Lordships' attention to these pages in the Digest. They think that they illustrate a general principle, applicable in Ceylon or in England, that to enable the defence of concealed fraud to be relied on as giving a new cause of

(4) A. I. R. 1924 Mad. 836=80 I. C. 731.
(5) [1912] 35 Mad. 670=12 I. C. 679.
(6) [1915] 38 Mad. 419=30 I. C. 423.
(7) [1918] A. C. 563 = 87 L. J. P. C. 92 = 34 T. L. R. 261=118 L. T. 661.

action, the fraud must be shown to be the fraud either of the defendant himself or of some one for whose action in the matter in question he has assumed responsibility."

The Supreme Court thought that it was sufficient to show that the appellants had obtained the cheques from a person who had committed a fraud and concealed it, although they themselves had not been guilty of fraud. In coming to that conclusion, they were influenced by the decisions of the English Courts of Chancery such as that of Lord Eldon in *Huguenin* v. *Baseley* (8) who said, in his judgment :

"that he should regret that any doubt could be entertained whether it is not competent to a Court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence, of others."

Their Lordships of the Committee then point out that the doctrine of restitution of property by third persons deriving a benefit does not apply to a new cause of action arising from a concealed fraud. The law is tersely stated in the following passage :

"In the present case there is a statute of limitation and in order to escape from its application it is necessary to show that there is a subsequent and independent cause of action which arises from the concealment of the fraud. Such a separate cause of action arises, as their Lordships have already said, only out of the conduct of a person who is held to have been responsible for the fraud and has in breach of his duty concealed it."

I shall not cite any English cases recognizing this principle beyond merely referring to the judgment of Lord Alverston, C. J., in *McCallum In re*, *McCallum* v. *McCallum* (9). The respondent's contention that the fraud of defendant 1 gives rise to a new cause of action even as against defendant 4 by reason of his having derived a supposed benefit, is thus clearly untenable and must be rejected.

For the respondent it is next argued, that defendant 1 must be deemed to have been the agent of defendant 2-3 and that the fraud of the agent gives a fresh starting point as against the principal. The facts relied on for this argument are these: The decree was passed in 1913 on a promissory note executed by defendant 1 in 1910. The suit itself was filed in 1912. There was a partition in 1911 between Lakshmanan Chetty and Ramaswami Chetty. It contains no reference to the debt in question, but there is a general clause that each party is to be liable for his own debts. It is now argued that this deed makes defendant 1 liable for the debt in question and that by implication he must be deemed to have been constituted defendant 3's agent for paying it off. It is next asserted that the debt became merged in the decree of 1913, and that when defendant 1 falsely pleaded that it had been discharged, it must be deemed that he was acting not only on his own behalf but also on behalf of his principal defendant 3. We must point out that this contention has been for the first time raised in this Court. There is not a scrap of evidence to show that defendant 1 was the agent of defendant 3. The partition deed does not in the least avail the respondent. It merely accounts for defendant 3 not having taken any steps in regard to this decree. It did no more than provide that each of the executants was to be liable for his own debts and this debt was not even specified. When subsequently the decree was passed against both, defendant 3 as between themselves was in a position to say:

"The debt is not mine; I shall have nothing to do with it."

I fail to see how any agency can be implied from these facts. If the respondent wished to rely upon any such ground, he ought to have made below a specific allegation and proved it by evidence. This contention therefore must be rejected.

I shall now proceed to deal with the contention of res judicata raised. As I have pointed out in an earlier paragraph, the assignee decree-holder contends that defendant 4, by reason of a certain previous order, is now precluded from pleading that the execution is barred under the 12 year rule. If this contention fails, the further question does not arise, whether defendant 5 is also barred by res judicata on the theory of constructive representation. The respondent's argument on the point of res judicata I have already set forth. The order which is said to operate as res judicata is the one made on Execution Petition 1509 of 1927. It was filed on 1st November 1927, that is, more than 14 years after the date of the decree. On 4th January 1928, the Judge endorsed upon this the word "notice" and on 18th April 1928 he made the

(8) [1806] 15 Ves. 180=9 R. R. 148.
(9) [1901] 1 Ch. 143=83 L. T. 717=49 W. R. 129=70 L. J. Ch. 206.

final order "send." This means that the Judge directed the decree to be transmitted. The respondent's argument is that the order then made decides by implication, that the decree was in force on the date of the previous petition. His argument is so far sound, but how does it follow from this that the present application is not barred? Now let us look at the previous petition to find out what was decided on the former occasion. The application presented was in the prescribed tabular form. In the column headed "Date of decree" the respondent gave two dates: (1) 19th February 1913, (2) 23rd January 1917. This is obviously misleading. How can the decree have two dates? It may be stated (with the information we now possess) that the second date happens to be that, when the High Court recognized the assignment in his favour. Under no other column in this petition does he again refer to this date. Nor does his application contain any hint that it was on that date that his right was recognized. The Judge, as is usual in such cases, trusted to his clerks. They endorsed on the docket of the petition:

"D. D., 23rd January 1917;
D. L. P., 26th November 1924;
More than one year."

The Judge, without further scrutiny, ordered "notice." I may explain that D. D. means "date of decree" and D. L. P. stands for "date of last petition." The respondent having raised the point of res judicata for the first time in this Court no formal evidence is forthcoming as to what these symbols mean. What then happened is however quite manifest. As the Judge had no reason to suspect that the decree was not one of 1917 the only point that mattered was, what was the interval of time between the petition before him and the previous one? That being more than a year, the Judge, in the usual course, ordered notice, and defendant 4 having failed to appear on the due date and contest the petition, the Court ordered execution. Right or wrong this order involves the decision that the decree was then executable and defendant 4 is estopped in any proceeding from asserting the contrary.

But is there any implied finding either that there was fraud or that it was discovered on 23rd January 1917? There was not a word said about fraud; in deed, not the remotest suggestion of it. On the contrary, the decree-holder, misled the Court (wilfully or not, it matters little) into believing that the decree was passed in 1917. Are we now to assume that the previous order had the effect of holding that, contrary to patent facts, the proper date of the decree is 23rd January 1917? Fortunately, we are not asked to proceed on any such absurd hypothesis. It is not in regard to the date of the decree that the ground of res judicata is urged. But what the respondent contends is, that we must hold that in the previous order is involved the finding, that owing to fraud, the time was extended. This contention is utterly untenable. I may in this connexion refer to a circumstance which, in my opinion, is most significant. E. A. No. 831 of 1924 is one of the previous execution applications filed by the respondent. It was filed on 1st August 1924, that is before the expiry of 12 years from the date of the decree. In that petition, as in those that followed, he mentions the date of the decree as being 10th February 1913 as well as 23rd January 1917. The 12 year period not having then expired, it was inconceivable that the decree-holder was then relying upon any fraud. This shows how utterly futile the argument is, that by referring to the date 23rd January 1917, in the latter petition, (that is E. A. No. 1509 of 1927 filed on 1st November 1927) the decree-holder intended to rely upon the ground of fraud.

Having made this observation I shall now approach the question from a somewhat different standpoint. The previous application defendant 4 could have resisted by pleading limitation. Had he appeared in Court and said that the execution was barred, the matter would have been enquired into. That being then a defence open to him, the former order must be held to involve the decision that the application was not barred. He cannot now assert that the previous application was in fact barred by limitation. He is debarred from showing that and nothing more. Can the former order be said to involve any adjudication as to the starting point? The date of the previons petition is, as I have said, 1st November 1927. The order, for aught we know, might have proceeded upon the footing that the starting point was in

1915; even in which case the former petition of 1927 would be in time, but the present one of 1928 would not. Conversely, the previous order might similarly be said to involve that the starting point was somewhere in 1926, in which case it would be open to the plaintiff to contend that the decree would not be barred till 1938. In other words, the previous order is not inconsistent with there being an implied decision, that the starting point was any one of the numerous (365 by 12) days, that intervened between 1st November 1915 and 1st November 1927. The argument is clearly unsound and must be rejected.

"Certainty is essential for the application of the rule of res judicata and the Court would not prevent the re-agitation of a matter where it is not certain that the previous decision proceeded on a particular ground: *B. Bayyan Naidu* v. *B. Suryanarayana* (10):"

"If it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have been passed without indicating which of them was thus litigated, and upon which the judgment was rendered, the whole subject-matter of the action will be at large: *Russell* v. *Place* (11), quoted in *Vythilinga Mudaliar* v. *Ramachandra Naicker* (12):"

"Where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion, But . . . .'such a conclusion must be inevitable or it cannot be drawn' . . . If there is ambiguity . . . . . the matter is open to controversy in subsequent proceedings: *Munisami Naidu* v. *Ammani Ammal* (13)."

This principle of res judicata is applied also in *In re Alsop and Joy's Contract* (14).

I may also extract the following passage from the judgment of Mellish, L. J., in *In re Bank of Hindustan, China & Japan (Alison's case)* (15):

"It is clear I apprehend that the judgment of the Courts of Commom law is not only conclusive with reference to the actual matter decided but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered: *In re Bank of Hindustan etc.*, (15)."

Mr. T. M. Krishnaswami Aiyar for the respondent contends that any matter which might and ought to have been made a ground of defence on the former occasion should be deemed to have been directly and substantially in issue: see S. 11, Expl. 4, Civil P. C. I fail to see how this rule can help him. How could defendant 4 be expected to answer a charge of fraud not made? The rule refers to a ground of defence which might and ought to have been raised, but any such defence can relate only to a matter either expressly or impliedly alleged. Let me take an example: *A* sues *B* for the first instalment due under a bond, and though the claim on the face of it is barred, succeeds in obtaining an ex parte decree. Let us suppose that he could have relied on an acknowledgment in writing signed by *B*, but that it was not referred to for some reason in the plaint. He then brings a second suit for a subsequent instalment. Can he assert that the previous ex parte decision has impliedly decided that the writing produced then for the first time amounts to a valid acknowledgment? Can he contend that it was decided by implication in the former suit, that the writing furnishes the starting point from which limitation is to be computed? The answer is plainly in the negative. The present case does not differ in substance from this illustration.

The rule referred to, means this and nothing more, that defendant 4 was bound to resist the previous petition, on all the grounds possible for him to urge according to his knowledge at that time, at the risk of being debarred from relying on them in any subsequent proceeding. The application of the rule may be thus illustrated. *A*, a Hindu, dies leaving a widow and a brother, *B*. The widow sues *B* for recovery of certain property alleging that it was the self-acquired property of her husband. *B* alleges that the property was joint family property and that on the death of *A* he became entitled to it by right of survivorship. The Court finds that the property was the self-acquired property of *A* and decrees the widow's claim. Subsequently *B* sues the widow to recover the same property from her, claiming the same as a devisee under *A's* will. The suit is barred as res judicata, for *B* might and ought to have set up the claim under the will as a ground of defence in the former suit.

"When a plaintiff claims an estate, and that defendant, being in possession, resists that claim, he is bound to resist upon all the grounds

(10) [1913] 37 Mad. 70=17 I. C. 445.
(11) [1854] 2 W. R. 243=23 L. J. Ch. 441=18 Beaw 21=18 Jur. 254.
(12) [1904] 14 M. L. J. 379.
(13) [1905] 15 M. L. J. 7.
(14) [1889] 61 L. T. 213.
(15) [1873] 9 Ch. A. 1=43 L. J. Ch. 1=29 L. T. 519=22 W. R. 113.

that it is possible for him according to his knowledge then to bring forward. *Srimutt Rajah Moottoo Vijaya* v. *Katama Natchiar* (16)."

Similarly, the present defendant 4 cannot be permitted on any ground to show that the decree was not in full force on the date of the former petition. But what the respondent contends is something very different; he says that defendant 4 is debarred from showing that the decree is not alive when the present application was filed.

Let me go back to the example given. The first suit decided that the property belongs to *A's* widow and not to *B*. That is the decision in the suit and the relief granted is based on that decision. *B* cannot urge on any ground in a subsequent proceeding, that the property is his. Apart from the relief granted, there is an adjudication of the issue, express or implied, that *A* and *B* became divided. That question again is barred as res judicata. But to bring out the respondent's point, I shall vary the facts of this example. Suppose that *A's* widow was in a position to, but did not, rely upon a writing that evidences the separation she had alleged. She now brings a second suit to enforce a covenant in it by *B* to pay a stated sum to *A's* husband. *B* disputes the genuineness of that writing. Can it be maintained that the previous decision contains an implied finding in favour of this document? Such an argument is fanciful, but this is on all fours with what the respondent urges. The point does not admit of serious doubt, but I have dwelt upon it at this length, as the opposite of what I am holding has been very strongly contended for.

The respondent's contention fails on yet another ground. When the judgment-debtor has no sufficient notice of the right claimed against him; the order passed in execution proceedings cannot operate as res judicata. In *Narayana Pattar* v. *Gopalakrishna Pattar* (17) the notice to *B* on *A's* execution application did not specify that interest was claimed; held: that the order granting interest ex parte had not the force of res judicata, so as to estop *B* from disputing the claim in subsequent proceedings. To the same effect is the ruling in *Ramasami Naik* v. *Ramasami Chetty* (18). In *Sheik Budan* v. *Ramchandra Bhunigaya* (19) the application went beyond the terms of the decree and West, J.; observes:

"Such an order, prima facie, only of an executive character, could not possibly have the effect of res judicata, unless the judgment-debtor being called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, had then either failed in his contention to the contrary, or at any rate, allowed the judgment to go by default: see also *Chidambaram Chetti* v. *Kandasami Goundan* (20)."

The cases relied on by the respondent do not really help him. What they decide is, that the judgment-debtor is bound by the order previously made. He is precluded from showing that it is wrong. The cases generally deal with the three year rule of limitation. The starting point being the previous application, if that was by the former order held to be in time, the judgment-debtor cannot show that it was in fact barred. He is bound by the former decision right or wrong, and if the previous petition was in time, that furnishing the starting point, the second one filed within three years of it is necessarilly not barred. This is all that the rulings relied upon by the respondent decide. In the present case we are concerned with the twelve year rule of limitation. The point to note is that previous petition, unlike in the other case, does not furnish the starting point. To maintain that the present application is out of time the judgment-debtor has no need to show that the former order is wrong. He can accept it as right and still contend that the present petition is barred. This fundamental difference the argument of the respondent ignores. *Mungul Persahd Dichit* v. *Grija Kant Lahiri* (21) and *Rajah of Ramnad* v. *Velusami Thevar* (22) do not therefore support the respondents' contention. The same remark applies to *Rajit Giripathi* v. *Bhavani Shanker* (23). I fail to see what

(16) [1866] 11 M. I. A. 50=10 W. R. 1=2 Sar. 212 (P.C.).
(17) [1905] 28 Mad. 355=15 M. L. J. 247.
(18) [1907] 30 Mad. 255=17 M. L. J. 201.
(19) [1887] 11 Bom. 537.
(20) A. I. R. 1924 Mad. 1=74 I. C. 155=46 Mad. 768 (F. B.).
(21) [1882] 8 Cal. 51=8 I. A. 123=4 Sar. 249 (P. C.).
(22) A. I. R. 1921 P. C. 23=59 I. C. 880=48 I. A. 45 (P.C.).
(23) A. I. R. 1924 Mad. 673=80 I. C. 103=47 Mad. 641.

bearing any of the three following cases cited has on the point to be decided:

Govinda Menon v. *Krishna Mannadiar* (24), *Rama Kirpal* v. *Rup Kuari* (25) and *Beni Ram* v. *Nanhu Mal* (26).

The only decided case on the point is *Dakshinamurthi Pillai* v. *Vedamurthy Mudaliar* (27) to which my learned brother was a party. In that a contention similar to the one now alleged for the respondent was raised and was summarily rejected.

For the various reasons I have given, the ground of res judicata taken by the respondent fails.

If defendant 4 himself is not precluded from raising the plea, the question whether defendant 5 is so precluded on the principle of representation does not arise. Nor is it necessary, in the view I take, to deal with the point raised by the appellant that the application as against him is, in any event, barred by time as it was filed more than three years after his father's death.

In the result, the appeal of defendant 5 is allowed with costs throughout.

Madhavan Nair, J. — This appeal arises out of application E. P. No. 1028 of 1928 made by the assignee decree-holder in O. S. No. 10 of 1912 on the file of the Subordinate Judge's Court, Tuticorin, for the transmission of the decree for concurrent execution to the sub-Courts at Ramnad, Madura, Devakotta, Sivaganga and Dindigul as the properties of the defendants are situate within the jurisdiction of those Courts.

The decree was passed on 10th February 1913 and the application for transmission was presented on 1st October 1928, i. e., more than 12 years after the decree. The judgment-debtor objected that the execution of the decree was barred by S. 48 (1), Civil P. C., as more than 12 years had elapsed since the date of the decree and the decree-holder had made prior application for execution. The assignee decree-holder claimed exemption from the bar of limitation under sub Cl. 2 (a) of the section. The relevant portions of Cls. 1 and 2, S. 48, Civil P. C., are as follows:

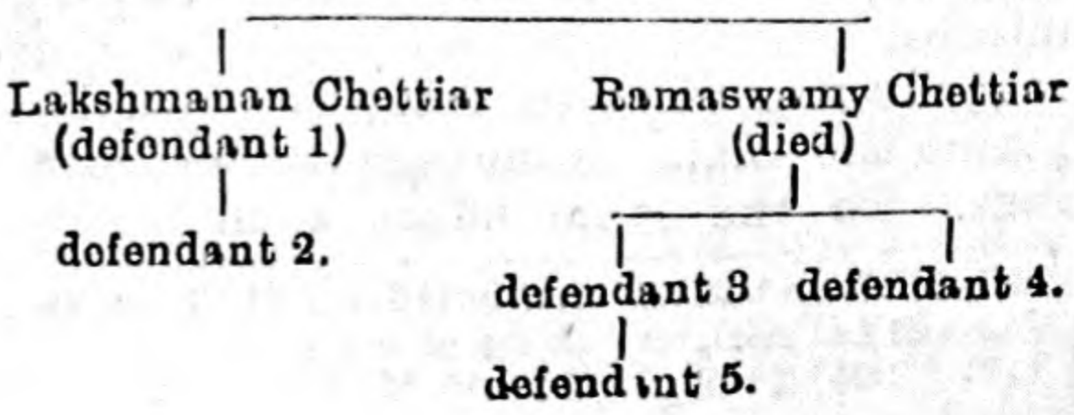
(1) "Where an application to execute a decree . . . . . has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed.

(2) Nothing in this section shall be deemed (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time immediately before the date of the application."

The contention of the assignee decree-holder in the lower Court was that his application was not barred by time as the execution of the decree was prevented by the fraud of defendant 1 definitely established on 23rd January 1917, i. e., "at some time within 12 years immediately before the date of his application," that is 1st October 1928, as required by Cl. 2, S. 48, Civil P. C. This contention was upheld by the lower Court and the transmission of the decree as prayed for was ordered.

This appeal has been filed by defendant 5 against that order. It may be stated here that in this Court the respondent, i. e. the assignee decree-holder, has not only relied on the contention urged in the lower Court, but has also sought to support the lower Court's order by raising another contention namely that the appellant is precluded from raising the present contention by a previous order dated 4th January 1928, passed by the Subordinate Judge on E. A. No. 1509 of 1927, dated 1st November 1927, for transmitting the decree for execution to the Madura Sub-Court.

To appreciate the arguments of the parties in all their fulness it is necessary to state a few facts. The plaintiff in O. S. No. 10 of 1912, one Srinivas Naick, obtained a decree for Rs. 28,283-12-0 due on a promissory note dated 15th September 1910, and executed by defendant 1 in favour of the plaintiff for Rs. 21,000. The decree was against defendant 1 and the family properties of all the defendants. There were four defendants to the suit. Defendant 5 was not a party to it. The relationship of the defendants to each other appears from the following table:



(24) A. I. R. 1928 Mad. 649=72 I. C. 397.
(25) [1884] 6 All. 269=11 I. A. 37=(1884) A. W. N. 286 (P. C.).
(26) [1885] 7 All. 102=11 I. A. 181 (P. C.).
(27) A. I. R. 1927 Mad. 842=103 I. C. 311.

Defendant 1 and the deceased father of defendants 3 and 4 are brothers. Defendant 2 is the son of defendant 1. Defendant 5, the present appellant, was brought on record in the course of the late execution application as the legal representative of defendant 3. After obtaining the decree the decree-holder, on 18th October 1913, filed E. P. No. 101 of 1913 for attachment and sale of the immovables of defendant 1. The sale was ordered, but it was stopped for want of proper bids on 30th July 1914. On 29th July 1914, the decree-holder assigned the decree in favour of the present respondent, i. e., the petitioner in E P. No. 1028 of 1928 for Rs. 25,000. On 31st July 1914, defendant 1 filed C. M. P. No. 330 of 1914, praying for recording full satisfaction of the decree. He stated that one M. L. M. Ramanathan Chettiar paid the money to the decree-holder on his behalf through his brothers-in-law Ramanathan Chettiar and Murugappa Chettiar and his agents in pursuance of an agreement made for the discharge of the decree debt and that the decree was thus entirely discharged. He also stated that he had learned that the said Ramanathan Chettiar, without taking a receipt, that the decree was fully discharged, had obtained the assignment of the decree in the name of a person who is his own man (see paras. 4 and 6 of the affidavit of defendant 1 in C. M. P No. 330 of 1914) meaning evidently the present respondent. On 22nd February 1915, the respondent, i. e., the assignee decree holder, filed E. P. No. 15 of 1915 for recognizing the assignment and for the attachment and sale of the immovables of defendant 1. Both the petitions, E. P. No. 15 of 1915 and C. M. P. No. 330 of 1914 were heard together by the Subordinate Judge and both were dismissed by him. The assignee decree-holder as well as defendant 1, preferred appeals against the order of the Subordinate Judge. In these appeals i. e., C. M. P. No. 307 of 1915 and C. M. A. No. 362 of 1915 the learned Judges of the High Court came to the conclusion that the probabilities

"are on the whole against the counter-petitioner's (defendant 1's) contention and in favour of the petitioner (assignee decree-holder)."

C. M. A. No. 362 of 1915 was therefore dismissed with costs and C. M. A. No. 307 of 1915 was allowed with costs. In the result, the petitioner in E. P. No. 15 of 1915 was recognized as the assignee decree-holder and the lower Court was directed to restore his petition to its file and proceed with the execution. A more detailed statement of the allegations of the assignee decree-holder and defendant 1 in their respective applications and of the findings of the Courts is not necessary for the purposes of this appeal, as it is conceded by the appellant that the High Court may be taken to have impliedly found in its order on C. M. A. No. 307 of 1915 and C. M. A. No. 362 of 1915 that fraud may be imputed to defendant 1, as any improper means resorted to, to prevent execution, has been held to be fraud within the meaning of Cl. 2, S. 48, Civil P. C. The date of the High Court's order is 23rd January 1917. This order is relied on by the assignee decree-holder to show that the judgment-debtor has by fraud prevented the execution of the decree on 23rd January 1917, i. e.,

"sometime within 12 years immediately before the date of the present application as required by Cl. 2, S 48 of the Code."

After the order of the High Court, the assignee decree-holder filed eight execution applications including the present one, all of which were petitions for transmission of the decree for execution to other Courts. It is not necessary to refer to all these applications for the purposes of this appeal but mention must be made of E. A. No. 1509 of 1927, dated 1st November 1927, the petition filed immediately before the present application, as the order made on this application is relied on to show that the appellant is precluded from raising the plea of the bar of limitation in the present application. The details of the application will be referred to later on. Before this application was filed defendants 2 and 3 had died. Defendant 1 was made the legal representative of the deceased defendant 2 and defendant 4 who was already on record, was made the legal representative of the deceased defendant 3 by application No. 1378 of 1924 by the assignee decree-holder. Defendant 1 has been now adjudged an insolvent. The order for transmission on E. A. No. 1509 of 1927 was passed on 4th January 1928 after notice to the defendants. As no steps were taken in the Madura Sub-

Court in pursuance of this order the records were returned and the assignee decree-holder filed the present application, E. A. No. 1028 of 1928 for again transmitting the decree to other Courts. Along with this application a civil miscellaneous petition was filed by the assignee decree-holder to implead the present appellant, styled therein defendant 5, as the legal representative of the deceased defendant 3. He is the son of defendant 3. The assignee decree-holder pleaded ignorance of this fact till now, and the learned Subordinate Judge, on the ground that the decree debt is binding on the estate of defendant 3 in the hands of defendant 5, directed him to be impleaded as defendant 3's legal representative and ordered the transmission of the decree as prayed for.

Defendants 2 and 3 having died, and defendant 1 having been adjudged an insolvent the defendants who contest the petition are defendants 4 and 5, and this appeal has been filed, as already mentioned, by defendant 5.

The first question that arises for consideration in this appeal is whether the "fraud" of defendant 1 can be availed of by the assignee decree-holder under Cl. 2, S. 48, Civil P. C., to claim exemption as against the other defendants from the bar of limitation enacted by Cl. 1 of the section. The learned District Judge answered the question in the affirmative as the fraud practised by defendant 1 and the obstruction to execution caused by him enured to the benefit of the other defendants, and inasmuch as by such fraud the decree-holder was not able to execute the decree. It is argued on behalf of the appellant that the judgment-creditor in this case, the assignee decree-holder, could claim the benefit of Cl. 2 of the section only as against the judgment-debtor who had by force or fraud prevented the execution of the decree, i. e. defendant 1, and not as against the other defendants. On the other side it is contended that, in a case like the present one, where the joint judgment debtor has by fraud prevented the execution of the decree, the judgment-creditor can claim exemption under the proviso not only against that judgment-debtor but also against the other judgment-debtors who have not prevented the execution of the decree by the commission of any such fraud. The question is not free from difficulty; but so far as this Court is concerned, the point is clearly covered by authority: see *Abdul Khadir* v. *Ahammad Shaiwa Ravuthar* (6). In that case, as in the one before us, a creditor obtained a joint and several decree against two judgment-debtors, defendants 1 and 2. Defendant 1 prevented by fraud the execution of the decree at some time within twelve years immediately before the date of the application to execute the decree. Defendant 2 did not commit any fraud nor was he a party to the fraud committed by defendant 1. The case first came up for decision before a Bench of two Judges, Sundara Ayyar and Phillips, JJ.: see *Abdul Kadir* v. *Ahammad Shaiwa Rowther* (5), but owing to a difference of opinion between them Sundara Ayyar, J., holding that execution was barred as againt defendant 2, and Phillips, J., holding that execution was not barred as against both, an appeal was preferred under Art. 15, Letters Patent. The case then came up for decision before a Bench of three Judges: Sir Arnold White, C. J., Sankaran Nair and Tyabji, JJ. The learned Judges agreed with the opinion of Sundara Ayyar, J., and held that the application in that case was barred as against defendant 2, i. e. the judgment-debtor who did not commit the fraud nor was a party to it.

In support of his conclusion, the learned Chief Justice, with whom the other Judges agreed, relies on the use of the expression "judgment-debtor" in the singular number in Cl. 2. This is what he says:

> "Now, the words are "the judgment-debtor." No doubt the expression "judgment-debtor" in the singular includes the plural. But as it seems to me it includes the plural in this sense: "where the judgment-debtor has, or if there are two or more judgment-debtors the judgment-debtors have, by fraud or force, prevented the execution of the decree, etc." That construction of the section is in accordance with the literal meaning of the words and with the well-known principle of construction, which is now embodied in the statute, that the singular includes the plural."

It is pointed out in the judgment that if we accept the other conclusion suggested, then we would be reading into the section a great deal which is not there and doing violence to the express language of the section. The argument that the construction of the section accepted by the Judges would be inequit-

able to the decree-holder is met with this observation:

"It seems to me that there is not only no equity in favour of the judgment-creditor but that it would be inequitable that a judgment-debtor should be deprived of the benefit of the prescribed limitation by reason of acts done by his judgment-debtor, over whom he has presumably no control and for whose action he is not responsible."

I think the reasoning adopted by the learned Chief Justice and the general considerations referred to in his judgment may well be applied to the facts of the case before us. I can see no reason why the fact that benefit has accrued to the joint judgment-debtors by the fraud of one of them with which they had nothing to do should be a reason for exempting a judgment-creditor from the bar of limitation as against those judgment-debtors. It was open him to proceed against them in spite of the fraud of the particular judgment-debtor. His inactivity, for which he now claims exemption was not brought about by their conduct. As the learned Chief Justice points out in the passage already quoted, it is inequitable that one judgment-debtor should be deprived of the benefit of the law by acts done by his joint judgment-debtor over whose action he has no control. It seems to me that, on principle, as well as on authority, the contention of the appellant should be upheld. I do not think that the decision in *Abdul Khadir* v. *Ahammad Shaiwa Rawthar* (6) is distinguishable on the ground that the fraud of defendant 1 in that case, which consisted in evading the execution of the warrant of arrest taken out against him was purely a personal one and resulted only to his exclusive advantage and not to the advantage of the other judgment-debtor. The judgment is clearly not based on any such special consideration, but on general principles and on the natural meaning of the words used in the section. In this connexion attention may be drawn to the decision in *Thorne* v. *Heard and Marsh* (28). That case dealt with S. 8, Trustee Act of 1888, 51 and 52 Vict. C. 59, and exemption was claimed under the section from the operation of the Statute of Limitations on the ground that the person proceeded against was guilty of acts of fraud. In the course of the judgment, Lord Davey made the following observations:

"I only desire to say this: In my opinion, if fraud,, or a nondiscovery of fraud, is to be relied on to take a case out of the Statute of Limitations, it must be the fraud of or in some way imputable to the person who invokes the aid of the Statute of Limitations."

If I may respectfully say so, I think this observation embodies a general principle and may well be applied in interpreting the expression "fraud of the judgment-debtor" in Cl. 2, S. 48, Civil P. C., though the decision having regard to its facts has no direct bearing on the case before us. I would therefore hold that the fraud of defendant 1 in this case cannot be availed of by the assignee decree-holder to claim exemption from the bar of limitation as against defendant 3 and consequently as against his legal representative, defendant 5 also.

I shall now refer to another plea urged by the respondent to make defendant 3 liable on account of the "fraud" of defendant 1 and that is, that defendant 1 must be considered to have been the agent of the defendants for taking the necessary steps for the discharge and satisfaction of the decree and that therefore the fraud committed by him must be attributed to the principals, as he, their agent, must be considered to have acted within his authority when he committed the fraud. It is impossible in this appeal to give any serious attention to this argumsnt. The question of agency is a mixed question of fact and law very largely depending upon the evidence in the particular case. This question which is now very strongly urged was not put forward in the lower Court. There is no trace of it in the lower Court's judgment and the materials now put before us are not by any means sufficient to arrive at a decision on the question. In suppert of the plea that defendant 1 must be considered to be an agent of defendant 3 reliance is placed upon the counteraffidavit of the present appellant, filed by him in the civil miscellaneous application put in the lower Court along with E. P. No. 1028 of 1923 to make him the legal representative of defendant 3: para. 3 of this affidavit to which our attention was drawn is as follows:

". . . . . Defendant 1 is the divided uncle of defendant 3, and under the registered deed of partition between defendant 3's father and defendant 1, the present debt has to be paid exclu-

(28) [1855] A. C. 495=64 L. J. Ch. 652=44 W. R. 155=73 L. T. 291=11 R. 254.

sively by defendant 1. The decree-holder was aware of the deed of partition and the undertaking under it of defendant 1."

In this paragraph the appellant was pointing out to the petitioner that there was no purpose in conducting execution proceedings against defendant 3 as the debt covered by the decree had to be paid according to the partition arrangement by defendant 1 exclusively and so in justice the discharge of that debt was his exclusive duty and that though the decree is a joint decree, defendant 3 should not be troubled with its performance. What is urged is that the debt is the personal debt of defendant 1 which only defendant 1 should be called upon to pay. This does not by any means show that defendant 1 has been constituted an agent for the payment of the decree debt by defendant 3 or the other defendants. On the contrary the statement in the paragraph negatives any idea of agency. No other paragraphs in the affidavit have been referred to in support of the present contention. No question of agency was suggested in the affidavit filed by the assignee decree-holder and I can find no reference to it in the counter affidavit filed by defendant 5. The partition deed referred to has not been filed in these proceedings; but we were invited to look into some paragraphs of it to find out the nature of the debt referred to in the counter affidavit. Neither party has been able to give an intelligible explanation as to what this deed says about this debt. On these flimsy and unsatisfactory materials it is impossible to decide whether defendant 1 acted as the agent of the third and other defendants with regard to the satisfaction of the decree. The appellant points out that, throughout the course of these proceedings, neither defendant 3 nor defendant 4 at any time acted in unison with defendant 1. In all the execution proceedings prior to E. P. No. 15 of 1915 and C. M. P. No. 330 of 1915 all the four defendants were parties; but in the proceedings relating to E. P. No. 15 of 1915 and C. M. P. No. 330 of 1915, in which the fraud of defendant 1 was established, defendants 3 and 4 did not appear either in person or by pleader. I have no doubt that the argument that defendant 1 should be deemed to be the agent of defendant 3 and the other defendants is purely an afterthought and has therefore been urged here for the first time. In this view there is no need to discuss the numerous cases that were brought to our notice to show that defendant 3 is liable on account of the fraud of defendant 1 on the ground that he is his agent.

The next argument raises the question whether the principle of constructive res judicata referred to in Expl. 4, S 11, Civil P. C., can apply to execution proceedings; and whether the appellant is precluded from raising the plea of the bar by limitation put forward by him by reason of the fact that he had opportunity of raising the same objection in the proceedings in E. P. No. 1509 of 1927 dated 1st November 1927, but had failed to do so. In that application as in the present one, the assignee-decree-holder requested the Court to transmit the decree for execution to another Court. The application contained the usual particulars required to be mentioned under O. 21, R. 11 and S. 39, Civil P. C. It is not necessary to describe the contents of this application, but reference may be made to para. 3 of the application wherein the date of decree is given, as this is important in connexion with the argument relating to constructive res judicata. The following details appear in para. 3 against the heading "date of the decree": 10th February 1913.

3. Date of the decree.

23rd January 1917,

To this application defendant 4 was a party not only on his own behalf, but also as the legal representative of his deceased brother, defendant 3, but defendant 5, the present appellant was not a party at he had not been brought on record as the legal representative of defendant 3 at that date. The following endorsements made by the Court appear on the back of the application:

Order 21, R. 25.
DD. 23rd January 1917.
DLP. 28th November 1924.
More than a year.
Notice by 4th January 1928.
25th November 1927. (Judge's signature).

There was some discussion at the Bar as to what D D and D L P meant. D D refers obviously to the date of the decree (see Col. 3 of the application) and D L P means the date of the last application which was, E.A. No. 1378 of 1924, dated 28th November 1924. The copy of the notice sent to the judgment-debtors has not been produced; but it may be taken

to be the usual notice under O. 21, R. 22, Civil P. C., as required by R. 138, Civil Rules of Practice which states that in an application for transmission notice of the application shall be given in all cases in which under O. 21, R. 22 notice of application for execution is required. Under O. 21, R. 22, the Court executing the decree is directed to issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. We may take it therefore that the notice sent to defendant 4 in this case simply asked him to show cause on a specified date why the decree should not be executed against him. On the day fixed for hearing, the judgment-debtors on whom the notice had been served did not appear, and the Court passed an order 'Send' as appears from the endorsement on the back of the application. Afterwards nothing further was done on this application. It is on this application and the order passed on it that the argument of constructive res judicata is based by the respondent.

The provisions of the Civil Procedure Code having a bearing on the question are S. 11 and Expl 4 to that section which run as follows:

Section 11:

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, and litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation 4:

"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Having regard to these provisions the respondent puts his argument in this way: on the receipt of the notice issued to him to show cause why the decree should not be executed, defendant 4 had an opportunity of appearing before the Court and pleading that the execution of the decree was barred at that date under S. 48, Civil P. C., as the application for execution was presented 12 years after the decree and that the assignee decree-holder could not rely on the fraud of defendant 1 to claim exemption from the bar of limitation against the other judgment-debtors; and since he failed to raise this plea which he ought to have raised as a ground of defence, it should be presumed that the Court when it passed the order 'send' finally decided the question of limitation against the judgment-debtors thereby holding impliedly that fraud within the meaning of Cl. 2, S. 48, was found to have been committed by defendant 1 on 23rd January 1917 and that by his fraud the execution of the decree was prevented against all the judgment-debtors and that the assignee-decree-holder has a period of 12 years to execute the decree commencing from 23rd January 1917. It is argued that since all these matters should be deemed to have been decided by the Court when it passed its order 'send' in E. P. No. 1509 of 1927, it is not open to defendant 4 to raise those very contentions in the present application having regard to Expl. 4, S. 11, Civil P. C. It is further urged that since defendant 4 who represents the estate of the deceased defendant 3 is precluded from raising the above contentions, defendant 5 the present appellant is also bound though he was not a party to E.P. No. 1509 of 1927 since he also is a representative of the deceased defendant 3 and the estate which he represents should be deemed to have been sufficiently represented by defendant 4 when the Court passed its order so as to make that order binding on the estate, i. e., on all its representatives. This means that the previous order becomes binding on the present appellant through defendant 4. The appellant meets these contentions with the argument that the rule of constructive res judicata as explained in Cl. 4, S. 11, Civil P. C., does not apply to execution proceedings, that the order on E. P. No. 1509 of 1927 has not impliedly decided that the starting point of limitation is 23rd January 1917, and that even if defendant 4 is bound by the order, the appellant, defendant 5 is not in any way bound by it. I shall deal with both these arguments separately.

On the question whether the principle of constructive res judicata as contained in Cl. 4, S. 11, Civil P. C., applies to execution proceedings, the following decisions of the various High Courts were brought to our notice: *Lakshmanan*

Chetty v. *Kuttayan Chetty* (29), *Narayana Pattar* v. *Gopalakrishna Pattar* (17), *Ramasami Naik* v. *Ramasami Chetty* (18), *Allupati Kopila Patro* v. *Allupati Kasinadha Patro* (30), *Somasundaram Pillai* v. *Chokkalingam Pillai* (31), *Subramania Aiyar* v. *Raja Rajeswara Dorai* (32), *Chidambaram Chetti* v. *Kandasami Goundan* (20), *Nachiappa Chettiar* v. *Subbier* (33), *Kandaswami Chettiar* v. *Maruda Pillai* (34), *Govinda Menon* v. *Krishna Mannadiar* (24), *Rajit Giripathi* v. *Bhavani Shankar* (23), *Kaliya Perumal Naidu* v. *Subramanian Chettiar* (35), *Lakshmanan Chetty* v. *Palaniappa Chetty* (36), *Subramanian Chettiar* v. *Ramanathan Chettiar* (37), *Sheik Budan* v. *Ramchandra Bhunjgaya* (19), *Mahadeo* v. *Trimbakbhat* (38), *Ramchandra Venkatesh* v. *Shrinivas Krishna* (39), *Gadigappa Chanbasappa* v. *Shidappa Gurushidappa* (40), *Kishan Sahai* v. *Aladad Khan* (41), *Behari Lal* v. *Majid Ali* (42), *Kalian Singh* v. *Jagan Prasad* (43), *Kalian Singh* v. *Jagan Prasad* (44), *Phul Chand* v. *Kandhya Lal* (45), *Shco Mangal* v. *Hulsa* (46), *Dwarka Das* v. *Muhammad Ashfaqullah*(47),*Dip Prakash* v. *Dwarka Prasad* (48) and *Prithi Mahton* v. *Jamshed Khan* (49).

There is no question that the general principles of law underlying the doctrine of res judicata apply to execution proceedings. This has been decided in a series of cases by the Privy Council: see *Delhi and London Bank Limited* v. *Orchard* (50), *Rama Kirpal* v. *Rup Kuari* (25) and *Beni Ram* v. *Nanhumal* (26) in the leading case of which *Rama Kirpal* v. *Rup Kuari* (25) the following observations occur in the judgment delivered by Sir Barnes Peacock :

"The question (if the term "res judicata" was intended as it doubtless was, and was understood by the Full Bench to refer to a matter decided by a Court of competent jurisdiction in a former suit) was irrelevant and inapplicable to the present case. The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties in every proceeding in that suit, or as a final judgment in a suit is binding upon them in carrying the judgment into execution. The binding force of such a judgment depends, not upon S. 13, Act 10 of 1877, but upon general principles of law. If it were not binding, there would be no end to litigation."

In England the principle of res judicata has been applied to proceedings in the same suit: see *Pearth* v. *Marriott* (51). In that case in the Court of Appeal Jessel, M. R., observed thus :

"What is the meaning of res judicata ? It is a decree inter partes on the same subject."

And whether the adjudication operates as a bar in proceedings had in continuation of the same suit or in a separate and distinct suit, the effect is the same: the matter passes in rem judicatum.

The decisions of the Privy Council show that, though S. 11, Civil P. C., does not in terms apply to an execution proceeding because the question arises in the same suit and not in a second suit; the general principles of law on which the section is based should be held to apply to execution as otherwise there would be no end to litigation. I think for the same reason the principle underlying Expl. 4 to the section should also be held applicable to execution proceedings. It is hardly necessary to mention this specially, as Expl. 4 is only an amplification of S. 11 and both the section and the explanation are based on the same general principles of law that a matter once decided by a competent Court should not be agitated again between the same parties ; but I am drawing special attention to it because it was very strenuously argued before us that the principle underlying the doctrine of res judicata, when applied to execution pro-

(29) [1901] 24 Mad. 669.
(30) [1907] 17 M. L. J. 310.
(31) [1917] 40 Mad. 780=38 I. C. 806.
(32) [1917] 40 Mad. 1016=38 I. C. 627.
(33) A. I. R. 1923 Mad. 505=72 I. C. 820=46 Mad. 506 (F.B.).
(24) A. I. R. 1924 Mad. 145=76 I. C. 761.
(35) A. I. R. 1928 Mad 203=109 I. C. 866.
(36) A.I.R. 1928 Mad. 1052=116 I.C. 368.
(37) A. I. R. 1929 Mad. 199=116 I.C. 113.
(38) [1919] 50 I.C. 972.
(39) A. I. R. 1922 Bom. 238=66 I. C. 940=46 Bom. 467.
(40) A. I. R. 1924 Bom. 495=83 I. C. 155=48 Bom. 638.
(41) [1891] 14 All. 64=(1891) A.W.N. 231.
(42) [1897] 24 All. 138=(1897) A.W.N. 29.
(43) [1915] 27 I.C. 950.
(44) [1915] 37 All. 589=30 I.C. 523.
(45) A. I. R. 1922 All. 247=65 I. C. 295=44 All. 130.
(46) A. I. R. 1922 All. 413=65 I. C. 377=44 All. 159.
(47) A. I. R. 1925 All. 117=80 I. C. 722=47 All. 86.
(48) A. I. R. 1926 All. 71=90 I. C. 83=48 All. 201.
(49) A. I. R. 1922 Pat. 289 = 67 I. C. 656 = 1 Pat. 593.
(50) [1877] 3 Cal. 47=4 I. A. 127 = 3 Sar. 721 (P. C.)
(51) [1883] 22 Ch. D. 182.

ceedings, should strictly be confined to cases where the question at issue was expressly decided in the prior application as in the Privy Council cases just noticed and should not be extended to cover cases where the question at issue may be said to have been impliedly or constructively decided in the course of the prior application. In other words, the argument is that the principle underlying Expl. 4, S 11, Civil P. C., should not be applied to execution proceedings at all. It is clear to me that though there may be found statements in support of this position in some of the judgments of our High Courts, the decisions of the Privy Council do not lend any support to this contention. In my opinion this contention is clearly untenable in view of the decisions of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (21) and *Rajah of Ramnad* v. *Velusami Thevar* (22) which directly bear on this question.

In *Mungal Pershad Dichit* v. *Grija Kant Lahiri* (21),the leading case on this point, the Judicial Committee held that:

"although the execution of a decree may have been actually barred by time at the date of an application, made for its execution, yet, if an order for such execution has been regularly made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid,"

and binding on the parties in subsequent proceedings in execution. The order which was held to have the force of res judicata in the subsequent proceedings is referred to at p. 59 in the report in these terms:

"Here an order for attachment was made by the Subordinate Judge on 8th October 1874, after notice served on the judgment-debtor on 23rd September 1874, to show why the decree should not be executed against him. The order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made."

It is clear from the judgment that the question whether the petition was barred by limitation, was not raised and expressly decided when the prior order was passed, but their Lordships held that since there was an order passed against the judgment-debtor the point must necessarily be taken to have been decided against him by implication.

In *Rajah of Ramnad* v. *Velusami Thevar* (22) when an assignee of a decree applied to be brought on the record and to have the decree executed, execution was allowed though the judgment-debtors resisted the application on the ground that it was barred by limitation. In the order granting execution the plea of limitation was not expressly dealt with. It was held by their Lordships that in a subsequent application the plea of limitation could not be raised, for it must be taken to have been decided in the order on the prior application. In that case no doubt the plea of limitation was taken but their Lordships remark:

"It was not only competent to the present respondents to bring the plea forward on that occasion, but it was incumbent on them to do so if they proposed to rely on it, and moreover it was in fact brought forward and decided upon. No appeal was from the order then made, and therefore it was not competent for the Subordinate Judge to admit the plea on subsequent proceedings or to consider it in his order of 31st March 1917."

As remarked by Fawcett, J., in *Gadigappa Chanbasappa* v. *Shidappa Gurushidappa* (40):

"The judgment of their Lordships (of the Privy Council) mainly proceeded on the ground that the respondents ought to have raised that defence, and that not having done so and having lost that opportunity they could not be allowed to raise the plea in the subsequent proceedings. It is only as a strengthening of the argument that Lord Moulton says: "Moreover it was in fact brought forward and decided upon"; and even taking the main argument as obiter dictum, it is clearly entitled to very great weight."

I think this case demolishes completely the argument of the appellant that the principle of Expl. 4, S. 11, should not be applied to execution proceedings.

In Madras, Expl. 4 has always been applied to execution proceedings. In the latest decision, in *Rajit Giripathi* v. *Bhavani Sankar* (23), full effect is given to the Privy Council decision in *Rajah of Ramnad* v. *Velusami Thevar* (22). The Bombay High Court also has in its latest decision in *Gadigappa Chanbasappa* v. *Shidappa Gurushidappa* (40), applied Expl. 4 to execution proceedings, though in some of its prior decisions [see *Mahadeo* v. *Trimbakbhat* (38) and *Ramchandra Venkatesh Sholapur* v. *Srinivas Krishna Kulkarni* (39)], it showed an inclination to hold that the principle of res judicata applied to execution proceedings does not necessarily involve the result that the point which is not heard

and, decided but which might and ought to have been raised, must be treated as necessarily decided as under S. 11 of the Code. The Allahabad High Court also has held [see its latest decision *Dip Prakash* v. *Dwaraka Prasad* (48)], that the principle of Expln. 4, S. 11 would apply to execution proceedings, though in some of its earlier decisions, such as *Kalyan Singh* v. *Jagan Prasad* (44), Letters Patent appeal against *Kalian Singh* v. *Jagan Prasad* (43) and *Sheo Mangal* v. *Hulsa* (46), it expressed opinions to the contrary. The observation in *Prithi Mahton* v. *Jamshed Khan* (49) that the special rules laid down in Expl. 4, S. 11, which goes beyond the doctrine of res judicata, ought not to be applied generally to execution cases, is obiter.

It follows from the above decisions that, though neither S. 11, Civil P. C., nor any of its explanations, can in terms apply to an execution proceeding because the question arises in a proceeding which is a continuation of the same suit, and not in a second suit, yet where a point has been decided in execution by a competent Court after notice to the counter-petitioner either expressly or by necessary implication, that decision is binding upon the parties in subsequent execution proceedings. We in this case are concerned only with the latter part of this rule which has special reference to what is generally, though inaccurately, called the doctrine of constructive res judicata. Where a point has been decided expressly in a prior proceeding, obviously there cannot be much difficulty in applying the principle of res judicata ; but the difficulty arises where the point has not been directly decided but is to be deemed to have been by implication decided when the order was passed, as he who ought to have raised the point in defence failed to do so when he had an opportunity of doing it. This is the reason why in various cases learned Judges have observed that the principle of constructive res judicata should be applied with great caution in execution proceedings and, this is also the reason why decisions of the same Court on similar points sometimes appear to be inconsistent. Pitfalls in the application of the rule of constructive res judicata in execution proceedings may be avoided if, as pointed out in *Subramania Ayyar* v. *Raja Rajeswara Dorai* (2), we keep steadily in view the principle that the party who is sought to be affected by the bar of res judicata should have notice of the point likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision. The following decisions of our Court will serve as illustration to this rule. In *Narayana Pattar* v. *Gopalakrishna Pattar* 17) an application was made for restitution, claiming interest thereon at 12 per cent. The notice served on the respondent in the proceedings did not contain any intimation of the claim for interest. Execution was ordered by way of arrest, but as process was not paid no further action was taken. When the applicant again moved the Court the respondents who did not appear on the first occasion appeared and objected to the grant of interest. It was held that the notice issued to them, such as it was was insufficient to fix them with the knowledge of the claim for interest and thereby bar them raising any controversy in the matter on their failing to appear on the day fixed. Following this decision, it was pointed out in *Ramasami Naick* v. *Ramasami Chetti* (18) that where application is not for the execution of something which has been directed to be done by any decree or order so as ipso facto to carry information as to what the claim made and the relief prayed for are, notice to the judgment-debtor without inserting the specific prayers will not render the order made upon such application res judicata : see also *Chidambaram Chetti* v. *Kandasami Goundan* (20).

I shall now consider how far the appellant in the present case is precluded from raising his present contentions by the order "send" passed in E. P. No. 1509 of 1927. It is said that he ought to have resisted the passing of that order when he received the notice of the application, and because he failed to do so he should not be allowed to raise his present contentions. I have already drawn attention to the notice served upon defendant 4. There is no reference in it to S. 48, Civil P. C , nor is there any indication in it that the assignee decree-holder intended to rely on the fraud committed by defendant 1 to claim against him and all the others exemption from the 12 years' rule of limitation. That petition was filed within three years of

the prior application. No one could have known at that time what use the assignee decree-holder was going to make of the date 23rd January 1927, mentioned in it as one of the dates of the decree in column 3. Did he really intend to treat it as the date of the decree, or did he intend then, as he now argues, to indicate by it that he was going to rely on the fraud of defendant 1 under Cl 2, S. 48, Civil P. C., or did he intend to treat it as the starting point of limitation in some other way? There was not a suggestion of fraud on the part of defendant 1 in the notice sent to defendant 4.

In what light is the insertion of the date 23rd January 1917, in that application to be understood? It is clearly not the date of the decree, for we know, and column. 3 also states it, that the date of the decree is 10th February 1913. There could have been therefore no mistake about the date of the decree nor do I think it is possible to hold that the decree-holder should have necessarily intended, by inserting that date, to show that he was referring to the fraud of defendant 1 which would entitle him to claim exemption from the bar of limitation as against the other defendants. This becomes quite obvious from the fact that E. P. No. 831 of 1924, also a prior execution application which was filed within 11 years after the decree—the 23rd January 1917—is referred to in Col. 3 along with the other two dates, the only difference being that on this occasion these are described as "decree numbers" instead of the "date of the decree" as in E P. No. 1509 of 1927. The importance of this application lies in the fact that at that time there was no need for the assignee decree-holder to draw any attention to the fraud of defendant 1 or to S. 48, Civil P. C., as the application, being within 11 years after the date of the decree, was not barred by the 12 years' rule of limitation. The mention of this specific date was in no way of any use to the assignee decree-holder at that time; and yet he referred to it then and repeated it again in E. P. No. 1509 of 1927. But it is clear to my mind that he did not till this moment intend to use it for the specific purpose to support which he uses it now. Why should we be asked to assume that 23rd January 1917, should necessarily be repeated as the date of the fraud? As pointed out by the appellant it was open to the assignee decree-holder, if he intended then, to make use of Cl. 2 in his favour to assign the fraud to any date during the period of the 12 years immediately prior to the date of E. P. No. 1509 of 1927 commencing from 1915. The appellant is not expected to imagine a possible case that might be put forward on behalf of the assignee decree-holder and to answer it in response to the notice which gave no indication whatever as to what the decree-holder was going to argue in respect of this point. In these circumstances it is impossible to hold that the order on the prior execution application impliedly decided that owing to the fraud of defendant 1 the assignee decree-holder obtained an extension of 12 years to execute the decree from 23rd January 1917. The notice simply stated why the decree should not be executed against him; there was absolutely nothing in the notice to show that the assignee decree-holder was contemplating to invoke the aid of S. 48, Cl. 2, Civil P. C., in his favour. If the notice served by the respondent had alleged fraud as a ground for claiming exemption from the bar of limitation, then his argument, that the appellant should have raised his present contention in E. P. No. 1509 of 1927 should cer ainly prevail. It is obvious that the ground of defence that a party ought to raise in the application of the rule of constructive res judicata can have reference only to the matter alleged against him as a ground of attack. With respect to that all the grounds of defence that he has should be pleaded. As fraud was not referred to in the prior proceedings it cannot be said that the appellants ought to have then raised with respect to it all his present defences within the meaning of the rule in Expl. 4, S. 11.

As he failed to oppose the application on the receipt of the notice it is not open to defendant 4 now to plead that the application, E. P. No. 1509 of 1927 is barred by the 12 years' rule; the order then passed impliedly decided that the decree was then executable and defendant 4 cannot be allowed to urge that that order was wrong in any subsequent proceeding. To that extent the bar of res judicata will operate against him; but that does not mean that he is precluded from contending that the present execu-

tion application is affected by the 12 years' rule. For the reasons already mentioned, the order then passed cannot be interpreted as involving any decision as regards the starting point of limitation. It is not necessary for maintaining the present application that the appellant should prove that the order on the prior application was wrong. This feature distinguishes the present case from *Mungul Pershad Dichit* v. *Girja Kant Lahiri* (21) where the only point for decision whether the decree was barred by the three years' rule of limitation was held to have been impliedly decided in the order on the prior application. In this connexion attention may be drawn to the decision of this Court in *Dakshinamurthy Pillai* v. *Vedamurthy Mudaliar* (27). In that case the decree of the High Court, which was sought to be executed, was dated 23rd February 1911. One of the questions was whether E. P. No. 150 of 1924, dated 4th April 1924, was within time. It was argued that since in a prior E. P. No. 130 of 1923, dated 18th July 1923, which was also put in more than 12 years from the date of the decree, no objection on the ground of limitation had been taken by the appellant, he was barred by res judicata from pleading that bar to any subsequent execution petitions but the argument was not accepted and the Court made the following observation in the judgment which may well be applied to the present case also :

"All that was implicitly decided on E. P. No. 139 of 1923 was that that petition was not barred by the 12 years' rule. That decision cannot for ever remove the operation of S. 48, Civil P. C., out of the way of all future execution petitions."

It follows therefore that defendant 4 is not barred by the plea of constructive res judicata from raising his present contentions.

The law is well settled that a prior decision to have the force of res judicata must not be wanting :

"in that certainty which is an essential element in the case of every estoppel : see *Vythilinga Mudaliar* v. *Ramachandra Naickar* (12) and *Munusami Naidu* v. *Ammal* (13)."

As pointed out in *Bommidi Bayyan Naidu* v. *Bommidi Suryanarayana* (10)

"certainty is essential for the application of the rule of res judicata and the Court would not prevent the re-agitation of a matter where it is not certain that the previous decision proceeded on a particular ground: see also *In re Bank of Hindustan, China and Japan* (*Alison's case*) (15)."

Sir J. Mollish, L. J., observed:

" . . . . that the judgment of the Courts of Common law is not only conclusive with reference to the actual matter decided, but that it is also conclusive with reference to the grounds of the decision, provided that from the judgment itself the actual grounds of the decision can be clearly discovered."

In this case it is clear from what I have said that it is impossible to state, with any precision, the ground or grounds on which the decision as regards limitation implied in the order 'send' passed on the prior application is based, i. e., whether it is based on the ground that the date of the decree is 23rd January 1917, which it is not or whether defendant 1 committed fraud on that date or at some other time during the 12 years prior to that application or on the ground that the date 23rd January 1917, marks the starting point of limitation for some other reasons. As the particular ground on which the prior decision proceeded is not certain, that decision cannot have the force of res judicata on this additional ground also.

As defendant 4 is not barred by res judicata from raising the present contentions, the question whether defendant 5 though not a party to E. P. No. 1509 of 1927 is also affected by the rule of res judicata from raising the present contentions by virtue of the representation by defendant 4 of the estate of defendant 3 in the prior proceedings does not arise for consideration.

It follows from what has been said above that the present appellant, i. e., defendant 5 is free to raise the contention that the decree sought to be executed is barred by the 12 years' rule of limitation contained in S. 48, Civil P. C. Accepting his contention for the reasons given in the earlier part of the judgment I hold that the assignee decree-holder cannot avail himself of the fraud of defendant 1 to keep the decree alive as against the other defendants.

In the result, this appeal by defendant 5 is allowed with costs throughout.

P.R.S./V.B. *Appeal allowed.*

A. I. R. 1931 Madras 399

BEASLEY, C. J. AND WALSH, J.

Atmakuru Butchiah Chetti—Appellant.

v.

S. Tayar Rao Naidu and *others*—Respondents.

Appeals Nos. 253 and 264 to 266 of 1928, and Civil Revn. Petn. No. 48 of 1930, Decided on 26th August 1930, against orders of District Judge, Ganjam, in E. A. No. 38 of 1928.

Civil P. C. (1908), O. 21, R. 2—Payment before decree—Rule does not apply.

Rule 2, O. 21, does not apply to payments made before the decree : 19 *Mad.* 230, *Ref.*

An agreement which does not relate to execution but directly attacks the decree itself cannot be pleaded in execution. It would be most dangerous to allow a decree itself to be attacked in execution: (*Case law discussed*).

[P 403 C 2]

B. Jaggannadha Doss—for Appellant.

V. Radhakrishnayya, B. Srinivasa Rao, T. Sreerangam Naidu, C. Sambasiva Rao, C. S. Venkatachari and *B. Srinivasa Rao*—for Respondents.

Judgment.—The facts which have given rise to these appeals are as follows:

The plaintiff, whom we may call Appanna and defendant 1 whom we may call Buchayya were brothers. Original Suit No. 30 of 1922 was instituted in the Court of the District Judge of Ganjam for partition of the family property worth three or four lakhs. Defendants 2 to 4 in the suit were minors represented by their guardian defendant 1. In 1923 there was a compromise with reference to certain outstandings due to the family and certain decree debts whereby defendant 1 was to take over the plaintiff's share in the outstandings and the plaintiff was to be paid Rupees 17,000. This compromise is dated 23rd October 1923, and was filed in Court on 29th October. It was signed by the plaintiff's pleader on 27th October and by the defendants' pleader on 29th October. It only related to some of the family properties and it was sanctioned by the Court so far as the minor members were concerned as it was in their interests on 1st November, and on the next day the Court passed the following order:

"This compromise of part of the matters in dispute in the suit is recorded; so far as the minor defendants are concerned it has been sanctioned (I. A. No. 380 of 1923)."

As regards the immovable property, there was a disposal by a preliminary decree on 21st February 1924, and a commissioner was appointed to make a division and as regards the rest of the property there was a reference to arbitration and an award was passed on 20th December 1926. This was remitted back and another award was made on 20th September 1927. Under this award defendant 1 had to pay about Rs 11,000 to the plaintiff. The final decree was passed on 27th September 1927, incorporating all the matters in one decree. This decree recites the compromise recorded between the parties on 23rd October 1923. The plaintiff had several creditors who attached the decree so obtained by him. When execution was sought the defendants took two objections: (1) that, with regard to the compromise of 1923, Rs. 15,000 had already been paid before the decree was passed and a receipt, Ex. 15, signed by the plaintiff on 27th October had been filed in Court on 29th October and therefore, credit must be given for this sum; and (2) that, with regard to the sum of Rs. 11,448 which the defendants had to pay under the award dated 20th September 1927, the plaintiff being in need of money to conduct the suit, had money advanced to him by defendant up to Rs. 7,000 and credit for this should be given. The learned District Judge refused to go into either of these questions on the ground that he could not go behind the decree which was sought to be executed. The present appeals are against this order and similar orders which he passed on execution petitions by other creditors.

It may be mentioned that this receipt Ex. 15, seems to have been filed into Court on 29th October 1923, as it bears the Judge's initials on that date. There are no indications of who filed it and it is not alluded to at all in the compromise petition dated 23rd October 1923, and filed into Court, which the pleaders for both the parties have signed. The plaintiff when examined in O. S. No. 30 of 1922, in the course of his statement about Ex. 15, said:

"I signed the receipt Ex. 15. Defendant 1 (Butchiah) must have done as directed in Ex. 15."

The learned District Judge rightly says that this evasive statement cannot be egarded as an admission by Appanna that

he had actually received Rs. 15,000 under Ex. 15.

In arguing against the order of the learned District Judge, the learned advocate for the appellant takes up the position (1) that O. 21, R. 2 is not applicable to the case as it applies only to payments made after the decree and the parties must be in the position of judgment-debtor and decree-holder, and (2) that, even if it does fall under O. 21, R. 2, there is sufficient intimation to Court by the plaintiff and no further certification is ne-ded. His main contention is that this pre-decree arrangement can be pleaded as a bar in execution of the decree. On the first point that the matter does not fall under O. 21, R. 2, we have have no hesitation in agreeing with him. If authority were needed for the position, *Rama Ayyan* v. *Srinivasa Pattar* (1), might be quoted. The present case is even stronger, for that was a case of adjustment after decree but not between the judgment-debtor and decree-holder. But even if we were to hold that O. 21, R. 2 can possibly apply on a strained view that this receipt Ex. 15 was to come into effect after the decree, we are of opinion that the provis ons of the rule would not have been complied with. No doubt as remarked by the Privy Council in *Shree Prakash Singh* v. *Allahabad Bank Limited* (2) a mere intimation by the decree-holder of payment is sufficient and special application is not necessary. But in this case there is nothing to show that the plaintiff ever intimated the receipt of this sum to the Court. As noted above, his statement with regard to the amount having been paid is evasive. The document was one which should have been in the custody of the defendants and presumably therefore it was filed into Court by the defendants. Under O 21, R. 2 (2), a judgment-debtor has got considerably more to do in order to get such payments recognized than merely to put the document into Court. The provisions of O. 21, R. 2 (2) have to be complied with and notice sent to the decree-holder as to why the Court should not record the payment. It is unnecessary to pursue this matter further in our view that O. 21, R. 2 does not apply to the present case.

There remains the further question whether an arrangement by the parties after the comencement of the suit but before the decree which has not been embodied in the decree can be set up or gone into in execution. The central point in this discussion is the ruling of the Full Bench in *Chidambaram Chettiar* v. *Krishna Vathiyar* (3) by Abdur Rahim, Offig, C. J., Seshagiri Ayyar and Philips, JJ., the latter dissenting. What was actually decided in that case was that an arrangement for stay of execution of the decree entered into in the course of the suit can be gone into in execution. The High Court of Calcutta has always taken the view that it cannot: vide *Binode Lal* v. *Brajendra Kumar* (4) and *Hassan Ali* v. *Gauzi Ali* (5). In the other direction there are *Laldas* v. *Kishore Das* (6) (a Full Bench case) and *Gauri Singh* v. *Gajadhar Das* (7). The previous Madras decision and those subsequent to it up to *Venkatasubba Mudali* v. *Manickammal* (8) have been clearly set out by Wallace, J., in his judgment in the latter case. He points out that *Rama Ayyan* v. *Sreenivasa Pattar* (1) is not in point. The other two decisions *Krishnamachariar* v. *Rukmani Ammal* (9) and *Subramania Pillai* v. *Kumaravelu Ambalam* (10), lay down in general terms that a pre-decree arrangement that a decree when obtained should not be executed can be pleaded in bar of execution Subsequent to the Full Bench case, *Chidambaram Chettiar* v. *Krishna Vathiyar* (3) as observed by Wallace, J., there have been two divergent lines of decisions, one following this general principle and the other limiting the application of tne Full Bench case. Amongst the former he quotes *Sambasiva Aiyar* v. *Thirumalai Ramanuja Thathachariar* (11) and *Velu Thevan* v. *Krishnasami Reddi* (12). Two cases not quoted by him which had been decided in this direction at that time are *Pedda*

(1) [1896] 19 Mad. 230=5 M. L. J. 218.
(2) A. I. R. 1929 P. C. 19=114 I. C. 581=56 I. A. 80=3 Luck 684 (P.C.).

(3) [1917] 40 Mad. 233=37 I. C. 836 (F.B.).
(4) [1902] 29 Cal. 810=6 C. W. N. 838.
(5) [1904] 31 Cal. 179.
(6) [1898] 22 Bom. 463.
(7) [1909] 2 I. C. 608.
(8) A. I. R. 1926 Mad. 582=93 I. C. 428=49 Mad. 513.
(9) [1905] 15 M. L. J. 370.
(10) [1916] 39 Mad 541=33 I. C. 66.
(11) [1920] 54 I. C. 137.
(12) A. I. R. 1925 Mad 591=87 I C. 297.

Veeranna v. *G. Veeranna* (13) and *Arunachala Goundan* v. *Swaminatha Aiyar* (14). On the other side he quotes *K. Mallaya* v. *Chinna Kotayya* (15) which he distinguishes as an agreement before the suit, *Ramanathan Chettiar* v. *Venkatachalam* (16) and *Arumugam Pillai* v. *Krishnasami Naidu* (17) and *Singa Raja* v. *Pethu Raja* (18) which last case he says is not in point, as it turns on the interpretation of O. 34, Rr. 2 (c) and 5 and makes no reference either to *Chidambaram Chettiar* v. *Krishna Vathiyar* (3) or *Arumugam Pillai* v. *Krishnasami Naidu* (17). He does not, however, quote *Doraisami Moopan* v. *Subbalakshmi Palayee Ammal* (19). This was a decision given on 17th December 1917, shortly after the Full Bench case *Chidambaram Chettiar* v. *Krishna Vathiyar* (3), which was in March 1916. It was held that the Full Bench case was not applicable to an agreement between the parties to a suit that no decree should be obtained therein. Since the decision in *Vekatasubba Mudali* v. *Manickammal* (8) there is a decision of a single Judge in *Mulla Ramzan* v. *Maung Po Kaing* (20) which considers the Calcutta, Madras and Bombay cases.

The learned advocate for the respondent argues that the present case does not fall under the Full Bench decision in *Chidambaram Chettiar* v. *Krishna Vathiyar* (3). He says that the principle really laid down in that case is that if there was any pre-decree arrangement by way of stay or non-execution of the decree, then such an arrangement relates to execution and can be pleaded as a bar in execution proceedings. But he urges that the cases subsequent to the Full Bench case have also emphasized another principle that the decree itself cannot be challenged in execution owing to an arrangement made during the suit. We think that there is clear distinction between the two things and if the cases are analyzed, it will be found, that those which conflict with each other are almost all border line cases where, though in substance the effect of the agreement may be to alter the decree, in form it only affects its execution. Bearing this principle in mind, if we take the cases decided prior to the Full Bench case, we find that *Subramania Pillai* v. *Kumaravelu Ambalam* (10) was an arrangement prior to the decree to enter up satisfaction of the decree. It was held that this could be gone into in execution. Here, in form, the matter was one of the execution of the decree, though in fact, the effect may have been to annul the decree. *Laldas* v. *Kishore Das* (6) was an agreement that as between two defendants costs should only be recovered from one of them. Here in form the matter may be held to be one of execution, though in fact the result may have been to alter the decree with regard to the costs recoverable from the defendants.

Turning to the case subsequent to *Chidambaram Chettiar* v. *Krishna Vathiyar* (3), the remarks about the Full Bench case in *Sambasiva Aiyar* v. *Thirumalai Ramanuja Thathachariar* (11) are really obiter, as that case was decided under O. 21, R. 2, and it was held that there had been no certification. *Velu Thevan* v. *Krishnasami Reddi* (12) was an agreement prior to the decree not to execute the decree that might be passed against one judgment-debtor and to realize the whole amount from the other. Here it was held that this could be pleaded in execution. Here again, in form the matter arises in execution though the effect of the arrangement may be to alter the decree as against one of the defendants. In *Arunachala Goundan* v. *Swaminatha Aiyyar* (14) it was decided that the judgment-debtor can raise in bar of an application for execution presented by the legal representative of the decree-holder any defence such as that of estoppel which is personal to the legal representative. It is not clear from the report what the precise nature of the agreement between the decree-holder and the judgment-debtor was, and the matter turned on whether the legal representative was estopped from disputing it.

As regards the cases which are adverse to the appellant since the Full Bench case and which turn on questions of this sort, the first is *Doraiswami Moopan* v. *Subbalakshmi Palayee Ammal* (19). This as pointed out above was soon after the Full Bench decision. The next, *Arumu-*

(13) [1917] 38 I. C. 295.
(14) A. I. R. 1924 Mad. 611=77 I. C. 547.
(15) A. I. R. 1921 Mad. 616=61 I. C. 901.
(16) A. I. R. 1923 Mad. 619=72 I. C. 836.
(17) [1920] 43 Mad. 725=56 I. C. 976.
(18) [1918] 42 Mad. 61=48 I. C. 196.
(19) [1918] 46 I. C. 880.
(20) A. I. R. 1926 Rang. 140=96 I. C. 773=4 Rang. 118.

gam Pillai v. *Krishnaswami Naidu* (17) is an important case. One of the Judges was Seshagiri Aiyar, J., who was a member of the Full Bench in *Chidambaram Chettiar* v. *Krishna Vathiyar* (3). Here the arrangement was that the decree which might be passed should be inexecutable in part. It was held that such an agreement could not be enforced in execution. Seshagiri Ayyar, J., says :

"In *Chidambaram Chettiar* v. *Krishna Vathiyar* (3), I rested my conclusion on the theory of stare decisis. It is argued before us by Mr. Jayarama Aiyar that it follows from my judgment in that case that all the cases referred to therein as supporting the theory of stare decisis must be taken to have been accepted by me as correct. I do not think that this suggestion is well-founded. The course of decisions was referred to for the general proposition that predecree arrangements are within the language of S. 47. I did not intend to accept as correct every one of the decisions I quoted for that purpose. On the other hand, I want to make it clear that *Chidambaram Chettiar* v. *Krishna Vathiyar* (3), should not, in my opinion, be applied to what are termed cognate cases. Further, I am clear that an attack against the decree as having been obtained by fraud by one of the parties thereto is not within the principle of *Chidambaram Chettiar* v, *Krishna Vathiyar* (3)."

This is a very important observation coming from one of the learned Judges who decided *Chidambaram Chettiar* v. *Krishna Vathiyar* (3) and it is especially valuable because the only case directly on all fours with the present case which has been quoted to us, namely the decision in *Pedda Veeranna* v. *Gondimalla Veeranna* (13) was a decision passed by the same Judge with Ayling, J., between the Full Bench case and this decision. It is the only case which has been quoted to us of an agreement sought to be set up in execution which seeks to attack the decree itself as in the present case, and was allowed to be pleaded in execution. There in pursuance of an award made by arbitrators, the debtor tendered the amount payable on the due date but the creditor refused to accept it and contested the validity of the award. The debtor filed a suit to enforce the award and it was made a decree of Court. In execution of the decree the decree-holder claimed interest on the sums mentioned in the award. It was held that as there was a tender prior to suit and as the tender was refused the decree-holder was not entitled to interest. This decision was rested on *Chidambaram Chettiar* v. *Krishna Vathiyar* (3) and it is important to note that as observed above, Seshagiri Aiyar, J., who was a party to that decision, expressly in the later case *Arumugam Pillai* v. *Krishnaswami Naidu* (17), restricted the principles which he meant to lay down in the Full Bench case. On the other side there are several authorities both of this Court and other Courts that an agreement which directly strikes at the decree itself cannot be pleaded in execution. The first as noted above is *Doraiswami Moopan* v. *Subbalakshmi Palayee Ammal* (19) in which it was held that an agreement between the parties to a suit that no decree should be obtained therein could not be pleaded in execution and that the Full Bench decision *Chidambaram Chettiar* v. *Krishna Vathiar* (3) did not apply to such a case. We have quoted *Arumugam Pillai* v. *Krishnaswami Naidu* (17). In *Koonameni Mallaya* v. *Kanneganti* (15) the respondent obtained a decree on their mortgage and sought the execution of the decree. The appellants set up an agreement entered into before the suit by which the respondent agreed to accept Rs. 1,500 and release certain items. It was held that this agreement could not be pleaded as defence in execution of the decree. Spencer, J., remarked :

"The conduct of a party who collusively allows a Court to pass a decree at the same time privately agreeing with the plaintiff that such a decree should not be enforced is, in my opinion, committing a fraud on the Court which should not be countenanced by permitting him to put forward such a plea in execution."

That case, no doubt, is distinguished by Wallace, J., in *Venkatasubba Mudali* v. *Manickammal* (8) by saying that it was a case of a pre-suit and not of a predecree arrangement. But we doubt whether this would make any great difference. In *Ramanathan Chettiar* v. *Venkatachalam* (16) the decree amount was Rs. 36,000 and a pre-decree arrangement was alleged by which only Rs. 33,750 was to be recovered from defendants 2 and 3 and there was to be no recovery from defendants 1 and 4. The Court thought that the case resembled *Arumugam Pillai* v. *Krishnaswami Naidu* (17) and not *Chidambaram Chettiar* v. *Krishna Vathiyar* (3). They followed the decision in *Arumugam Pillai* v. *Krishnaswami Naidu* (17) and held that this agreement could not be gone into in execution.

Finally, the recent case of *Mulla Ramzan* v. *Maung Po Kaing* (20) is very similar to the present case, and the authorities of Calcutta, Bombay and Madras have been considered. In that case, in execution proceedings, it was pleaded by the judgment-debtor that prior to the passing of the decree he had entered into an agreement with the decree-holder whereby, in consideration of his confessing judgment for the full decretal amount of Rs. 2,000, the decree-holder agreed to accept Rs. 1,000 only and that accordingly the decree could be executed to that extent only, and it was held that a decree which on the face of it is enforceable to the fullest extent, cannot in execution proceedings be challenged as being inexecutable, wholly or in part, on account of an agreement between the parties entered into prior to the decree, and that S. 47, Civil P. C., had no application in that case. The learned Judge says :

"Putting the most liberal construction on the words (of S. 47), I fail to see how a question like the one involved in the present case can be said to relate "to the execution of the decree." The words "the decree" refer to the decree passed by the Court and of which the decree-holder is seeking execution. It is only questions relating to the execution or executability of this decree, which the executing Court is directed to determine. When a judgment-debtor sets up an agreement of this kind, that, prior to the decree, there was an agreement between the parties that though the decree was to be passed for Rs. 2,000 it should only be executed to the extent of Rs. 1,000. and not for the whole, he is not seeking the aid of the Court to determine any question relating to the execution of the decree as passed by the Court, but is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as agreed upon by the parties. Without going to the extent of saying, as Spencer, J., of the Madras High Court does in one of the cases reported in the unauthorized reports, *Koonameni Mallya* v. *Kanneganti* (15), that parties who collusively allow a Court to pass a decree, having privately agreed that the decree shcould not be enforced, are committing a fraud on the Court, I can at least say that parties who, having agreed that a decree should not be executable wholly or in part, pray the Court to pass an unconditional decree, are thereby inviting the Court merely to take part in a solemn farce."

In *Benodelal Pakrashi* v. *Brajendra Kumar Saha* (4), it was laid down that payment during the suit must be set up in the suit itself, and this part of the judgment has not been dissented from in any of the Madras decisions.

On a review of the authorities it appears to us that the Full Bench case, *Chidambaram Chettiar* v. *Krishna Vathiyar* (3) only covers agreements which relate to execution and not to agreements which attack the decree itself. There may be, as noted above, certain pre-decree arrangements which though in form they relate to execution, do in substance modify or totally nullify the decree ; and in regard to these cases we find different decisions owing probably to the angle from which the matter is regarded. But the only case quoted to us in which the agreement directly alters the decree by something which does not relate to execution at all, but means that the decree shall be executed for a sum different from what has been stated in the decree, is *Pedda Veeranna* v. *Gondimalla Veeranna* (13) and the effect of this decision is discounted by the subsequent remarks of Seshagiri Ayyar, J., in *Arumugam Pillai* v. *Krishnaswami Naidu* (17). In all other cases of both this and other Courts it seems to be quite clear that an agreement which does not relate to execution, but directly attacks the decree itself cannot be pleaded in execution. We do not think it is necessary to express any opinion as to whether the defendants can file a separate suit on the basis of the alleged agreement. Nor do we wish to go into the question of res judicata in which connexion *Mahabir Pershad Singh* v. *Macnaghten* (21) has been quoted ; for there is a difference between decrees passed on contest and those which are passed on compromise between the parties : see *Raja Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramaswami Chetti* (22). We think it would be most dangerous to allow a decree itself to be attacked in execution. In our opinion, the decision of the learned District Judge is correct, and these appeals must be dismissed with costs.

A revision petition has been put in against an order refusing to amend the decree. For the reasons stated above, it is clear that the decree cannot be amended. Apart from this, only the attaching parties in appeal suits are parties to this application, and, in any case, once third parties intervene, an amendment should not be allowed so as to affect such third parties : see *Hutton* v. *Har-*

(21) [1889] 16 Cal. 682.
(22) [1911] 35 Mad. 75=9 I. C. 875.

ris (23). The petition is dismissed with costs. One set of costs in C. M.A.No. 253, one set of costs in C. M. As. Nos. 264, 265 and 266.

One set of costs on civil miscellaneous appeals to be proportionate to the amounts claimed in execution by the various decree-holders.

P.R.S./K.N. *Petition dismissed.*

(23) [1892] A. C. 547.

A. I. R. 1931 Madras 404

BEASLEY, C. J. AND CURGENVEN, J.

T. S. Ramabadra Odayar and *another* —Plaintiffs—Appellants.

v.

T. S. Gopalaswami Odayar—Defendants—Respondents.

Appeals Nos. 411 and 439 of 1925 and 6 of 1926, Decided on 1st May 1930 against decree of Sub-Judge, Kumbakonam, D/- 25th October 1924.

(a) Hindu Law—Partition—Separation of one member and specification of shares of other who at the same time agree to remain joint—Agreement to remain joint is valid and shares binding at time of subsequent partition — Deed — Construction—Partition deed.

A Hindu family consisted of three main branches: *S* representing one branch, *B* and *M* representing another and *G* and three others represented the third branch. To avoid future disputes in connexion with partition a deed of partition was executed, under which deed *B* was assigned a one-fifth share of the entire property. Remaining four-fifths were divided into five equal shares, one going to *S* and the remaining four to the third branch. By one of the clauses in the deed *M* had relinquished his interest in the property or his share and in view of this the parties agreed that the members other than *B* would during the lifetime of *M* live as members of one family and that after death of *M* partition was to be effected according to the shares already decided upon. The above agreement was incorporated in the deed in the following terms: "So long as the sharers other than *B* of us remain together without effecting a division by metes and bounds according to the shares mentioned in Cl. (1) the family shall be regarded as an ordinary undivided Hindu family subject to the law of survivorship." After *M's* death *S* instituted a suit for partition claiming a half-share, impeaching the partition deed on the ground that specification of the shares in Cl. (1) was repugnant to Hindu law as the family was to remain joint. In the meanwhile a sharer in the third branch had died.

Held: on construction of the document: (i) that the intention of the parties was that the members other than *B* should remain joint until *M's* death, and even though other members had their shares specified there was no disruption of the status of jointness as regards others on the date of agreement; (ii) that the agreement was lawful and binding on parties thereto; (iii) that share of the deceased member of the third branch passed by survivorship to the members of his branch; (iv) that *S* could not share more than one-fifth share: (*Case law discussed.*) [P 413 C 2]

(b) Deed—Construction—Rule — Intention should be ascertained from document as a whole.

In construing a document every endeavour should be made to ascertain from it, read as a whole, what was the expressed intention of the parties to it. Each part must, if possible, be reconciled to the remainder, because it must be presumed, unless and until such presumption appears to be forbidden by the language, that it was drafted to subserve a consistent purpose and course of action. [P 413 C 2]

(c) Deed—Construction—Deed ambiguous—Subsequent conduct of parties may be looked at.

Where a deed is ambiguous it is permissible to look at the subsequent conduct of the parties to ascertain if it favours the one view or the other. [P 416 C 1]

A. V. Viswanatha Sastri, K. S. Krishnaswami Ayyangar, S. Ramanujam, S. Panchanadha Mudaliar, S. Ramaswami, K. V. Krishnaswami Ayyar, T. R. Srinivasa Ayyangar, R. Gopalaswami Ayyangar and *K. S. Desikan*—for Appellants.

S. Varadachariar, N. A. Krishna Ayyar, M. Ranganatha Sastri, C. P. Ramaswami Ayyar, T. V. Ramanatha Ayyar, R. Rajagopala Ayyangar, S. V. Venugopala Chariar, S. Srinivasa Ayyangar, K. Narasimha Ayyangar, S. Venkatesa Ayyangar, K. Bhashyam Ayyangar and *Advocate-General*—for Respondents.

Beasley, C. J.—These are three linked appeals, namely Appeal No. 411 of 1925, Appeal No. 439 of 1925 and Appeal No. 6 of 1926. Of these, Appeal No. 439 of 1925 was argued first as in that the main and the most important contentions between the parties had to be considered. I propose in my judgment to deal with all the three appeals together.

All these appeals arise out of O. S. No. 67 of 1919 in the Court of the Subordinate Judge of Kumbakonam. That was a suit for partition. The parties to the suit were all members of an undivided Hindu family related to one another in the manner set out in Sch. A to the plaint. The Hindu family was possessed of considerable immovable property and in the partition suit the plaintiff claimed a half-share in the whole property. The plaintiff stands by himself representing one branch of the family. The genealogical table (Sch. A) shows that all the parties to the suit trace their descent back to one Sepperumal Odayar; and in the judgment of my learned brother

Curgenven, J., the genealogical table has been described in detail and therefore it is unnecessary for me to explain any further how the parties stand in relationship to one another.

In the Court below a preliminary decree was passed by means of which the plaintiff was given one-fifth share, defendants 3, 4, 5, 7 and 8 one-fifth share, defendant 6 one-fifth share, defendant 9 one-fifth share, and defendants 1 and 2 one-fifth share. The learned Subordinate Judge gave a decree for an account and also directed that the accounting was to be upon the basis of an undivided family although he found that the family had become divided in status by reason of document Ex. A. This document has been the cause of all the trouble in the suit. Various constructions have been placed upon it by the contending parties both here and in the Court below and these appeals depend entirely upon what view we take of that document. In order that it can be better understood we have to go back to the year 1895. Ex. A is dated 25th November of that year and is described as a deed of partition. On that date there were alive Muthu Odayar who died in 1903, Balasubrahmania Odayar who died since the suit was filed, Singaravelu Odayar who died in 1917, Somasundara Odayar his son who subsequently died leaving a widow defendant 10, Sivaswami Odayar who died in 1909 leaving a widow defendant 9, Gopalaswami Odayar and Siva Vadivelu Odayar the grandson of Sinnu Odayar and the adopted son of Sendalangara Odayar who was himself the son of Sinnu Odayar, the son of Sepperumal Odayar the common ancestor.

By this deed Balasubrahmanya Odayar separated himself from the rest of the family and under Cl. 1 of the deed it was agreed that he should take one-fifth share of the whole property, the remaining four-fifths share being agreed to be allotted in five equal shares to: (1) Singaravelu Odayar and Somasundara Odayar, (2) Sivaswami Odayar, (3) Gopalaswami Odayar and Vijia Raghunathan, (4) Balaguruswami and Balakrishnaswami and (5) Siva Vadivelu the adoptive father of the plaintiff—I describe him as the adoptive father of the plaintiff because in Ex. A his adoption is recognized and the learned Judge in the Court below has found that adoption proved. The consideration for this document is set out in the preamble to it and is stated to be the fact that disputes might arise in the family in connexion with the partition and heavy loss might be sustained thereby, that Sinnu Odayar and his father Ramu Odayar (Nos. 4 and 11 in the genealogical table) had acquired properties by hard work and brought the family to a very prosperous condition and the natural affection towards his heirs, namely Singaravelu Odayar, Sivaswami Odayar, Gopalaswami Odayar, Balaguruswami and Balakrishnaswami and also towards Balasubrahmanya.

Under Cl. 6 of the document Muthu Odayar gave away his share in the family properties as he had no heirs and was advanced in age but there is a reservation that during his lifetime he should be at liberty to utilize a sum of Rs. 4,000 per annum out of the income from the four-fifths share of the properties (ascertained in Cl. 1). Another clause of importance is Cl. 3 which provides that the sharers are to take the immovable properties specified in list A and the outstandings in list C and that Balasubrahmanya the outgoing member is to take the immovable properties specified in list B. Cl. 6 must again be referred to here as it is there provided that the sharers (as ascertained in Cl. 1) are during the lifetime of Muthu Odayar to live as members of one family and that after him partition of the property is to be effected according to the shares given in Cl. 1. Then Cl. 8 which reads as follows:

> "So long as the sharers other than Balasubrahmanya Odayar of us remain joint without effecting a division according to the shares mentioned in para. 1 hereof, the family shall be treated as an ordinary undivided Hindu family subject to the law of survivorship."

It is this clause that has given rise to the whole of the trouble. In the absence of such a clause it would be a very difficult task for the plaintiff to contend that Ex. A did not effect a division in status between those members of the family who were parties to it, Balasubrahmanya of course going out altogether and having by the deed separated himself entirely from the family. The construction of Ex. A would then, in my view, have been quite a simple matter and it would have been that the family agreed to divide in status according to certain shares but to live together until

the death of Muthu Odayar. The case would then, in my view, have been a plain sailing. But there is Cl. 8 and this has enabled the Advocate-General on behalf of the plaintiff to contend that there was no division in status created by Ex. A and that Ex. A must be ignored altogether and the family dealt with in the partition suit as an undivided Hindu family subject to none of the provisions of Ex. A. This, he contends, entitles the plaintiffs to a half-share of the family property upon a division. Alternatively he argues that Cl. 8 is so inconsistent with the other clauses in the document that it alone must be applied. On the other hand it is contended by Mr. Varadachari for defendant 1 that, if Cl. 8 is inconsistent with Cl. 1, then the former must be cut out and the parties governed by Cl. 1. Mr. K. S. Krishnaswami Ayyangar for defendant 6 contends that full effect must be given to Ex. A, that its provisions are not inconsistent with one another and that both Cl. 1 and Cl. 8 can be taken together and a meaning given to the document. In this contention he is supported by Mr. K. V. Krishnaswami Ayyar for respondent 14. The conflicting contentions of the parties therefore may be briefly stated as follows:

The plaintiff wishes to ignore Ex. A altogether and treat the family as an undivided family and the defendants contend for the position of a division in status brought about by Ex. A, and an agreement under it to live as if the family were an undivided family, but not really an undivided family, and an agreement to divide by metes and bounds at a later date in accordance with the shares as ascertained in Cl. 1 of the document. Mr. Varadachari and Mr. K. S. Krishnaswami Ayyangar however do not go the whole way together in that argument. The latter argues that Cl. 8 is not repugnant in any sense and that what it means is that although the family is a divided family, it is to be treated as if it were an undivided family and as if the members of it at the time of the execution of the document had agreed together to dispose each of their shares to the others in the event of their dying without male issue. Mr. Varadachari, on the other hand, contends that there could be no such disposition in law or in fact, and that Cl. 8 itself is repugnant to the rest of the other clauses in the document.

The Advocate-General also contends that the evil of this clause is that it is an agreement to alter the ordinary rule of succession and, therefore, is quite inconsistent with the position of a division in status which creates a tenancy-in-common because it is provided that the property is to go by survivorship instead of by inheritance as it would do in the case of a tenancy-in-common. The learned Subordinate Judge having held that under Cl. 1, Ex. A, there was a disruption of the joint family and therefore a tenancy-in common, says that Cl. 8 creates a coparcenary with the rights of survivorship, that where there is a disruption of the coparcenary the right of survivorship is gone and that a coparcenary is purely a creature of law and cannot be created by the act of parties. He has therefore held that Cl. 8 is wholly inconsistent with the scheme of division set out in the previous paragraphs and has rejected Cl. 8 on the ground that where there are two clauses in a deed which are wholly inconsistent with and irreconcilable to each other the former prevails. He has further held that Cl. 8 relating to the right of survivorship prevents the devolution of property to female heirs and is void since it alters the line of succession allotted by the Hindu law.

We have first of all to consider whether the claim to a half-share in the property put forward by the Advocate-General can possibly be sustained. If a document is unambiguous in its terms, then little difficulty arises. So far as the terms of the document itself are concerned it is contended by the learned Advocate-General and Mr. Varadachari that it is impossible to hold that they are unambiguous; and we have been addressed at great length for very many days as to the meaning or possible meaning or impossible meaning of its provisions. It is obvious that when Cl. 8 is contrasted with the other clauses, they are, without a consideration of the intention of the parties, irreconcilable. We have therefore, to see whether we can gather from this document what the intentions of the parties to it were; coupled with their conduct subsequent to it is the duty of the Court to give effect to a document if it possibly can. The Ad-

vocate-General invites us to reject the document altogether except as bringing about the separation of Balasubrahmanya from the rest of the family. But I am unable to agree with the suggestion put forward by him that all that was intended by the parties to this document was by it merely to separate Balasubrahmanya from the rest of the family. To begin with in the preamble it is stated:

"In consideration of the fact that disputes might arise in our family in connexion with partition and heavy loss might be sustained thereby."

It cannot, in my view, have been intended by this merely to refer to disputes between Balasubrahmanya and the other members of the family as it seems to me obvious that it refers to possible disputes between all the members of the family on a partition. Then again in Cl. 1 the remaining four-fifths shares are divided up into five equal shares and allotted to groups 1 to 5. If the document was merely entered into for the purpose of separating Balasubrahmanya from the rest of the family, it was unnecessary to deal with any of the remaining four-fifths shares by dividing them equally into five shares. All that it was necessary to do was to give Balasubrahmanya his one-fifth share and let him go out. Then under para. 6 Muthu Odayar gives up his share in the family having no heirs and being advanced in age; and there is the provision already referred to that the other sharers are, during his lifetime, to live as members of one family and after his death to effect a partition. The parties to the document must have had some intention when they made that arrangement. Having ascertained the shares in Cl. 1, in Cl. 6 not only do they agree after Muthu Odayar's death to effect a partition, but to effect it according to the shares as ascertained in Cl. 1. Then in Cl. 8 a division according to the shares mentioned in Cl. 1 is referred to. Therefore, in my opinion, it is impossible to hold that the intention of the parties by this document was merely to separate Balasubrahmanya.

The documents must be given a meaning. There appear to be two possible alternatives, namely that the parties intended by this document to divide in status but to remain, although divided in status, as an undivided family and after Muthu Odayar's death to effect a division by metes and bounds in accordance with the shares agreed upon by Cl. 1, that they recognized that by executing Ex. A they were dividing in status but wished to live together as one family until Muthu Odayar's death, and that they decided that during that time, and until they did effect a partition by metes and bounds the rule as to the devolution of property in a Hindu undivided family should apply. The other possible alternative is that they did not intend to divide themselves in status by Ex. A, that all they intended to do was to postpone a division until some future date and that when they did divide the division was to be in accordance with Cl. 1 of the document. But before the latter alternative is considered, we have to consider whether the execution of Ex. A, quite irrespective of what the intentions of the parties might be, did bring about a disruption of status and upon this point there are some cases which have to be considered. The first of these is *Appovier's* case—*Appovier* v. *Rama Subba Aiyan*'(1), a decision of the Privy Council. There it was held that according to the true constitution of an undivided Hindu family no individual member of the family, whilst it remains undivided, can predicate of the joint and undivided property, that he has a certain definite share.

The proceeds of undivided property must be brought to the common chest or purse, and there dealt with according to the modes of enjoyment by the members of the family. But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and each member has thenceforth a definite aud certain share in the estate, which he may claim to receive and enjoy in severalty, although the property itself has not been actually severed and divided. Where therefore, a deed of partition was made and executed by the other members of an undivided family, dealing with and making actual partition of a portion of the joint estate, but leaving the remainder to be divided at a

(1) [1863] 11 M. I. A. 75=8 W. R. 1=2 Sar. 218 (P.C.).

future period in the same manner, such deed was held to be a division of right operating as a conversion of the tenancy and a change of status in the family so far as the property specified changing as it were the joint tenancy thereof into a tenancy-in-common and by operation of law making the members of the previously undivided family a divided family in respect of such property. At p. 89 Lord Westbury in delivering the judgment of the Judicial Committee states as follows:

"Certain principles, or alleged rules of law, have been strongly contended for by the appellant. One of them is, that if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds. Their Lordships do not find that any such doctrine has been established; and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject, to which the title is applied. According to the true notion of an undivided family in Hindu law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector, or receiver of the rents, a certain definite share."

He then proceeds to say that the members of an undivided family can agree amongst themselves that the property shall be the subject of ownership in certain defined shares and this alters the character of undivided property, that joint enjoyment is taken away from it and the member has a right to claim to receive and enjoy it in severalty and that by such an agreement therefore the joint tenancy is converted into a tenancy-in-common. In *Balabux* v. *Rukhmabai* (2) the Privy Council held that there is no presumption when one coparcener separates from the others that the latter remain united, that where it is necessary, in order to ascertain the share of the outgoing coparcener, to fix the shares which the others are or would be entitled to, the separation of one may be said to be the virtual separation of all and that an agreement amongst the remaining coparceners to remain united or to reunite must be proved like any other fact. There can be no question in this case of any agreement to reunite as there were minors in existence and such minority renders any such agreement impossible. The importance of the decision lies in its placing the burden upon those who maintain that there has been no division in status of displacing the presumption which this judgment holds arises. In a later case *Parbati* v. *Naunihal Singh* (3) another decision of the Privy Council, it was held that where one member of the family effects a separation of himself from the family and where the ascertainment of the shares of the remaining members of the family is merely incidental to that one member's separation the presumption is that the other members remain undivided. Both *Appovier's* case (1) and the case in *Balkishen Das* v. *Ram Narain Sahu* (4) were considered and the principles laid down in them followed but it was stated that the High Court had proceeded in an erroneous method in considering whether each document was by itself sufficient to rebut the prima facie presumption that as the family was joint before 1861 it continued to be joint, and omitting to take into account the cumulative effect of all the documents which taken together showed that all the transactions for many years could only be reconciled and made consistent on one hypothesis, namely, that the important document was a genuine document and the agreement in it embodied a real agreement.

There, after the death of one of the members of the joint family in 1861 the other members mutally agreed that the joint property should thenceforth be held and enjoyed by the various members of the family in certain defined shares which they specified in a petition to the Collector to have their names entered to that effect in the official papers of the village. This was done, the petition was filed and it was held that on the evidence and in the circumstances of the case a partition of the property had been effected in 1861 and that the transactions and conduct of the members of the family with respect to the management of the property had been on the basis that it was held in separate shares from that time. In a

(2) [1903] 30 Cal. 725=30 I.A. 130=8 Sar. 470 (P.C.).

(3) [1909] 31 All. 412=3 I.C. 195=36 I.A. 71 (P.C.).

(4) [1903] 30 Cal. 738=30 I.A. 139=8 Sar. 489 (P.C.).

later case namely *Palani Ammal* v. *Muthuvenkatachala Moniagar* (5) the Privy Council held that when a member of a joint family has separated, an agreement by the remaining members to continue undivided may be inferred from the way in which their business is carried on after the separation. On p. 257 (of 48 *Mad.*) it is stated in the judgment :

"In coming to a conclusion that the members of a Mitakshara joint family have or have not separated there are some principles of law which should be borne in mind when the fact of a separation is denied. A Mitakshara family is presumed in law to be a joint family until it is proved that the members have separated. That the coparceners in a joint family can by agreement amongst themselves separate and cease to be a joint family, and on separation are entitled to partition the joint family property amongst themselves is now well-established law."

Then a reference is made to *Appovier's* case (1) and it proceeds :

"But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the share of the coparceners on a separation would be."

The result seems to me to be that where the ascertainment of the shares of the remaining coparceners is merely incidental to the separation of one of them, no presumption arises that the family hitherto undivided has become divided. The High Court judgment in this case is reported in *Palani Ammal* v. *Muthuvenkatachala Manigar* (6). On p. 780 (of 33 *M. L. J.*) Kumaraswami Sastri, J., after reviewing a number of authorities upon the question of whether the separation of one member ipso facto effects a separation between all the others stated his opinion to be that where the consideration of the shares of the others is only incidental for the purpose of giving the relief which the plaintiff wants (as it is not possible to arrive at the share of one coparcener without knowing how many coparceners there are and their shares) the status of the others is unaffected by a decree or division in favour of one member.

Syed Kasam v. *Jorawar Singh* (7) is another case to which we were referred. There a member of a joint Hindu family governed by the Mitakshara claimed his share of the family property and the members of the family agreed to appoint an arbitrator to partition the property among them and to accept his partition and it was argued that this agreement to appoint an arbitrator effected a severance of the joint estate. This contention the Privy Council accepted and at p. 92 (of 50 *Cal.*), Viscount Cave states as follows :

"It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately even though no actual division takes place ; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree."

But the facts of this case are very different to those in that case on account of Cl. 8 of the present agreement, Whilst that remains, it seems to me that it cannot be held that the ascertainment of the shares of the coparceners in the earlier clauses of it necessarily brings about a division in status. It seems to me that in all the cases to which we were referred upon this point, upon the facts of them a present intention to divide in status was apparent. In this case, as I have already said, in the absence of Cl. 8 such an intention is discoverable. But effect has to be given to this agreement, and to Cl. 8, unless it can be shown that whatever the intention of the parties to the agreement may have been, the ascertainment of the shares of the remaining members of the family must in law operate as a division in status. No authority for this proposition has been put before us and I am clearly of the opinion that such a proposition as that cannot be supported by reference to any of the cases referred to. One fact must not be overlooked and that is that Ex. A was drafted by a vakil and it is hardly likely that he would have drafted a document intending in the earlier part of it to convert the estate into a tenancy in-common and yet in the latter part of it to preserve the coparcenary. He cannot have intended to disrupt the status of the family and yet to apply the principle of survivorship to it. This would, in my view, have created an impossible position. What therefore was it that the parties intended ?

It was contended before us that the wishes of Muthu Odayar were intended to be given effect to and they were that

(5) A.I.R. 1925 P.C. 49=87 I.C. 333=52 I.A. 83=48 Mad. 254 (P.C.).
(6) [1918] 43 I.C. 833.
(7) A.I.R. 1922 P.C. 353=68 I.C. 573=49 I.A. 358=50 Cal. 84 (P.C.).

the family should remain an undivided family during his lifetime. He was an old man and willing to give up his share in the family property to the others. I think that this contention is well founded and that in deference to Muthu Odayar's wishes the family agreed to remain undivided during his lifetime and had no present intention at the date of the execution of Ex. A to divide in status at all. Clearly there had been disputes in the family. The adoption of Siva Vadivelu was open to question and in Ex. A that matter was set at rest. There were also other matters which required adjustment and there is nothing unreasonable in supposing that when the parties came together for the purpose of dividing themselves from Balasubrahmania, they took that opportunity of settling once and for all, all the matters then in dispute and likely to cause disputes thereafter —indeed it is so stated in the document—that there never was any intention to become divided in status but that they agreed to a future partition and that when the occasion for it should arise there should be no dispute as to the shares of the coparceners on such a partition.

No other view of the intention of the parties seems to me possible and I have no difficulty in thinking that such was the intention. That such was the intention of the parties was nobody's case in the appeal but the comment to be made upon that is that all the parties to the appeal were trying to get a larger share of the family property and that this case suited no one. The view that I have taken is strongly supported by the subsequent conduct of the family. They continued to live as an undivided family throughout and it was not suggested that there was any documentary evidence faintly suggesting a previous division in status except Ex. 6 (a) a letter addressed to the Chairman, Municipal Council, Kumbakonam, and signed by Sivaswami Odayar. Certain voters took exception to the candidature of Sivaswami Odayar at the Municipal elections because Siva Vadivelu was already a Municipal Councillor and the rules framed by Government allowed only one member of an undivided Hindu family to be registered as a person qualified to be elected or to vote and it was therefore claimed that the nomination of Sivaswami Odayar should be rejected and Ex. 6 (a) represents Sivaswami Odayar's answer to this objection. Whilst setting out other answers the following answer is given :

"Even admitting for the sake of argument that the rule referred to is capable of the interpretation put upon it by the petitioners our family might for the purpose of this objection be legally considered as a divided one under the terms of a registered document entered into among the members thereof dated 25th November 1895. Each member is therefore entitled to have his name registered separately provided he possesses the requisite qualifications."

This answer is by no means definite. Certainly it does not unequivocally state that the family was a divided one ; on the contrary it seems to admit that it is not but ought, for the purpose of the objection to be considered as such. I cannot take this answer as in any way indicating that the family considered that a division had taken place by means of Ex. A. This is the only document which by any possible stretch of imagination can be said to support the respondent's case. On the other hand there are a number of documents which indicate that the family remained undivided. In Ex. D, a petition dated 1904, Siva Vadivelu is described by defendant 1 as his undivided brother. Ex. K K is the written statement filed by Singaravelu Odayar in O. S. No. 42 of 1908 in the Sub-Court, Kumbakonam, and in para. 4 of it is stated :

"Myself, defendants 8 to 11 and the deceased Sivaswami Odayar are members of an undivided family."

Sivaswami Odayar died in 1909 before this written statement was filed. Then again in para. 9 it is stated : " The said Sivaswami Odayar and ourselves were members of an undivided family."

This written statement was adopted by Gopalaswami Odayar, defendant 8 in that suit, for himself and as guardian of the minor defendant 11 and also by Balaguruswami Odayar and Balakrishna Odayar. Written statements in O. S. No. 132 of 1917 in the Court of the Additional District Munsif of Tiruvalur were also filed of which Ex. C-13 is an example and there also Gopalaswami Odayar stated that defendant 2 in that suit was his undivided brother. There are other documents such as Exs. CC, CC-1, and PP which are quite incompatible with any other position than that of an undivided family.

Much was addressed to us in argument upon the meaning of the words in Cl (8) "the family shall be treated as an ordinary undivided Hindu family." It was contended that the use of the word "treated" implied that the family was not actually an undivided family because "treated" is to be read as "deemed" but although upon a strict construction of the word "deemed" it may possibly imply something different to actual, I do not think that when the whole of the clause is read, it means anything else than an actual ordinary undivided Hindu family.

The vakil who was responsible for drafting the document cannot have intended to say that a tenancy-in-common was nevertheless to "be deemed to be an undivided Hindu family subject to the law of survivorship." I think that it is more probable that he had in mind the possible result of the earlier ascertainment of the shares of the members of the family and that in Cl. (8) he decided to make it clear that there had been no division in status by that ascertainment and so emphasized the retention of the undivided status in order to remove any possible misconception. This is the conclusion I have arrived at as to the construction of Ex. A and, in my view, it cannot be argued that it is not binding upon the plaintiff. It is an agreement which, in the absence of any authority to the contrary, can be validly entered into and was entered into by his adoptive father Siva Vadivelu and was an agreement between all the adult members of the family. There was certain consideration for it in that it settled the disputes between the parties and recognized the adoption of the plaintiff's adoptive father and in fact gave him a somewhat larger share than he would have got by reason of such adoption and furthermore there was a relinquishment of Muthu Odayar's share. In view of this finding that there was no disruption in the family on the date of Ex. A even in status and that the family remained undivided, it is unnecessary to deal with the arguments of counsel based upon a division in status effected on the date which Ex. A bears. On the question of upon what basis the accounts are to be taken, it follows from this decision that it must be on the basis of an undivided family from 5th November 1917, and following the form in *Sri Ranga Thathachariar* v. *Srinavasa Thathachariar* (8). I have arrived at the same conclusion upon this point as that of the learned Subordinate Judge but of course for different reasons, because he found that Ex. A did effect a division in status. I agree with the learned Subordinate Judge also in rejecting the plaintiff's claim to past mesne profits in respect of items C-5 and C-7 against defendants 27 and 28 as he has found that they were not in adverse possession and I am not inclined to disagree with that finding. The result of this therefore is that the appeal must be dismissed with costs. Two sets of costs to respondents defendants 1, 2 and 9 in one group and defendants 3, 4 and 6 in the other group ; (defendant 28, does not ask for any costs).

With regard to appeal No. 411 of 1925 the only question is what was the construction to be placed upon Cl. (8), Ex. A, That only fell for discussion in the event of our holding that Ex. A effected a division in status and as we have held that it did not, this appeal is not capable of further argument but is allowed to the extent indicated in the judgment of Curgenven, J., Costs of all parties to come out of the estate. Certain other matters are left over for future argument.

With regard to Appeal No. 5 of 1926 I agree with the conclusions of my learned brother whose judgment I have read and with his reasoning also. This appeal must be dismissed with costs.

Curgenven, J.—These three appeals arise out of a suit for the partition of the joint property of a family of Odayars known as the Thannirkunnam family. This property comprised the whole or portions of several villages in the Tanjore District, as well as moveables and outstandings, the whole amounting according to the plaint valuation, to some four and a half lakhs. The following is the family genealogical table :

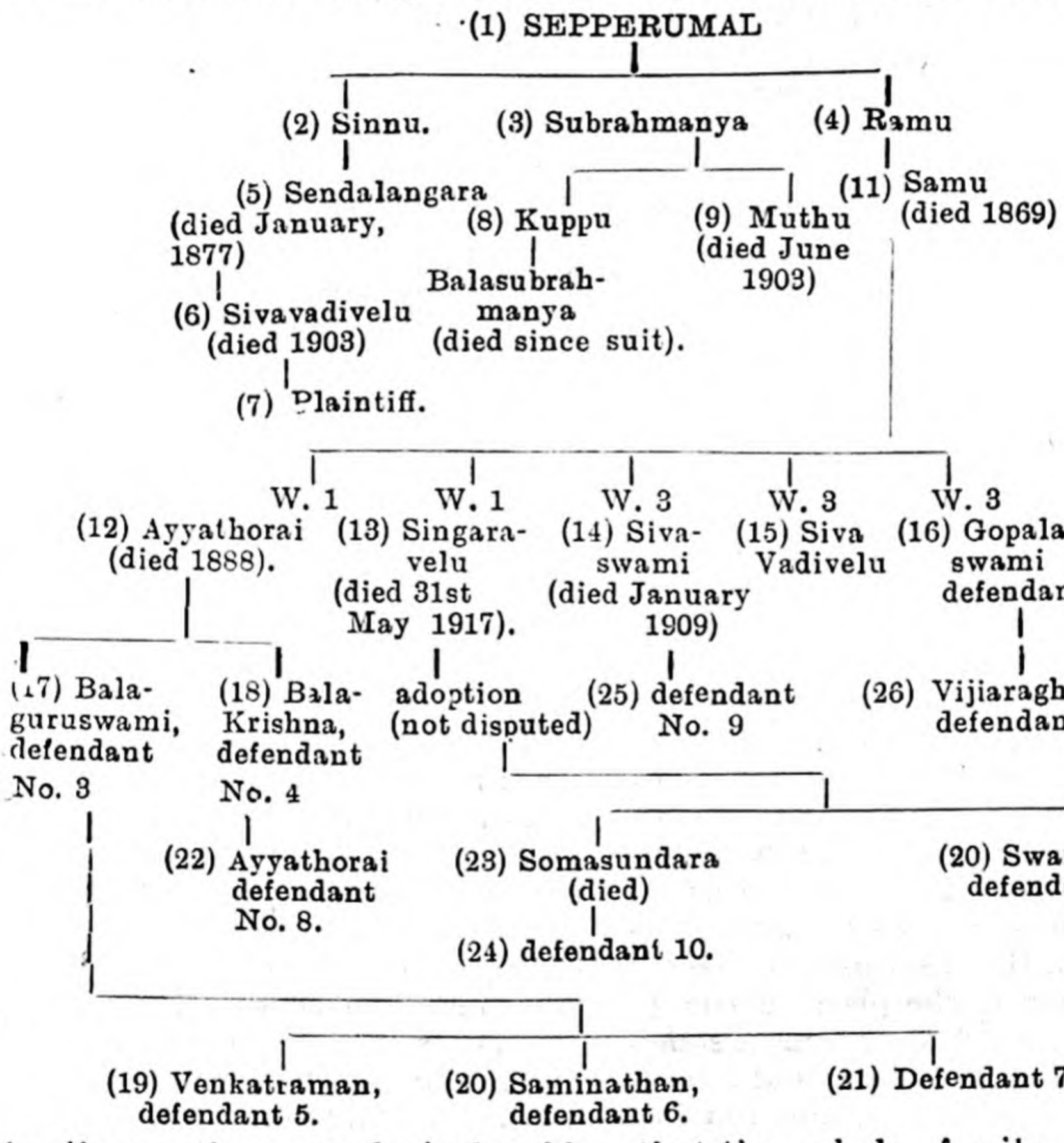
(*For pedigree table, see p.* 412).

The family lived in a condition of undisputed jointness until 1895, but not without disputes regarding certain matters which will be referred to later. In that year all the adult members subscribed to a partition deed, Ex. A, and it is upon the construction of this document

(8) A. I. R. 1927 Mad. 801 = 104 I. C. 472 = 50 Mad. 866.

that the first two of three appeals have to be decided.

The questions to which the document Ex. A gives rise are: firstly, what does it mean and, secondly, is it binding upon the signatories to it and those claiming under them? Very long and elaborate arguments have been addressed to us upon the former of these two questions, the parties ranging themselves into three main groups; each with its own construction to put forward. How these groups came to be formed, and in what circumstances the document originated, need to be borne in mind in attempting to discover the intention underlying the deed. The family, as the genealogical table shows, consisted in 1895, of three main branches, those of Sinnu, Subrahmanya and Ramu Odayar. Sinnu's branch depended for its existence upon the fact of the adoption of Siva Vadivelu, a member of Ramu's branch, by Sinnu's son Sendalangara. Subrahmanya's branch was represented by two members, Balasubrahmanya and Muthu. The third branch, that of Ramu, included a number of persons, Ramu's son Samu having had five sons. All those defendants who belong to the family are representatives of this branch. Up to 1895, as has been said, the family formed a single coparcenary; although being possessed of extensive property and engaged in various activities, its members may have exhibited some external marks of separateness. Some time before the date of Ex. A various disputes arose. One, it is said, had reference to Siva Vadivelu's adoption. Another was concerned with the nature of some of the property, whether it was self-acquired or joint. Balasubrahmanya of the second branch, evinced a desire to get his share divided, while Muthu of the same branch, was strongly of opinion that the whole family should remain joint. It was a question therefore whether to agree to his division, and if so, what share he should get. Some of these circumstances will need to be considered again when the binding character of the document is inquired into. It is sufficient to say here that Balasubrahmanya had his way and split off from the remainder of the family; and this seems primarily to have afforded occasion for the deed. At the same time there is no doubt that the opportunity



was availed of to compose the other outstanding questions, and to settle once for all how upon a general partition the property was to be allotted.

The document begins by calling itself a deed of partition between the signatories, a description which the cleavage with Balasubrahmanya would in itself justify, and adverts to the danger that disputes might arise in connexion with partition and heavy loss be occasioned thereby. Grounds are then found in the services to the family of Ramu Odayar and his son Samu Odayar for giving their branch special consideration. Accordingly, "the partition arrangements we have come to amongst ourselves are as follows." Then follow nine clauses setting forth these arrangements. Of these, the language of Cls. (1), (3), (6) and (8) must decide the construction to be placed upon the document. Cl. (1) assigns to Balasubrahmanya a one-fifth share and provides as regards the remaining four-fifths that the division is to be into five equal shares—four to go to the four subbranches of the third branch, and one to Siva Vadivelu. Cl. 3 defines Balasubrahmanya's share by means of a list, and collects the remaining property, comprising the family property of the remaining members, into two other lists. Cl. (6) recites that Muthu Odayar, out of natural affection for Samu Odayar's heirs, and because they would otherwise get a smaller share, gives them his share in the family property, being himself without heirs and advanced in years. In view of this

"the rest of us shall during the lifetime of Muthu Odayar live as members of one family. After Muthu Odayar, partition shall be effected according to the shares laid down in Cl. 1."

Clause (8) runs as follows:

"So long as the sharers other than Balasubrahmanya Odayar of us remain together without effecting a division by metes and bounds according to the shares mentioned in Cl. (1), the family shall be regarded as an ordinary undivided Hindu family subject to the law of survivorship."

The meaning of these clauses, as I have said, has been variously interpreted. The plaintiff, while very willing to avail himself of the document so far as it confirms his father's adoption, contends that Cl. (8) shows that the family remained joint and that the specification of shares in Cl. (1), being repugnant to the notion of a joint family, is invalid. He asks for a half-share in the entire remaining property, including that resigned by Muthu Odayar. A directly contrary view is pressed upon us on behalf of defendants 1, 2 and 9. One of Somu Odayar's sons, Sivaswami, died subsequent to the execution of the document, leaving a widow, defendant 9. Of course, if the family remained joint she will only be entitled to maintenance. But if Ex. A created a severance of status, the question whether or not she is to take her husband's share will depend upon whether, in spite of that circumstance, the rule of survivorship is to be applied under Cl. (8). She therefore contends for the virtual rejection of this clause. Defendant 1 is the sole surviving full brother of Sivaswami Odayar, and supports the widow in consideration of his reversionary interest. The third group—descendants of Ayyathorai Odayar (defendants 3, 4, 5, 7 and 8) and Singaravelu's adopted son (defendant 6)—contend that although Cl. (1) may have effected a severance of status, yet it is possible to give legal effect to Cl. (8) in such a manner as to apply what is, within certain limits, a rule of survivorship. The Principal Subordinate Judge has found in favour of the construction contended for by defendants 1, 2 and 9. This has given rise on the one hand to an appeal by the plaintiff. (A. S. No. 439), and on the other an appeal by defendants 3 to 8 (A. S. No. 411).

In approaching the construction of the document, no authority is needed for the principle that every endeavour should be made to ascertain from it, read as a whole, what was the expressed intention of the parties to it. Each part must, if possible, be reconciled to the remainder, because it must be presumed, unless and until such presumption appears to be forbidden by the language, that it was drafted to subserve a consistent purpose and course of action. Observation of this principle would seem to require that those constructions which would reject either Cl. (1) or Cl. (8) should, to begin with at least, be put on one side; because it seems clear that the adoption of either must frustrate some part of the intention with which the settlement was executed. There remain two interpretations to consider. The first supposes Cl. (1) to have effected a division in status, while Cl. (8) preserves the rule of survivorship. The second, which none of the parties finds it in his interest to sup-

port, but which may not be the less worth considering on that account, would construe Cl. (1) as no more than an agreement into what shares the property should be divided after Muthu Odayar's death, and not as evidencing a resolve immediately to sever in status. The clause would then plainly be reconcilable with Cl. (8).

Dealing with the merits of these two views it may be conceded that, but for the existence of Cl. (8) the natural view, and the view supported by authority, would be that a severance of status resulted from the declaration contained in Cl. 1. So far as the partial partition of Balasubrahmanya's share was concerned, all that was needed was to specify his one-fifth, and to leave the remaining members as an undivided family in possession of the remainder. Without doubt therefore a further intention is denoted by the apportionment of the four-fifths remaining into five equal shares. It has been urged that, whether that intention was to divide prospectively, or immediately, the mere definition of shares in law converted the joint tenancy of a coparcenary into a tenancy-in-common because an essential incident of a coparcenary is that no member can predicate what his share would be upon a partition. Before considering the case law upon this point, a few elementary considerations need to be stated. The members of a coparcenary own their property jointly, and the interest which each member has in it fluctuates with the number of other members, as some are born and some die. It fluctuates by operation of the rule of survivorship, and since that rule is a necessary incident of the status, so must be the liability to fluctuation. Hence abrogation of rule, rendering the shares fixed, necessarily involves a disruption of the joint status. The members become tenants-in-common, each possessed of individual rights which they may dispose of as individual property. They have substituted the rule of inheritance for the rule of survivorship. But if they retain the rule of survivorship it is not easy to understand how they can be said to have fixed their shares, because by the terms of their agreement those shares are still subject to the fluctuation produced by the rule operating upon them. Merely to specify therefore that on partition the property will be divided according to a certain method, and until then the members will remain joint-would not seem, on first principles, necessarily to precipitate a severance. A simple illustration of the distinction I seek to draw may be given. Suppose four brothers and a cousin (son of a deceased paternal uncle) compose a joint family. Upon a partition the cousin would take half the property, the primary division being per stirpes, and the four brothers would each take one quarter of the other half. Suppose however that these five members come to a settlement whereby they agree that, when a partition takes place, it is to be per capita throughout instead of per stirpes in the first instance, so that each member would obtain one-fifth, the family in the meanwhile to remain joint. There has been a substitution of one rule for another for the ascertainment of shares, but the shares are not thereby any the more or the less ascertained. Much less has any division of rights been effected. Yet that is very much what has occurred here. What the parties in effect said was:

> "We will recognize Sivavadivelu's adoption, but when come to divide we will ignore it, and count this member as though he occupied his natural place as a son of Samu Odayar,"

though it may be a question how the rule of survivorship should be applied to such an arrangement. I do not think that there is any authority for the view that such an agreement necessarily causes a division of status. The dicta of Lord Westbury in *Appovier's* case, *Appovier* v. *Rama Subba Aiyan* (1) do not apply to such circumstances, because there the family members agreed that thenceforth the property should be subject to ownership in certain defined shares, so that there was a division of rights, although it was not followed up by an actual partition. In *Balakrishen Das* v. *Ram Narayan Sahu* (4) the members of a joint family executed an ikrarnama, and the question was whether it effected a division in status. Their Lordships experienced

> "no difficulty in the construction of the ikrarnama, in which it is stated in unambiguous terms that defined shares in the whole estate had been allotted to the several coparceners,"

and that they were thereby converted from joint tenants into tenants-in-common. In the present case, assuming the retention of the rule of survivorship, the conversion of the joint tenancy into a

tenancy-in-common can scarcely have occurred. Another case in the same line of Privy Council decisions is *Parbati* v. *Naunihal Singh* (3), which related to an agreement by the members of a joint family that the family property should be thenceforth held and enjoyed by the various members of the family in certain defined shares. In deciding that the agreement produced a division in status their Lordships were, I think more concerned with the construction of the documents evidencing the agreement than with their legal effect, once it was found that an immediate division into shares was intended. The use of the word "thenceforth" will be noted. Another and not dissimilar case is *Syed Kasam* v. *Jorawar Singh* (7) of some assistance here because of an observation that the agreement was

"quite sufficient to effect a severance in interest and to prevent the share of Nain Singh from passing by survivorship."

Only by holding that Cl. 8 of the present agreement cannot operate can the agreement itself be held to effect such a severance.

I think it will be found that in each of these cases a present intention to divide in status was discovered, and none of them is authority for the view that the parties cannot agree to certain principles of partition, to be applied in future without becoming tenants-in-common. This in my view disposes of the contention that the family members here, irrespective of their own wishes, and irrespective of the terms upon which they proposed to hold their property until Muthu Odayar's death, must be regarded as severed in status. Before going further, it will be convenient to consider what their actual intention seems to have been. The document was drafted by a vakil, and although unfortunately it has given rise to this costly litigation, it is not unreasonable to suppose that it was drafted with due regard to the principles of Hindu law. It can hardly be supposed that anyone conversant with those principles would draw an instrument of so hybrid a character that in one place it divides status and makes the signatories tenants-in-common, while in another it applies to their property so well understood an incident of the joint family status as the rule of survivorship. It is not too much to say that this rule is the logical outcome of conditions wholly at variance with the incidents of a cotenancy. If Mr. K. S. Krishnaswami Aiyangar, in his endeavours to reconcile the two things, has convinced me of one thing it is the extreme difficulty of the task which was set him. He had to admit that the survivorship principle could only be applied with modification; and Mr. Varadachariar found no difficulty in suggesting problems and anomalies to which its application would give rise. Let us then see what the members of the family would seem to have desired.

One thing is clear—that very great deference was paid to the wishes of Muthu Odayar. He was the only surviving member of his generation, and, as the document says, "advanced in years." His name stands first in the deed. He was to give up his share to the others, and, as the evidence shows, he was most anxious that, apart from Balasubrahmanya's separation, which he deplored, the family should remain joint. Doubtless some slur may attach to family members who dispute and divide. It was therefore provided that so long as he lived there should be no further partition. I can see no reason to suppose that during his lifetime a division even of status was intended. After all, although such a severance is a familiar enough legal conception in the Courts, the necessity for partition first by status and then by metes and bounds does not very commonly arise in practice. Nor, again if such was the intention, are the parties likely to have nullified its main legal effect by the addition of Cl. 8. Accordingly, I cannot escape the conclusion that what they wanted was to remain joint until after Muthu Odayar's death, while settling how the property should then be divided. I have myself no difficulty in construing Ex. A as an expression of such an intention. It has been asked why, if no immediate division was intended, the parties should have been at pains to declare in Cl. 8 that

"the family shall be treated as (or "deemed to be") an ordinary undivided Hindu family subject to the law of survivorship"

and stress has been laid on the word "treated" or "deemed" as indicating a consciousness that the family was not in fact joint. No doubt that the phrase "deemed to be" is commonly used in statutes to extend the application of a

provision of law to a class not otherwise amenable to it. But as the learned Advocate-General observes, one cannot apply to a mufassil document rules of construction that would be appropriate in the case of a statute. I think the reasonable view to take is that the draftsman, having in mind such decisions as *Appovier's* case (1) and realizing that Cl. 1 might imperil the joint status (a fear, as the sequel shows, not unfounded) inserted Cl. 8 as a precautionary measure. A case which bears some resemblance to this one was decided by Krishnan and Ramesam, JJ., in *Venkatachala Pillai* v. *Arutha Vathachi* (9). The second of three brothers was adopted out of the family, the other two remaining joint. All three entered into an agreement to put their property together and live as members of a joint family, and when a division should take place to divide into three equal shares—subject to the operation of the law of survivorship. It fell to be decided whether the agreement had occasioned a severance of a status, and there, as here, it was argued that the deed

"as a matter of legal consequence, whatever the parties might have intended, resulted in the severance of coparcenary;"

but the learned Judges observe that the document recited that no party to it was to assert that any portion of the property belonged to him separately or exclusively and provided for future born children to be made sharers. It was further suggested that the fixing of the shares at one-third each was an indication that a division was intended, and *Balkrishan Das* v. *Ram Narain Sahu* (4) was cited in support of this contention. The answer to this, equally applicable I think to the present case, was that the definition of shares amounted to nothing more than a statement as to what each person would be entitled to in case of a division if no brother were born.

I should be prepared to hold then that the document is not ambiguous of the intention to remain joint, and is not ambiguously expressed. But conceding that there may be ambiguity, it is permissible to look at the subsequent conduct of the parties to ascertain if it favours the one view or the other.

A number of documents throw light upon this question. The earliest is a petition (Ex. D) filed in 1904 by defendant 1 asking to be appointed to the Negapatam Devastanam Committee in the vacancy caused by the death of Sivavadivelu, whom he describes as his undivided brother. Sivavadivelu was, of course, his natural brother though his cousin brother by adoption. Sivaswami Odayar, who was very largely conducting the family affairs, died in 1909 and his death gave occasion for a number of applications in pending suits. Ex. KK is a written statement filed by Singaravelu Odayar in a suit on a promissory note in which he was impleaded after Sivaswami Odayar's death. The terms of this statement throughout are only compatible with the existence of an undivided status. The present defendant 1 and defendants 3 and 4 adopted this statement in Exs. KK-1 and KK-2. The C series of documents again are compatible only with joint family membership, as for instance Ex. C-4, where the members of the family of Sivaswami, claiming to be his coparceners, asked to be brought on for purposes of executing the decree. The widow would, of course, have been the proper representative had the deceased man not been joint with the other family members. Ex. PP is a promissory note executed by Singaravelu Odayar, in 1911, in renewal of a debt contracted by Sivaswami Odayar, whom he describes as his undivided brother. Ex. CC is an application by Singaravelu Odayar to the receiver of the Palace Estate at Tanjore to transfer to his undivided younger brother Gopalaswami Odayar (defendant 1) the registry standing in his name of certain lands. The record shows that reference was made to the head karnam who reported that the family was an undivided one. A statement to the same effect is contained in a letter, Ex. CC-1 which defendant 1 wrote to the receiver in the same connexion. In 1917, a few days before his death, Singaravelu Odayar on behalf of himself, his adopted son and all the members of Ayyathorai's branch sent the remainder of the family a notice, Ex. N, that they should be held thenceforward to be divided. The notice says :

"Although yourselves and ourselves have been till now, living as members of an undivided family, as we think that we should become divided from you, we have become divided from now. You have no right to the properties

(9) A. I. R. 1923 Mad. 568=72 I. C. 548.

belonging to our share. In the same way, we have no right to the properties belonging to your share. We strictly inform you that henceforward there shall be between us only relationship by blood, but no interest with regard to property."

Whatever the circumstances in which this notice was issued it contains no allusion to the partition deed of 1895 and expressing as it does an unequivocal intention to become divided in status, it cannot easily be reconciled with the theory that an earlier division of this kind had already taken place. In fact, no further action seems to have been taken and this notice remained as much a dead letter as the suit partition deed itself. I have left to the last the only document which can in any manner be construed as suggesting a divided status. In 1899 Sivaswami Odayar offered himself as a candidate at a Municipal Election in Kumbakonam and Ex. 6 is a protest addressed by a number of voters to the Chairman, objecting to his candidature on the ground that his brother Sivavadivelu was already a Municipal Councillor and that the rules precluded more than one member of an undivided Hindu family from sitting on the Council. Ex. 6 (a) is Sivaswami Odayar's reply. His primary argument is that where in anundivided family the property is sufficient to qualify more than one individual for a seat, the rule referred to had no application. He then goes on to say that admitting that the rule is capable of the interpretation placed upon it by the petitioners his family

"might for the purpose of this objection be legally considered as a divided one under the terms of a registered document entered into among the members thereof dated 25th November 1895."

It seems clear to me from the terms of this letter that Sivaswami Odayar's own view was that he was undivided from his brother and that he merely put forward the possible legal effect of the partition deed as a means of gaining his object. If he had indeed believed that it divided the status, his reply would surely have been in different terms. From a consideration of all the available documentary evidence therefore I think that no other conclusion is possible but that those members of the family whose views are ascertainable from these documents entertained the view that they were still undivided in status.

My conclusion then is that the family members intended to remain joint until Muthu Odayar's death, while entering into this agreement as to what their shares should be thereafter. I have already expressed the view that an agreement of this nature does not necessarily disrupt the status. Nor has any authority been shown for the position that the members of a joint family are incapable of entering into such an agreement. There is no doubt that at the time of partition the members may by general agreement distribute the property otherwise, than as Hindu law provides, and there seems no reason why such an agreement cannot be entered into beforehand.

In the Privy Council case *Lakshmi Chand* v. *Anandi* (10) two brothers, while remaining joint, agreed that, if either died without male issue, his widow should take a life interest in half the estate, thereby abrogating the ruleof survivorship. It was held that the agrement was valid because a coshare rmaewith the consent of the remaining coy sharers mortgage or charge the share to which he would be entitled upon a partition ; and, on the same principle, he may deal otherwise with such a share. If therefore all the family members enter into a settlement whereby some will, upon a partition, receive less than what under Hindu law would be their share, the latter cannot afterwards plead that they were legally incompetent so to agree. Nor, I think, can the plaintiff succeed in attacking the agreement on the ground that, being without consideration, it is not binding upon him. It was entered into by his father, Sivavadivelu Odayar, before he was born, and although Sivavadivelu lived until 1903 he never repudiated it. So far as the other signatories are concerned it settles the question of his adoption, for which it seems there is extremely little independent evidence, a batch of four sale deeds (see Exs. Z and Z-1) in which this relationship is recited being the only documentary evidence (if indeed they are legal evidence at all) originating before Ex. A upon the record. On the other hand, the evidence of defendants 1 and 3 as D. Ws. 18 and 13 shows that there were disputes within the family about the adoption, and this is borne out

(10) A. I. R. 1926 P, C. 54 =95 I. C. 566 = 53 I. A. 123=48 All. 313 (P. C.).

by two other witnesses, D. Ws. 4 and 5 If Ex. A goes, therefore the plaintiff's status, following Sivavadivelu's status as an adopted son is at least in jeopardy, and as that would be fatal to the claim he makes to a half-share in the property, he does not handle this two-edged argument very confidently. It seems incontestable that Ex. A is binding for the sufficient reasons that it was an agreement between all the adult members of the family, and that it put an end —for the time being at least—to the disputes between them. Besides the matter of the plaintiff's father's adoption, there was the connected question of the share which Balasubrahmanya Odayar was to take. If the adoption was to be recognized he would get one-sixth of the whole, if not, one fourth. A mean was struck, and he received one-fifth. It appears, too, that there was a disagreement whether certain property was self-acquired by Ramu and Samu Odayar or joint family property, a question which would affect the shares to be taken by each branch. Lastly, the settlement included Muthu Odayar's resignation of his own share, subject to the payment to him annually of a sum of Rs. 4,000. Altogether, there can be no question, but that just where a number of creditors accept a composition, so in the general give-and-take and composing of differences, Ex. A as a family settlement is binding upon its signatories and those claiming under them.

The result of these findings will be that the undivided share of Sivaswami Odayar will pass by survivorship to the remaining members of his own branch, viz. (1) the descendants of Ayyathori, defendants 3 to 5, 7 and 8; (2) defendant 6 as representing his adoptive father Singaravelu, and (3) Gopalaswami and his son, defendants 1 and 2. Each of these will receive one-third of one-fifth share in addition to his or their own one-fifth in all four-fifteenths each, this fraction being further subdivided, in the case of the first branch, equally between defendant 3 and 4's sub-branches. The decree of the lower Court will be modified accordingly. The plaintiff, belonging to a different main branch from Sivaswami Odayar's, cannot benefit by his death, but will take the one-fifth already awarded him by the lower Court. As regards the other orders to be passed in A. S. Nos. 411 and 439, I agree to the terms of them as proposed by my Lord.

P.R.S./V.B. *Appeal dismissed.*

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*A. I. R. 1931 Madras 418

MADHAVAN NAIR, J.

Papathi Ammal—Plaintiff—Petitioner

v.

Karuppiah Pillai and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 1414 of 1928, Decided on 4th March 1930, against order of Distirct Munsif, Ramnad, D/- 3rd April 1928.

*** Civil P. C. (1908), O. 33, Rr. 2 and 3—Court allowing plaintiff to sue as pauper—Afterwards plaint returned validly under O. 7, R. 10—Compliance of Rr. 2 and 3 in representation of plaint is not necessary.**

When the plaint validly returned by one Court is presented to another Court in pursuance of the order passed by the first Court which had allowed the plaintiff to institute the suit as a pauper, the objection that it should have been filed by the party in person in order to entitle the petitioner to ask for liberty to continue the suit in forma pauperis cannot be upheld: *A.I.R.* 1929 *Mad* 828, *Rel. on.*

[P 419 C 1]

R. Kesava Aiyengar—for Petitioner.

T. R. Srinivasan—for Respondents.

Judgment—The petitioner asked for permission to institute the suit as a pauper in the Subordinate Judge's Court of Ramnad and that petition was allowed and the petitioner was treated as a pauper. Later on it was found that the valuation of the suit made it triable by the District Munsif of Ramnad. A memorandum was submitted by both the parties and it was agreed that the said suit should be tried by the District Munsif's Court, Ramnad. The plaint was accordingly returned for presentation to the proper Court under O. 7, R. 10 Civil P. C. The petitioner then presented the plaint to the District Munsif's Court of Ramnad and filed an application under O. 33, Rr. 1, 2 and 3 and uuder S. 151, Civil P. C., to declare the petitioner as pauper and to allow the petitioner to continue the suit O. S. 437 of 1927 on the file of that Court in forma pauperis.

Objection was taken by the respondents that the petition would not lie and that no such permission should be given. It is pointed out that the plaint was presented by a pleader and not by the party in person and that the requirements of O. 33 have not been complied with. These objections were upheld by

the lower Court and the petition was dismissed.

I think the lower Court's decision is wrong. The plaint that was returned was validly returned by the Subordinate Judge of Ramnad and it had to be presented to the District Munsif in pursuance of the order passed by the Subordinate Judge. No objection can be taken to the presentation of the plaint in these circumstances. Further it was also agreed by the parties that the suit may be tried by the District Munsif, Ramnad. In a case of this description when the plaint validly returned by one Court is presented to another Court in pursuance of the order passed by the first Court, I do not think that the objection that it should have been filed by the party in person in order to entitle the petitioner to ask for liberty to continue the suit in forma pauperis can be upheld. The principle of the decision in *Subbarao* v. *Venkatiratnam* (1) may be applied to this case. There it was pointed out that if a plaint has been validly presented in a Court and then the petitioner seeks to continue the suit in forma pauperis his petition is not to be dismissed on the ground that it was not in the form prescribed by R. 2, O. 33, and presented in person as required by R. 3, and that the proper procedure was to see if the plaint discloses a cause of action and issue notice to the Government to see if the plaintiff was really a pauper unable to pay the additional stamp duty, and, if the same was found, to allow the plaintiff to continue the suit in forma pauperis. Of course it is not disputed by the petitioner that her pauperim may be enquired into de novo in the District Munsif's Court of Ramnad. I think, on the principle enunciated in the above Madras decision and also having regard to the joint memo filed by both the partis in the present case, the application of the petitioner should have been allowed by the learned District Munsif. I set aside the lower Court's order. The petition will be taken up and disposed of on the merits. The petition is allowed with costs.

P.R.S./V.S. *Order set aside.*

(1) A. I. R. 1929 Mad. 828=121 I. C. 857=53 Mad. 43.

A. I. R. 1931 Madras 419

JACKSON, J.

S. Sendiappa Nadar and *others*—Petitioners.

v.

President, District Board, Madura—Respondents.

Criminal Revn. Nos. 445, 465 to 468, 520 and 521 of 1930, Criminal Revn. Petns. Nos. 412, 429 to 432, 483 and 484 of 1930, Decided on 2nd December 1930, against order of Second Class Magistrate, Periyakulam, D/ 21st June 1930.

Criminal P. C. (1898), S. 439—Remedy by way of appeal open — High Court will not interfere in revision.

Where a remedy ultimately lies by way of appeal it is unnecessary for the High Court to move in revision. And if the lower Court is clearly acting without jurisdiction the party need not concern himself at all about the trial but can simply appeal if the matter comes to judgment. If on the other hand it is not so clear, and it is a moot point whether or not the lower Court has jurisdiction then that matter should be thrashed out fully in both the Courts below before it is brought if necessary to the High Court. [P 419 C 2]

K. V. Sesha Ayyangar and *T. Ramachandra Rao*—for Petitioners.

Public Prosecutor—for the Crown.

A. Srirangachariar—for Respondents.

Order.—The petitioner seeks to revise an order passed in the course of a summons case by the Sub-Magistrate, Periyakulam. There is no provision in the Code of Criminal Procedure for writing orders in the course of a case, and the Sub-Magistrate would have been well advised to have deferred all writing till after the conclusion of the trial. If the petitioner felt aggrieved his proper course was to have moved in revision against the issue of summons. But speaking for myself, I should not have thought it advisable for this Court to intervene at that stage. Where a remedy ultimately lies by way of appeal, it is unnecessary for the High Court to move in revision. And if it is argued that the lower Court is clearly acting without jurisdiction, then the short answer is that the party need not concern himself at all about the trial, but can simply appeal if the matter comes to judgment. If on the other hand it is not so clear, and it is a moot point whether or not the lower Court has jurisdiction, then that matter should be thrashed out fully in both Courts below before it is brought if necessary, to the High Court. There-

fore if this petition had come before me for admission I should have dismissed it out of hand. I have only considered it because its admission was allowed, and the petitioner, after incurring the cost of printing has brought the matter up ready for hearing.

The President of the District Board, Madura, complains against the petitioner for constructing a building on a road vested in the Board. No section is mentioned. Attached to the complaint was a notice sent by the President of the District Board to the petitioner and apparently he is prosecuted for not obeying that notice by removing the encroachment, in which case it would be a complaint under S. 220, of the Act (Madras Local Boards Act.)

Apparently the road in question is vested in a Union under S. 60. The statement in the complaint that the road vested in the District Board seems to have been a deliberate misstatement of fact, because when the petitioner pleaded that the prosecution wat without jurisdiction the President of the District Board disclosed a cause of action of which he must have been aware when he launched the prosecution, but which he chose entirely to conceal. It appears that the Union was requested to move in the matter and declined. Thereupon the President of the District Board acted under S. 42 (b) and assumed the function of the Union Board. This may be done under S. 41 if the Board has made default in performing any duty imposed upon it by statute.

The President of a Local Board may require the owner of any premises to remove an obstruction under S. 159 ; but the only duty imposed upon him under that section is to exercise his discretion in the matter. The Act does not lay down that he must remove any encroachment; and if, as in this case, he elect not to serve a notice it cannot be said that he has made default in performing his duty. Matters of discretion are never considered to be mandatory: cf. 10 Halsbury, para. 170.

It must be found therefore that the President of the District Board had no authority to serve a notice under S. 159 in respect of a road not vested in that Board, or to prosecute for the failure to comply with that notice.

The petition is allowed and the complaint dismissed. A similar order is passed in Criminal Revn. Cases Nos. 465, 466, 467, 468, 520 and 521 of 1930.

P.R.S./K.N. *Petition allowed.*

A. I. R. 1931 Madras 420

BEASLEY, C. J. AND SUNDARAM CHETTY, J.

Kesava Chetti—Prisoner—Accused.

v.

Emperor

Referred Trial No. 132 of 1930, and Criminal Appeal No. 557 of 1930, Decided on 21st January 1931, by the Court of Session, North Arcot Division, for confirmation of sentence of death.

Penal Code (1860), S. 302—Death by blow with heavy stick — But no real intention to murder—Lesser punishment of transportation of life was given under S. 302.

Where the accused strikes the deceased on the head with a heavy stick and thereby causes his death, the accused is guilty of murder, as he must be taken to have known that what he was doing must in all probability cause the death of the deceased. Where the accused has no real intention in the strict sense of the word to kill the deceased, the Court will be justified in awarding the lesser sentence of transportation for life : *A.I.R.* 1923 *All.* 355, *Foll.* [P 421 C 2]

K. W. Rama Rao—for Accused.

Public Prosecutor—for the Crown.

Judgment. — The appellant was charged in the lower Court with murdering one Chinnaswami Chetty by striking him on the head with a heavy stick by reason of which blow Chinnaswami Chetty's skull was fractured in consequence of which he died. He was convicted in the lower Court of the offence of murder and received the death sentence. His case here has been strenuously argued by Mr. Rama Rao who has endeavoured to convince us that the offence committed by his client was not that of murder but only culpable homicide not amounting to murder. In the alternative his contention is that if his offence does amount to that of murder, the lesser sentence of transportation for life is the appropriate one.

The facts of the case are as follows: The appellant is the brother of a man named Chinna Pillai. Chinna Pillai was not at all on good terms with his wife and was habitually quarrelling with her. In consequence of those quarrels his wife had to leave him on several occasions previously. On the date in question, at about midnight a violent quarrel

took place between Chinna Pillai and his wife, so violent that it brought other persons, relations by marriage and blood relations and others who were not related at all, on the spot. It also brought on the spot Chinnaswami Chetty, the uncle of Chinna Pillai's wife. He came upon the scene, according to the evidence for the prosecution, in order to make peace. His presence there was resented by the appellant who gave him a slap on the face, and having done this the appellant went away to a cart close by, picked up a cart stick, came back with it and struck the deceased three blows: one on his skull and the other two on each side of his face. The blow on the skull fractured it and as a result of that blow Chinnaswami Chetty died. After Chinnaswami Chetty had fallen down as a result of this very severe blow those round about the scene chased the appellant into the house of P. W. 9 and there is no doubt at all that somebody picked up a stick which had fallen down from his hands and gave him a severe blow on one of his wrists and fractured it. The medical evidence discloses the fact that the appellant had bruises on his body and that his wrist was fractured. The appellant has endeavoured to make out that he received this fracture before the beating of Chinnaswami Chetty and not after, but we have no hesitation whatever in disbelieving that version ; and we are satisfied that the injuries the appellant received were after he had struck Chinnaswami Chetty the very severe blow on the head. According to the medical evidence considerable force must have been used in order to cause that fatal injury to the deceased. In the committing Magistrate's Court the appellant set up the case of drunkenness. He said that he, the deceased and others had been drinking heavily and that he was intoxicated and did not know what happened.

In the Sessions Court, when he was defended by two counsel, he set up the defence that he knew all about it, that he was attacked by the deceased man with the stick and that the injuries to the deceased were caused accidentally by P. W. 2, a version of the affair which we cannot possibly accept in view of the prosecution evidence. He has called two defence witnesses both of whom are quite unable to account for the death of Chinnaswami Chetty. They do not mention his being struck by anybody and the evidence of both these witnesses cannot be accepted. We are bound to accept the prosecution version supported as it is by the eyewitnesses to the occurrence. The result is that we are satisfied that the appellant struck this very severe blow on the head of the deceased and caused his death. He must be taken to have known that to strike a man on his skull with a stick using considerable force was an act so imminently dangerous that it must in all probability cause death and that he did so without any possible excuse. This therefore is the offence of murder and nothing short of it. The appellant was therefore quite properly convicted of that offence.

We have however to consider the question of sentence. As before stated, the appellant was sentenced to death by the learned Sessions Judge. We have examined the records very carefully and gone into the facts of the case very carefully in order to see whether there are any extenuating circumstances which would justify us in inflicting upon the appellant the lesser alternative sentence. We think that we are justified in doing so on the ground that, although he must be taken to have known that what he was doing must in all probability cause the death of the deceased and his offence was therefore murder, he, in striking the blow, had no real intention, in the strict sense of the word, to kill the deceased man. We are supported in our view by a decision of the Allahabad High Court reported in *Emperor* v. *Umrao* (1). That is a decision of the learned Chief Justice of that Court Sir Grimwood Mears and Banerji, J. In that case the accused person struck only one blow with a lathi on the skull of a man with whom he had quarrelled previously ; that man died and it was held that although the accused did not intend to kill him he was guilty of an offence under S. 302, I. P. C., and not under S. 304, but it was held that as he had no intention to kill that could be taken as a circumstance in extenuation of his offence and that he could be awarded the lesser of the two sentences.

This case is a border line case and we give the appellant the benefit of any

(1) A. I. R. 1933 All. 355=74 I. C. 257=24 Cr. L. J. 753.

doubt that may be in the case. Therefore whilst confirming the conviction of the appellant under S. 302, I. P. C., we alter the sentence to one of transportation for life. The appeal is otherwise dismissed.

P.R.S./B.V. *Appeal dismissed. but sentence reduced.*

A. I. R. 1931 Madras 422
Full Bench

BEASLEY, C.J., REILLY AND SUNDARAM CHETTY, JJ.

In the matter of *First Grade Pleader, Vellore.*

Full Bench, Decided on 19th January 1931.

Legal Practitioners Act (18 of 1879), S. 13 (f) (b)—Practitioner asking for adjou nments to move High Court merely to delay course of justice and taking no steps is guilty of improper conduct.

Where a legal practitioner asks for adjournments on different occasions to move the High Court and takes no steps whatever in that direction, and it appears that the adjournments were asked for merely to delay the course of justice with deliberate intention, he is guilty of gross improper conduct and renders himself liable to punishment. [P 422 C 1]

Advocate-General—for the Crown.

L. A. Govindaraghava Ayyar and *P. S. Ramachandra Ayyar*—for Pleader.

Beasley, C. J.—This matter comes before us under S. 13 (b) and (f), Legal Practitioners Act. The charge against the legal practitioner here is that on three different occasions he applied for adjournment in the Court of the Sub-Magistrate at Polur on the ground that the High Court would be moved for a transfer of the case and that he took no steps at all on those occasions, either himself or by means of his client, to move the High Court. It is charged against him that he applied for those adjournments with the deliberate intention of delaying the course of justice. I am quite satisfied that if it is proved against a legal practitioner that he deliberately, for the purpose of impeding the course of justice, makes a statement to a Court which he knows or believes to be untrue and thereby gains an advantage for his client, he is guilty of grossly improper conduct and as such renders himself liable to be dealt with by the High Court. In this case of course it is not suggested that he has been guilty of fraudulent conduct in the sense that the word "fraudulent" is usually used, but it is alleged that his conduct has been grossly improper. The three dates upon which the legal practitioner applied for adjournments are 8th February 1930, 27th May 1930 and 24th June 1930. His client was charged with the offence of criminal breach of trust.

On 4th October 1929 appearance was entered cn behalf of the accused person by the legal practitioner in this case. Previous to this the accused in the Magistrate's Court had obtained an adjournment and actually presented a petition to the District Magistrate which was rejected. After the legal practitioner had entered his appearance on behalf of his client, the client applied for adjournments twice on his own behalf for the purpose of moving the High Court and one adjournment was granted and the other refused, but on neither occasion were any steps taken to move the High Court, and it is highly improbable that the practitioner was unaware of this. Then we come to the three occasions upon which the practitioner himself on behalf of his client presented petitions for adjournment. The first, as I have already stated, was on the 8th February of this year. The reason assigned then for an adjournment for the purpose of moving the High Court was because it was contended on behalf of the accused that the offence with which the accused was charged was not one of criminal breach of trust but one of cheating under S. 420, I. P. C., and that the Sub-Magistrate of Polur had therefore no jurisdiction to entertain that charge. An adjournment was granted for the purpose of taking that question up to the High Court, but no steps were taken either by the legal practitioner or by his client. Then, on 27th May, one of the defence witnesses was available in Court and ready to be examined. But the accused did not wish that witness to be examined as the other defence witnesses were not ready, and an adjournment was asked for for the purpose of having all the defence witnesses summoned and examined on the same day. That application was refused by the Magistrate. Then an adjournment was asked for by the legal practitioner for the purpose of making an application to the High Court against that order, and it was granted. It does not seem to me to have been reasonable

to ask for an adjournment of the case to some future date in order to examine all the defence witnesses.

One of the defence witnesses was there and he could have been examined, but it has been stated on behalf of the legal practitioner by Mr. L. A. Govindaraghava Ayyar that it was probably because it was thought more convenient to call the defence witnesses in a certain order. However that may be, no steps were taken to move the High Court in the matter so that we have here the second occasion on which the legal practitioner asked for an adjournment for a purpose which was never carried out. The third occasion was on the 24th June of this year. The case had been adjourned for hearing to the 21st June by the Sub-Magistrate, and on that date the accused sent a telegram stating that he was ill and unable to attend Court. The Magistrate who had by this time formed a reasonable opinion with regard to the tactics being pursued by the accused would not accept that statement of the telegram or the excuse, and ordered the accused to be brought to Court on a non-bailable warrant and he was produced in Court on the 24th June. With him came a medical certificate granted by a local dispensary showing that the accused had attended as an outpatient at that dispensary on the 21st June, the very day when the case should have been taken up by the Magistrate; but the nature of the illness from which the accused in that case was suffering was not stated in the certificate. With that certificate before him and the previous history of the case in his mind, the Magistrate refused to grant bail to the accused. Thereupon he was again asked by the practitioner for an adjournment for the purpose of moving the High Court. That he refused to grant, but later on, in the same day, he granted an adjournment for 14 days for the purpose of the High Court being moved. After 13 days had elapsed and no steps whatever had been taken to move the High Court the practitioner withdrew from the case. That was on 7th July 1930.

The charge against the practitioner is that he was not acting bona fide in the matter and that he knew perfectly well when he asked for adjournments for the purpose of moving the High Court and obtained them, that that purpose was not going to be carried out and that he therefore impeded the course of justice. This of course is not a matter of direct evidence at all. One cannot look into the mind of the practitioner and say how much he knew, how much he did not know, or what his intention was. His intention has to be gathered from the circumstances of the case, and if the inference is so strong that it leads us to the conclusion that he knew perfectly well when he asked for adjournments and obtained them, that the purpose for which the adjournments were asked was not going to be carried out, then he has been guilty of grossly improper conduct.

The facts of the case here are that to the practitioner's knowledge, obviously before he himself commenced asking for adjournments, his client had twice asked for adjournment for the purpose of moving the High Court, but had taken no steps whatever in the matter. Then he himself asked for an adjournment for a similar purpose and that purpose was not carried out. That was repeated a second time and it was repeated a third time. With the knowledge the legal practitioner had before him of what his client had done before, he never started making applications on his behalf and with the knowledge that on the first occasion on which he himself gained an adjournment no attempt was made to move the High Court, nor on the second occasion; on the third occasion the inference is well-nigh irresistible that he knew perfectly well when he asked for the adjournment that he was putting forward a misrepresentation for the purpose of gaining a benefit for his client and that the High Court would never be moved by him. In his written explanation he says that he did this on the instructions of his client. He seems to think that it is the duty of a legal practitioner blindly to follow every instruction his client gives him. That is an entire misapprehension of the duty of a legal practitioner. He has not only got a duty towards his client but he has got a duty towards the Court, and it is his duty to see that the case is fairly and honestly conducted. He must not trick or deceive the Court or attempt to gain for his client an advantage by dishonest means. To attempt to obtain adjournments by misrepresentations and to put forward a purpose which the legal

practitioner knows will never be carried out is to attempt to gain, and to gain an advantage, by a trick and a very dishonest one too.

It is to be noted also that in his written explanation he says that he withdrew from the case because his client was in want of funds and that his client's creditors were pressing him on towards insolvency. That must mean that if his client had not been in need of funds, and his creditors had not been pressing him towards insolvency, he would have remained in the case as his legal practitiouer. Before the District Magistrate, upon whose report this case has come before us, a totally different explanation was given, namely that the practitioner then realized that his client's conduct was not bona fide. It need hardly be pointed out that these two explanations appear to be quite contradictory.

In my view the charge against the legal practitioner has been proved and amounts to grossly improper conduct, and for that conduct he must be punished. This is, so far as I know, the first case of this kind that has ever been before this Court and I do not think that we should make a very serious example of the pleader. I think that one very useful purpose will have been achieved by it being brought home to some of the members of the legal profession that they are under a duty to the Court. They must not mislead the Court. They must not ask for adjournments for their clients when they know that the reasons they are putting forward are untrue or have reason to believe are untrue. They must only make applications which they believe to be well founded. I think that this case will certainly serve a very useful purpose in bringing to the notice of legal practitioners, the majority of whom of course I feel sure do not require such a thing to be brought to their notice, that this is nct a conduct which can be tolerated by the High Court. The punishment which in my opinion should be inflicted upon the pleader is that he be suspended from practice for a period of three months.

Reilly, J.—I agree.

Sundaram Chetty, J.—I agree.

P.R.S./S.N. *Order accordingly.*

A .I. R. 1931 Madras 424

PANDALAI, J.

A. K. Kannayya Chetty and *others*—Petitioners.

v.

President, Union Board, Tirukoilur—Respondent.

Criminal Revn. Cases Nos. 852, 853, 896, 914 and 932 of 1929, Criminal Revn. Petns. Nos. 763, 764, 804, 821 and 839 of 1929, Decided on 10th September 1930 against judgments of Sub-divisional Magistrate, Tirukoilur.

Madras Local Boards Act (1920), S. 3 (18) —"Public road" does not exclude road margin belonging to Government.

There is nothing in the alteration of the language of the definition of public road in the Act of 1920 to show that "public road" excludes a road margin belonging to the Government which might have been included in it under the older Act. [P 426 C 1,2]

N. S. Venkatarama Ayyar, B. Somayya, C. Vasudevan, V. L. Ethiraj, and *N. Somasundaram*—for Petitioners.

S. Jagadisa Ayyar and *R. Srinivasa Ayyar*—for Respondent.

Parakkat Govinda Menon—for the Crown.

Order.—The petitioners in these cases are owners or occupiers of houses in the southern row of a street called South Car Street 'in Tirukoilur Union. They and some other house owners who have not applied to this Court were convicted by the Stationary Second Class Magistrate, Tirukoilur, which conviction was affirmed on appeal to the Sub-divisional Magistrate, Tirukoilur under S. 207 (1) (a), Local Boards' Act for failure to remove encroachments into the street in front of their several premises consisting of thatched roofs supported on posts planted in the ground. The common defence of all the petitioners was that the roofs were not encroachments because the strip of land occupied by them which is at the southern margin of the road was not part of the road but Government land under which there was a water channel called Thoppakulam channel covered by stone slabs laid across the top. This defence was rejected by both the Courts below who found that though the Thoppukulam channel which has been out of use for several years and the stone coverings to it belong to Government the surface is part of the road according to the definition in the Local

Boards Act and vests in the Union Board. It was proved that the site of the channel was surveyed as part of the road in 1920 to which no objection was then taken by any of the adjacent house owners and that in 1915 when proceedings under the Land Encroachment Act for levying penal assessment against the petitioner in Cr. R. C. 932 were taken the Collector while excusing the levy ordered by the Tahsildar and permitting the continuance of the encroaching roof so long as the owner did not interfere with the repairs of the channel made it quite clear which that petitioner admitted that the site belonged to Government liable to assessment under the Act. On these findings the petitioners were convicted and fined Rs. 25 each.

In this Court the advocate for the petitioners has advanced the argument that the definition of public road in the Local Boards Act 1920 is different from that of Public road in Act 6 of 1900 which itself amended the original definition of street and public street in the Act of 1884. It was contended that the result of this change of definition is that though the site of the Thoppakulam channel with its covering may have been part of the road or street according to the older definition yet the present definition excludes it from the road as it has become "the adjacent property'. belonging to Government. This is the main question in these cases.

The present Local Boards Act came into force on 1st April 1921 till when the former Act of 1884 as amended in 1900 was in force. According to Section 235 of the Act of 1920 all property rights and interests of whatever kind owned by or vested in a Local Board as constituted under the old Act, passed to the corresponding Local Board constituted under the new Act. If therefore the site of the Thoppakulam channel could be shown to have formed part of a public road under the old Act, it would necessarily form part of the same road under the new Act unless indeed there were something in the new Act (e. g., the definition of public road) which necessarily excludes it therefrom in spite of S. 235. A comparison of the old definition of road and street with the new definition of public road does not support the petitioner's contention. Road in the Act of 1884 as amended in 1900 includes

any road' street, square, court, alley or passage whether a thoroughfare or not over which the public has a right of way together with the drains on either side and with the land whether covered or not by any pavement verandah or other erection which lies on either side of the roadway up to the boundaries of the adjacent property whether that property be private property or property reserved by Government for other purposes and also includes the roadway over any public bridge or cause way.

"Public road" in the same Act means:
"any road which is now vested in a Local Board or which may hereafter be made at the cost of the Local Fund or which may hereafter be declared under S. 53 to be a public road."

The idea contained in the above definition of including in a road the marginal land between the roadway and the adjacent property was continued from the still older definition of street in the Act of 1884 as originally passed as
"any road, street, square, court, alley, or passage, whether a thoroughfare, or not over which the public have a right of way, together with the land (not being private property) whether covered or not by any pavement, verandah, or other erection, wh ch lies between the roadway and the main wall of any house adjacent thereto and also the roadway over any public bridge or cause way."

Similarly public street in the Act of 1884 as originally passed meant
"any street which now is a public street or may hereafter be declared to be a public street in manner hereinafter provided."

In the Act of 1920
"public road" means any street, road, square, court, alley, passage or riding path, whether a thoroughfare or not; over which the public have a right of way and included
(a) the roadway over any public bridge or cause-way,
(b) the footway attached to any such road, public bridge or cause way; and
(c) the drains attached to any such road, public bridge or cause-way, and the land, whether covered or not by any pavement, verandah or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property is privatp property or property belonging to Government.".

In the same Act
"private road" means any street, road, square, court, alley, passage or riding path which is not a "public road" but does not include a pathway made by the owner of premises on his own land to secure access to, or the convenient use of, such premises."

From the above it is clear that in the Acts of 1884 and the Amending Act of 1900 there was no definition of private street or private road and that the word "street" in 1884 and "road" in 1900

were defined as connoting all the attributes of a public street or road. The "public street" for which therefore there was no necessity for a fresh definition in 1884 was declared to mean streets which were then or were declared afterwards to be public. Similarly the substituted expression "public road" for which there was no necessity for a fresh definition in 1900 was declared to mean roads which were then vested in the Local Board or were afterwards made at the cost of the Local Fund or afterwards declared to be public. The amendments of 1920 were so far as the present matter goes not of substance but of arrangemsnt and merely verbal. The definition of "public road" of 1920 corresponds to "street" in 1884 and to that of "road" in 1900. Through all of them the same idea runs of a road or other way over which the public have a right of way and all of them include the marginal spaces on either side between the actual roadway and the adjacent property. It is only in describing the limit of the adjacent property that some alteration of language has occurred. In 1884, the limit was described as the main wall of any adjacent house. This left out cases where there was no house adjacent. Therefore in 1900 the limit was described as the boundary of the adjacent property whether it be private property or property reserved by Government for other purposes. This language seemed liable to the interpretation that unless Government property adjacent to road were "reserved" for some other purpose than a road, it would come within the definition of "road". Of very few properties can it be properly said that they are reserved by the owner for any purpose. If they are Government property they may be used for any purpose at the pleasure of Government and previous reservation notwithstanding. Therefore, the definition was too wide and the limit of the adjacent property really illusory. This was corrected in 1920 by omitting the words as to reseva-tion by Government" and we have now as the limit of a public road boundaries of the adjacent property whether it be pri-vate property or Government property.

There is nothing in the alteration of the language of the definition of public road in the Act of 1920 which supports the petitioner's argument that it excludes a road margin belonging to the Government which might have been included in it under the older Act. Under both Acts the road question is whether the disputed Government property is really only adjacent to the road and not a part of the road in the sense of being used or treated or intended to be used or treated as part of the road. So far as the present cases are concerned the findings of the Courts leave no room for doubt in the matter. The Thoppakulam channel which has for many years been out of use and which runs underground along the southern margin of the South Street is undoubtedly Government property. In 1915 the petitioner in 932 was assessed to penal assessment under the Land Encroachment Act for keeping the overhanging roof. The collector excused the assessment aud allowed the roof to remain but on condition that the owner did not interfere with the repairs to the channel. By S. 2 (2), Land Encroachment Act, all public roads, streets vested in a local authority are Government property within the meaning of that section. By the proviso to S. 3 payment of penal assessment does not confer any right of occupancy in the unauthorized occupant. Nor can the fact that the Collector did not then consider it necessary to levy the assessment or to evict the occupant affect in any manner his liability to action under Ss. 98 and 98-A, Local Boards Act (1884) as amended in 1900 which was then in force. In May 1920 the street in question was surveyed.

In the survey plan the Thoppakulam channel is not separately demarcated as different Government property but is included in the width of the street. No question or objection was raised by Government or anyone else as to this and it is idle for petitioners now to contend that the width of the road does not include the width of the channel and that the latter is a separate property adjacent to but not forming part of the road. I have no doubt that on the evidence before the lower Courts they were right in concluding that the space over which the petitioners have erected the roofs is part of a public road and that the roofs were therefore encroachments. The petitions are dismissed.

P.R.S./S.N. *Petitions dismissed.*

* A. I. R. 1931 Madras 427

BEASLEY, C. J. AND CORNISH, J.

Raman Koravan and *others*—Accused —Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 470 of 1930 and Criminal Ref. No. 6 of 1930, Decided on 20th November 1930, against order of Addl. Sess. Judge, Coimbatore, in Case No. 79 of 1930.

(a) Criminal P. C. (1898), S. 297—Dacoity —Judge not pointing out to jury that theft becomes robbery only when violence is used for committing theft—This is misdirection.

It is essential that the jury should be directed that theft only becomes robbery when it is shown that in the course of committing theft and for the purpose of committing theft violence is used. Where the Court omits to mention this very essential point he makes his charge to the jury very bad on that point and it amounts to misdirection: *Mad. Cr. Appeals Nos.* 169 and 183 *of* 1930; 38 *I. C.* 730; 5 *C. W. N.* 372 and 6 *C. W. N.* 72, *Ref.* [P 428 C 1]

*** (b) Criminal P. C. (1898), S. 297—Charge of dacoity—Charge against named persons—Sometimes verdict of acquittal of some and conviction of rest making number convicted below five—Jury must be warned of this and its consequent effect.**

When jury have before them a charge of dacoity viz. in cases where the charge is as against named persons, the jury often return a verdict acquitting some of them and convicting others and the number of those convicted falls below five. In such cases it should be pointed out to the jury what the effect of that verdict is. Thus the number of the convicted being less than five unless the jury are of opinion that in addition to the acquitted persons, there were other persons concerned not before the Court, the verdict of conviction of less than five persons of the offence cannot stand. Therefore the jury must be told that they must have due regard to the fact that they have acquitted a certain number of persons reducing the number to below five and that they must be satisfied before convicting any number short of five that they were acting conjointly with persons not charged in the case. [P 429 C 1,2]

K. N. Ganapathi—for the Crown.

Beasley, C. J.—In the Court below seven accused were charged with the offence of dacoity. and another, accused 6 was charged with dishonestly receiving stolen property under S. 412, I. P. C. The jury convicted accused 1, 2, 6 and 7 and accused 1, 2 and 7 of dacoity and the 6th of receiving stolen property. Accused 3, 4, 5 and 8 were found "not guilty." The learned Sessions Judge accepted the verdict of the jury in regard to accused 8 and acquitted him. In respect of the conviction of accused 1, 2 and 7 of dacoity, he sentenced accused 1 and 2 to five years' rigorous imprisonment each and accused 7 to four years' rigorous imprisonment. The jury having acquitted accused 3, 4 and 5 of the offence of dacoity, the learned Sessions Judge was dissatisfied with that acquittal and has referred the case to the High Court on the ground that the verdict of acquittal of those accused is perverse and that they should have convicted them of the offence of dacoity with which they were charged.

The occurrence took place on 27th March last. On that day P. Ws. 1 to 6 were returning from Shandy at Erode in the cart of P. W. 7. There were four carts going along the road and the last cart of the four was the object of attack by some persons after the carts had reached a place about 12 miles away from Erode. According to the prosecution case, about ten persons attacked the carts threw stones and beat the bandy man P. W. 7 and some of the prosecution witnesses. They then took some purses containing money, some cloth bundles and a bag of paddy from the cart. They then made off because the occupants of the other three carts came to the spot, The case against the accused in the Court below rested on the evidence of identification of the accused as being the persons who were present, on that of the approver P. W. 12 who gave evidence with regard to the offence and his association with some of the accused and on the evidence that accused 1, 2 and 7 were shown to have been in possession of property proved to have been stolen under the following circumstances: The house of accused 1 and 2 were searched and with regard to accused 7 he gave information about where some of the stolen property lay hidden and as a result of the information given, articles identified as the articles which had been stolen were there found. There was plenty of evidence to connect the other accused in the case with the offence of dacoity but as before mentioned, the jury acquitted them and the learned Sessions Judge is of the opinion that they did so because the evidence against them was mainly that of an approver and they had not been shown to have been in possession of recently stolen property as accused 1, 2 and 7 had and that the jury were prepared to convict of the offence only those

persons who were actually found to be in possesion of stolen property or who were able to show the police the place where the stolen property lay hidden. He is of the opinion that there is plenty of evidence in the case which clearly connects the other accused with the offence of dacoity and that is how the case comes before us. One difficulty of course in the way of the learned Sessions Judge was that the jury only found three of the accused guilty of dacoity and this was not a case where the charge against the accused was of having committed dacoity with named persons and other unknown persons and the effect of the jury's verdict without any explanation was that only three persons had been present and had taken part in a theft during the course of which violence was used and therefore there was this difficulty that if the acquittal of the other four was correct, then clearly these three convicted persons could not be convicted of dacoity because there is no proof that they had committed the offence of theft with violence with two or more persons which would bring up the number to five required by the section. However we are not here at present concerned with that point but with the charge to the jury of the learned Sessions Judge and it has been very fairly pointed out to us by the learned Public Prosecutor that there is a defect in his charge to the jury where he sets out the law on dacoity, namely, its definition. He says as follows;

"Dacoity is robberry conjointly committed by five or more persons; robbery is an aggravated form of theft; theft becomes robbery if force is used in committing the theft or in carrying away the property obtained by theft."

Then he goes on to define what theft is. The learned Sessions Judge does not point out to the jury that it is necessary not only that force should be used during the commission of the theft but that it must be used for the purpose of committing the theft. As has been pointed out by this Court and by the Calcutta High Court, it is essential that the jury should be directed that theft only becomes robery when it is shown that in the course of committing theft and for the purpose of committing theft, violence is used and in my opinion the omission of the learned Sessions Judge to point out that very important essential makes his charge to the jury bad on that point. and that it amounts to misdirection. This question was considered by a Bench of this Court of which I was a member in *Criminal Appeals Nos.* 169 and 183 of 1930. In that case the Assistant Sessions Judge in his charge to the jury defined the offence of robbery as follows:

"When in committing the theft or in carrying away property, a person voluntarily causes hurt or wrongful restraint, the offence amounts to robbery,"

and we held that that amounted to a misdirection because on the authority of this High Court and the Calcutta High Court the omission to state that violence must be nsed for the purpose of committing the theft was one which amounted to a misdirection. That is what the learned Sessions Judge has done in this case. The other cases upon the point are *Karuppa Goundan* v. *Emperor* (1) a decision of Spencer and Napier, JJ. and also *Otaruddi Manjhi* v. *Kalifuddi Manjhi* (2) .and *King Emperor* v. *Mathura Thakur* (3). As there is a misdirection in this case with regard to what constitutes the offence of dacoity clearly the accused cannot be convicted of that offence. There is clear evidence that they were guilty however of the offence of theft. The offence of theft was quite correctly stated to the jury and there is ample evidence to show that the three convicted accused persons were guilty of that offence. They have filed jail appeals and therefore it is necessary to say whether there was any misdirection by the learned Sessions Judge with regard to the facts of the case. There was not. There is clear evidence that accused 1's house on being searched contained a saree identified to be one of the stolen articles, that accused 2's house on being searched was found to have in it M. O. 80 another article proved to have been stolen and that accused 7 pointed out to a place where were discovered several articles identified as stolen property. Under these circumstauces there was no misdirection by the learned Sessions Judge with regard to the evidence against those persons and there was ample evidence upon which they could be convicted of theft. As it was they were on a misdirection convicted of dacoity. But it is open to us to convict them here of the offence of theft and there being

(1) [1917] 18 Cr. L. J. 349=38 I. C. 730.
(2) [1901] 5 C. W. N. 372.
(3) [1902] 6 C. W. N. 72.

ample evidence with regard to the commission of that offence and no misdirection by the learned Sessions Judge upon the point, there must be substituted for the conviction of dacoity a conviction of the offence of simple theft. The theft was accompanied by some amount of violence and therefore we see no reason for treating this as anything but a serious offence and under these circumstances they must be sentenced in respect of the offence of theft to three years' rigorous imprisonment. The disposal of the question of misdirection as regards the law relating to the offence of dacoity makes it unnecessary for us to consider any further the reference to us by the learned Sessions Judge. If there had been a proper direction with regard to dacoity and we had been able to find that the verdict of the jury with regard to the other accused persons was perverse, the verdict of acquittal with regard to those persons would have to be set aside; but as the direction was wrong in law on the question of dacoity, we cannot go into the further question of dacoity; we cannot go into the further question as to whether or not the acquittal of accused 3 was or was not correct.

I think I ought to mention one matter, because it is a matter which frequently arises when jury have before them a charge of dacoity, viz., in cases where the charge is as against named persons, the jury often return a verdict acquitting some of them and convicting the others and the number of those convicted falls below five. In such cases it should be pointed out to the jury what the effect of that verdict is. For instance suppose nine persons are charged with the offence of dacoity and five of them are acquitted by the jury and four convicted. The number of those convicted being four and not five, it is essential that the attention of the jury should be directed to the effect of that verdict. As five persons have not been convicted of of dacoity, unles the jury are of the opinion that in addition to the five acquitted there were other persons concerned not before the Court, clearly the verdict of conviction of the four persons of the offence cannot possibly stand. In this case the accused were not charged with having committed dacoity together with unknown persons; had they been so, the difficulty would not have arisen because it was open to the jury to find that the three persons whom they did convict were acting conjointly with two or more persons other than the named persons. But that was not the charge here and it is very important when such a situation as this arises that the jury should be told when they do return such a verdict that they must have due regard to the fact that they have acquitted a certain number of persons reducing the number to below five and that they must be satisfied before convicting any number short of five that they were acting conjointly with persons not charged in the case.

The result is that the conviction of accused 1, 2 and 7 of the offence of dacoity is altered to a conviction of theft and that the sentence passed upon them is reduced to one of three years' rigorous imprisonment each. Accused 3, 4 and 5 must be acquitted and are directed to be set at liberty.

P.R.S./B.V. *Conviction altered.*
Sentence reduced.

A. I. R. 1931 Madras 429

JACKSON, J.

M. Muthukumara Pillai—Accused 2—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 956 and 957 of 1930 and Criminal Revn. Petns. Nos. 884 and 885 of 1930, Decided on 6th February 1931, against orders of Joint Magistrate, Kumbakonam, D/- 4th December 1930.

Criminal P. C. (1898), S. 202—Report of police under S. 202 is part of record.

The report of the police under S. 202 is part of the record and there seems no reason to refuse copy: 14 *Cal.* 141, *Foll.* [P 429 C 2]

V. Rathnam—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The report of the police under S. 202, Criminal P. C., is part of the record as observed in *Baidya Nath Singh* v. *Muspratt* (1) and there seems no reason to refuse copy. Copy of list of witnesses also should be given. It is ordered accordingly. As regards other documents this Court cannot decide their relevance;

(1) [1887] 14 Cal. 141.

and petitioner must abide his remedy, if at all, by appeal.

P.R.S./V.S. *Order accordingly.*

A. I. R. 1931 Madras 430

BEASLEY, C. J. AND WALSH, J.

Krishnama Naicken and *another*—Appellants.

v.

Emperor—Opposite Party.

Referred Trial No. 88 of 1930 and Criminal Appeal No. 349 of 1930, Decided on 2nd October 1930, referred by Addl. Sess. Judge, Coimbatore.

(a) Evidence Act (1872), S. 32—Fact that statement of dying man recorded by another is read over and signed by deponent only makes its evidentiary value stronger.

Whether the statement made by a dying man and recorded by another is read over to him or not, or whether it is signed by him, makes no difference, and the fact that it has been read over and signed by the deponent only makes its evidentiary value stronger : 49 *Cal.* 358, *Foll.*

[P 431 C 2]

(b) Evidence Act (1872), S. 160—*X* recording statement of deceased—Statement not read over nor signed by deceased—Statement recorded in April—*X* required to give evidence not till July—*X* just putting in statement recorded by him as correct account of what deceased had stated—Statement admitted in evidence—On appeal objection raised that it was wrongly admitted inasmuch as *X* did not use it to refresh his memory nor did he attempt from recollection to reproduce words used by deceased—Statement held to be rightly admitted as under such circumstances statement should be treated as if the witness had prefaced it by stating categorically that he could not remember what deceased said—Evidence Act (1872), S. 32.

A Sub-Assistant Surgeon recorded the statement made by the deceased just before his death. The recorded statement however was neither read over to the deceased nor did it bear his signature. It was recorded in April, but the Sub-Assistant Surgeon was called upon to give evidence in the Sessions Court not till July. In the Sessions Court he just put in the recorded statement which was admitted in evidence. On appeal it was objected that the statement was wrongly admitted inasmuch as the witness did not use it to refresh his memory nor did he attempt from recollection to reproduce the words used by the accused.

Held : that under the circumstances the Sub-Assistant Surgeon was entitled to put in the statement recorded by him as a correct record of what the deceased said at the time ; and the statement was correctly admitted as a record of what the deceased stated, from which, the Sub-Assistant Surgeon refreshed his memory, for in such cases the statement should be treated as if the witness had prefaced it by stating categorically that he could not remember what the deceased said : *A. I. R.* 1926 *Lah.* 310, *Foll.* ; 8 *Cal.* 211, *not Appr.* ; 36 *Cal.* 659, *Rel. on.* ; 67 *I. C.* 577, *Discussed and Dist.*

[P 434 C 2, P 435 C 1]

(c) Penal Code (1860), S. 300— Sudden provocation.

The plea of grave and sudden provocation is one which it is for the accused to make out.

[P 436 C 1]

George Joseph—for Appellants.

Acting Public Prosecutor — for the Crown.

Beasley, C. J.—The two appellants, accused 1 and 2 in the Court below, were charged with the murder of Krishnama Naicken early in the morning of 2nd April 1930 at a place called Peedampalli. They were both convicted of the offence and appellant 1 was sentenced to death and appellant 2 to transportation for life. A great many difficulties have been raised in this appeal by Mr. Joseph in the course of his elaborate argument on behalf of the appellants, but really the case presents very little difficulty.

The prosecution case is that two days before the crime was committed, accused 1 quarrelled with P. W. 11, a Palla, and pursued him into the garden of P. W. 10, the father of the deceased. Nothing further happened then. On the next day accused 1 renewed the quarrel and P. W. 11 once more went to the garden of P. W. 10. Here the deceased took the part of P. W. 11 and attempted to strike accused 1 and there appears to have been a scuffle. Accused 1 went away threatening to cut the deceased to pieces for his interference on behalf of the Palla, P. W. 11. Then it is alleged that the wife of accused 1 was being ill-treated by him and had decided to leave him and wanted the help of the deceased as escort for her journey, and asked the deceased to help her on the Tuesday morning i. e., the day before the deceased was murdered. Nothing was done however until the early morning of Wednesday, 2nd April, when the deceased was aroused by accused 1's wife and asked to accompany her on her journey. This was at about cock-crow time and the deceased who was living in another part of the same house as that occupied by accused 1, his wife and his brother-in-law, left the house with accused 2 and the wife of accused 1 to escort her to a village named Pappampatti. According to the evidence of P. W. 5, the widow of the deceased, accused 1's wife said that her husband was ill-treating her and asked the deceased to escort her as far as Pappam-

patti ; and accused 2 was standing a few yards off at the time. She attempted to dissuade the deceased from going. He however set off with accused 1's wife and accused 2. After they had gone about a mile, and had reached a pallam on the way, accused 1 came on the scene and attacked the deceased with a billhook and thereupon the deceased struck accused 1 with his stick. This stick was wrested from him by accused 2 and he was then beaten and stabbed. P. Ws. 2 and 3 who are a master and servant were sleeping in a shed in a garden not far off at this time, the shed being a quarter of a mile from the spot where the stabbing of the deceased took place. P. W. 3 had gone out at the request of P. W. 2 to feed the cattle, and both of them heard cries coming from the spot where the deceased was, and ran to the scene. In order to get there they had to cross a bund on the top of which there was a quantity of prickly pear. This bund and the prickly pear were of sufficient height to prevent P. Ws. 2 and 3 from seeing anything that was happening on the other side of it and they do not pretend that they saw anything at all until they had mounted the bund and were going to the other side of it when they saw both the accused running off.

They say that they attempted to pursue them, but that as they were threatened with the bill hook they desisted and went to the scene of the occurrence where the deceased was crying out for help. They found the deceased lying injured in the pallam, and he told them what had happened; how he had been beaten and stabbed by both the accused. P. W. 2 directed P. W. 3 to go and inform the uncles of the deceased whilst he remained with the injured man. The uncles of the deceased are P. Ws. 8 and 9, and they were at this time working in their garden quite close to the house of the deceased and the two accused. P. W. 3 told them what had happened. P. W. 8 sent P. W. 9 at once to make a report to the Village Munsif, and he himself went to the scene where he found the deceased lying injured with P. W. 2 beside him. The deceased told P. W. 8 what had happened. He was then put into a cart and taken to the village and from there was taken in a motor car to the Sulur dispensary where P. W. 1, the Sub-Assistant Surgeon, attended to him. At first the deceased's injuries did not appear to be serious, but at 10-30 p. m. he suddenly got worse and as there was no time to send for a Magistrate, P. W. 1 took a statement from the deceased, Ex. B, which he recorded, and the injured man died at about midnight. In the meantime a requisition had been sent to the police by P. W. 1, and the Head Constable P. W. 13 saw the injured man who gave him an account of the occurrence. The Village Munsif, P. W. 12, sent of his reports to the police and to the Magistrate, and, if the stabbing and the beating of the deceased took place shortly before dawn, then we are of the opinion that there was no undue delay in sending off those reports. P. Ws. 2, 3, 5, 8 and 9 were examined on the same morning, but as P. W. 10, the father of the deceased, could not be found he was not examined until two or three days later by the Circle Inspector. P. W. 4, the wife of accused 1, was also examined three days later.

The inquest was held by P. W. 14 and the post-mortem was conducted by P. W. 6. The injuries sustained by the deceased were eight punctured and incised wounds on the head, arms and right leg ; and both the bones in the right forearm were fractured and the left ankle was broken ; so that it is clear that this unfortunate man was brutally beaten. According to P. W. 6 death was due to shock and haemorrhage of brain caused by these injuries. Accused 1 also received an injury because, on examination by P. W. 6, he was found to be suffering from a contused wound on the left side of the forehead. P. W. 4 gave no evidence-in-chief useful to the prosecution at the Sessions trial and was allowed to be treated as hostile ; and having regard to the fact that she is the wife of accused 1, there is nothing singular in the attitude taken up by her at the Sessions trial. Of course according to the prosecution case she was the only eyewitness of the occurrence. She was also hostile in the committing Magistrate's Court. The deceased also gave an account of the affair to his wife, P. W. 5, after she had come on the scene of the occurrence and, as before mentioned, to P. Ws. 2, 3 and 8 and the Head Constable. In all these accounts he named the two accused as his assailants. Reference has been made to the

statement of the deceased recorded by the Sub-Assistant Surgeon, P. W. 1. That is Ex. B. It is very brief and is as follows:

"One Krishnama Naicken, son of Velappa Naicken of Peedampalli assisted by his brother-in-law, assaulted me with koduval, stick, etc., this early morning at tbout 4-30 a. m. I was decoyed by accused Krishnama Naicken's wife on plea of helping her from being brutally assaulted by her hausband. I believing this to be true went to a pallam near Naliama Naicken's garden. The accused's brother-in-law caught hold of my tuft and the accused cut me with a koduval on my head. I fell down and both assaulted me with koduval and stick. I cried out and then the neighbours came and took me to this dispensary. There was no one else present at the time I was assaulted except the above three persons."

To P. Ws. 2, 3, 5, 8 and 13 deceased stated that he was attacked by accused 1, that he beat accused 1 with his stick and that accused 2 wrested the stick from him and beat him. In Ex. B he does not mention that he beat accused 1 with his stick. Ex. B was not read over to the deceased nor does it bear his signature. In the Sessions Court objection was taken to the admissibility of Ex. B. P. W. 1 had stated that he questioned the deceased in Tamil and recorded the statement in English, whereupon objection was taken by the pleaders for the appellants. Ex. B was however admitted and the learned Sessions Judge has made a note that the accused's pleaders were offered the opportunity of testing the witness in Tamil by reading him a short piece of Tamil, but they declined the offer. Ex. B is attested by P. W. 1's compounder who was present throughout the whole of the declaration.

In his judgment the learned Sessions Judge, in dealing with Ex. B, states that "it has been attacked, but I see no reason to doubt its genuineness." That is the only reference he makes to that document on the question of its admissibility. It appears therefore that the only objection taken to the document by the appellants' pleaders was that it was not a correct record of what the deceased stated. Here however Mr. Joseph has contended that Ex. B is inadmissible. His argument is that as it was not actually written by the deceased, but was written by somebody else and was not read over to him after it had been so written, and does not bear the signature of the deceased, it is not a written statement within the provisions of S. 32, Evidence Act, and is therefore inadmissible as a written statement of the deceased. He agrees that if such a statement is read over to the deceased and agreed to be correct, or is signed by the deceased, then there can be no question about its admissibility in evidence provided the person who wrote it, is put in the witness box to state that he wrote it. He relies on what P. W. 1 stated in the Sessions Court, namely :

"As I found his condition to be bad I took a dying declaration from the deceased at 10-30 p. m. and I recorded correctly what he told me It is Ex. B. I did not take his signature as his right arm was fractured."

His contention is that this not being the written statement of the deceased or recorded by some one else in compliance with the necessary formalities, the only evidence of whatthe deceased said can be that of witnesses who state from memory what it was they heard the deceased say. He agrees that those witnesses can be allowed to refresh their memories by reference to any writing made by themselves at the time of the transaction that is provided for by S. 159, Evidence Act, and he contends that that is not what P. W. 1 did in this case and that he did not state anything from memory, but merely put in Ex. B. Mr. Joseph agrees that he would not be able to take any exception to the evidence of P. W. 1 if that witness had said that he did not remember the actual words of the deceased and had been allowed by the Court to refresh his memory. His objection of course is purely technical and it is obvious that witnesses, who depose to something they heard an injured man say with regard to those injuries shortly before death purely from recollection, are not likely to be so accurate as a record made of the statement at the time. The evidence which is likely to be less accurate is clearly admissible, but when evidence which is more likely to be accurate is tendered, according to Mr. Joseph, it is inadmissible. He has referred to some cases which according to him support his argument and render Ex. B inadmissible. One of these is *Empress* v. *Samiruddin* (1). There it was decided that the dying statement of a deceased person must be taken in the presence of the accused, that if not so taken the writing cannot be admitted

(1) [1882] 8 Cal. 211=10 C. L. R. 11.

to prove the statement made and that the statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witnesses memory. On p. 213 the matter is thus dealt with in the judgment of Pontifex and Field, JJ. :

"The piece of evidence to which this observation relates is the dying statement of the deceased Babar Ali. This was recorded by the Deputy Magistrate as a deposition ; but it does not appear that Babar Ali was examined in the presence of the accused Samiruddin; and unless he were so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made."

This is relied upon Mr. Joseph as an authority in his favour because he argues that P. W. 1 did not use the writing to refresh his memory, but merely put it in without any attempt to refresh his memory or without having attempted to reproduce from his own recollection the words used by the deceased. Another case referred to by him is *Kunj Lal* v. *Emperor* (2). The headnote of that case is as follows:

"Witnesses should not be allowed to prove a dying declaration as if it were a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by a deceased person admissible under S. 32, Evidence Act, and that statement is not the document made by the Magistrate, but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the evidence of some witness who heard it made, the witness being at liberty to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made."

But it would appear from the judgment on p. 580 that the argument against the reception of the evidence of persons who heard the deceased person make a statement, which was recorded in writing, was a valuable criticism only, but the Court held that the two witnesses to whom the statements were made by the deceased having been produced in Court, and made available for cross-examination, the defect in the form in which the dying statements were taken down did not destroy their value. In that case both the Sub-Inspector and the Magistrate went into the witness box. It is a very different thing when it is sought to put in a statement by itself without calling the person to whom it was made to give evidence. *Empress* v. *Samiruddin* (1) was dissented from by Spencer and Phillips, JJ., in *In re Karuppan Saman* (3), where it was held that it was not necessary, in order to make a dying declaration admissible in evidence, that the Magistrate who recorded it be examined as a witness in the case. In the course of the judgment it is stated:

"It is conceded that an oral statement of a deceased person as to the cause of his death, if made in the absence of the accused, may be proved by anyone who heard it made as well as by the person who recorded it . . . . . That is sufficient for the purpose of the case, as Ex. D has been proved by the Sub-Assistant Surgeon who heard the statement being made and signed it. With all due deference we are unable to follow the learned Judge who decided *Empress* v. *Samiruddin* (1) and *King-Emperor* v. *Mathura Thakur* (4), when they say that the only way of proving such a statement is by calling a person who heard it made and permitting him to refresh his memory from the writing under S. 159, Evidence Act. Whether they are treated as written statements of deceased persons or written record of verbal statements S. 32 (1) allows dying declarations which have been reduced to writing to be admitted as relevant facts. They thus become substantive evidence of the circumstances leading to the deceased person's death when the cause of the death is in question. A statement taken in the absence of the accused from a witness for the prosecution is described as a "deposition" in S. 512, Criminal P. C., but Ss. 157 and 158, Evidence Act, show that if it satisfies the conditions of S. 32, it is nevertheless a statement, and as such is relevant whether the absence of the witness is caused by his death or by some other cause which makes him incapable of giving evidence in person."

Mr. Ganapathi, the learned Acting Public Prosecutor, contends that whether the statement recorded is read over or not, or whether it is signed, makes no difference and that the fact that it has been read over and signed by the deponent only makes its evidentiary value stronger, and with this contention we entirely agree. We were referred by Mr. Ganapathi to *Empreor* v. *Balramdas* (5), at p. 363 (of 49 *Cal.*) where it is stated:

"An objection has been taken that as the Assistant Surgeon neither himself recorded the statement nor read it at the time when it was made, he could not refresh his memory by re-

(2) [1922] 67 I. C. 577=23 Cr. L. J. 417.

(3) [1915] 16 Cr. L. J. 759=31 I. C. 859.

(4) [1902] 6 C. W. N. 72.

(5) A. I. R. 1922 Cal. 382=71 I. C. 685=24 Cr. L. J. 221=49 Cal. 358.

ference to that statement under S. 159, Evidence Act. But we hold that the evidence that the deceased used the words contained in the statement given by the witness who can speak to those words by refreshing his memory is not the only way in which the statement of the deceased person can be proved. If the witness who heard that statement made swears that the written statement correctly reproduces the words used by the deceased, this is sufficient to prove that the deceased did use the words contained in that statement. Here the important part of the evidence is that the dying declaration was recorded in the presence of a witness and was admitted by the deceased to be correct. This we think is sufficient. Our view is supported by the case of *Gouridas Namasudra* v. *Emperor* (6). There the written petition of complaint, which contained the statement made by the deceased person as to the cause of his death, was admitted in evidence on being proved by the mukhtear's mohurrir, who had prepared it under personal instructions, and who deposed that the deceased made the statement to him which was correctly recorded in the petition."

The case of *Gouridas Namasudra* v. *Emperor* (6) was not dissented from in this judgment because in the opinion of the Court the evidence of the Assistant Surgeon fulfilled the test laid down in that case. This case decides that any body who has heard the deceased make a statement which has been recorded can give evidence of it either by refreshing his memory or from recollection without it. This however does not quite meet the point of Mr Joseph whose contention is that P. W. 1 neither refreshed his memory nor attempted from recollection to reproduce the words used by the deceased. But upon this point *Partab Singh* v. *Emperor* (7) is against him. In that a case head constable produced a document which purported to be the record of a statement made by a dying person, and stated that he had recorded the statement correctly as contained in the document, and that the deceased was in his senses at the time, but did not repeat in his own words what the deceased had said; and it was held that inasmuch as the surrounding circumstances, and more especially the length of the period which intervened between the recording of the statement and the trial of the case, rendered it impossible for the constable to recollect and repeat the words used, his statement should be treated as if he had prefaced it by stating categorically that he could not remember what the deceased had said and that S. 160, Evidence Act, applies when the witness states in so many words that he does not recollect, and when the circumstances establish beyond doubt that this is so, and that having specific recollection of the facts he can only testify regarding the contents of the document before him and explain that he recorded correctly what the deponent said at the time. It is not clear whether in this case the statement made by the deceased was read over to the deceased or not but in our view that does not affect the question of the admissibility of the document. On p. 96 in the judgment it is stated as follows:

"In Ss. 159 and 160, Evidence Act, a distinction is drawn between the manner in which a witness may refresh his memory by referring to the writing and the testimony which he can give of facts stated in the document. If it is merely a question of a man refreshing his memory the document itself is not tendered in evidence and the witness merely gives evidence in the ordinary way after reading what has been written. S. 160 deals with the case where in spite of having written or read a document under the circumstances described in S. 159 the witness has got no specific recollection of the facts therein recorded but is sure that they were correctly recorded. Where this is the case the witness is still entitled to testify to the facts and the document itself is then tendered in evidence."

Further on it is stated:

"Section 160, Evidence Act, applies equally when the witness states in so many words that he does not recollect and when the circumstances establish beyond doubt that this is so. Having no specific recollection of the facts he can only testify to the effect that he recorded correctly what the deponent said at the time."

We think that as the statement was recorded in April, and the evidence was not given by P. W. 1 at the Sessions trial until July, P. W. 1 cannot be expected accurately to reproduce the words of the deceased, and that he was entitled therefore to put in Ex. B as a correct record of what the deponent said at the time. We guard ourselves from saying that when a dying declaration has been recorded and has been read over to the deponent and agreed to be correct it can be put in by itself and treated as substantive evidence without calling the person who recorded it, as we are of the opinion that the evidence of the person who recorded it or in his unavoidable absence some other person who was present and heard it correctly recorded should always be taken to make the written re-

(6) [1909] 36 Cal. 659=10 Cr. L. J. 186=2 I. C. 841

(7) A. I. R. 1926 Lah. 310=92 I. C. 167=27 Cr. L. J. 215=7 Lah. 91 (P. C.).

cord admissible. Ex. B was therefore correctly admitted in evidence in the lower Court as a record of the statement made by the deceased by P. W. 1 from which P. W. 1 refreshed his memory.

The evidence of P. Ws. 2 and 3 corroborates the statements made by the deceased to P. W. 1. Much was made of the fact that these two witnesses could not have heard the cries of the deceased because the evidence shows that not only were they 400 yards or more away from the spot where the deceased is alleged to have been beaten but there was the intervening bund which would prevent the sound travelling to them. The learned Sessions Judge is of the opinion, that these two witnesses could have heard the cries of the deceased. The occurrence is alleged to have taken place just before or at dawn when everything is usually quiet and there would be no other noise and it is certainly not impossible that P. Ws. 2 and 3 did hear the cries of the deceased. He must have struggled when attacked and certainly would have cried out very loudly in view of the brutal attack that was made upon him and the very great pain that he must have suffered; and we see no reason for thinking that P. Ws. 2 and 3 have not spoken the truth. They certainly went to the place of the occurrence very soon after the attack upon the deceased took place and something must have caused them both to go there. We are satisfied that these two witnesses would be able to see accused 1 and 2 when they reached the other side of the bund and as they say attempted to pursue them.

Mr. Joseph, however has taken the point that the learned Sessions Judge should have gone with the assessors to view the alleged scene of the occurrence as a petition was presented to him requesting him to adopt that course and one of the assessors also wished to view the place. The learned Sessions Judge rejected the petition and we think quite rightly. The distance between the alleged scene of the occurrence and the place where P. Ws. 2 and 3 were when they heard as they say the cries of the deceased was given by the police and a view of the spot would have been of no value at all for the purpose of finding out whether P. Ws. 2 and 3 could hear the cries of the deceased from where they stood unless the view had been held under precisely similar conditions as those prevailing at the time of the occurrence. In other words the wind would have to be blowing from the same quarter with the same strength and the cries uttered by the deceased would also have to be reproduced by some one else with the same loudness as that of the deceased. In our view a view would otherwise have been useless. We see no reason at all for doubting the evidence of P. Ws. 2 and 3 nor that of the head constable P. W. 13 with regard to the statement made by the deceased as to the manner in which he sustained his injuries. P. W. 5 also corroborates the deceased's story that accused 2 and accused 1's wife came to fetch him in the early hours of the morning. We are satisfied that the murder took place immediately before dawn although we have had pressed upon us a strong argument by Mr. Joseph that the murder is stated to have taken place at about cock-crow time which in his contention is considerably earlier than just before dawn. We do not agree with him. The word "cock-crow" is used very loosely by witnesses and we think that it is usually intended to mean just before dawn; and according to P. Ws. 2 and 3 it was just about dawn when they came upon the deceased lying in the pallam. It is most probable therefore that the deceased left his house about 20 minutes before dawn with accused 2 and accused 1's wife in order to go to the village of Pappampatti.

Another comment made by Mr. Joseph with regard to the case is that P. W. 10, the father of the deceased had quarrelled with him and the evidence is that he could not be found in order to be examined for two or three days after the occurrence. He puts forward the suggestion that the murder was committed by P. W. 10 but there is no evidence upon the record to support this suggestion and it remains merely a suggestion. But it is one which, in our opinion, is destroyed when the probabilities of the case are considered. The deceased had been brutally treated besides being stabbed—both the bones in the right forearm were fractured and the left ankle was broken—and it is unlikely that the deceased knowing that his father had inflicted these injuries upon him would have exculpated him and wrongly charged the appellants with the offence even though they hap-

pened to be identified with the opposite faction; and the suggestion is rendered still more improbable by the fact that the deceased stated that accused 2's wife was there and was therefore a witness of what he alleged took place, and naming the wife of one of his assailants as a witness would be very dangerous indeed if she were not present. Another alternative suggestion strongly pressed upon us by Mr Joseph is that the accused may have been enraged by meeting his wife in the company of the deceased and that he may have found her missing from the house, followed her up to the scene of offence and found the deceased taking her to her parent's home. The plea of grave and sudden provocation is one which it is for the accused to make out. It has not been set up by him and it is negatived by the fact that, if the prosecution evidence be accepted, the accused's wife was being accompanied by her own brother as well as by the deceased. In this connexion it is also argued that the deceased cannot have been decoyed away by P. W. 4 because the evidence shows that accused used actually to quarrel with his wife. It has to be remembered that the deceased and his wife and accused and his wife lived in different parts of the same house. The terms on which accused 1 and his wife P. W. 4 were must therefore have been well known to the deceased. So if P. W. 4 was to decoy the deceased and prevail on him to take her to her parents' house, the only course was to speak the truth on this point. Whether she acted as a decoy under compulsion by her husband or was made an innocent tool by him is immaterial. In addition to all this, there is the undoubted fact that accused 1 absconded for a few days and that accused 2 when arrested the same night was wearing a shirt with two or three spots of blood certified to be human blood by the Imperial Serologist upon it. No explanation is given by accused 1 for the blood spots on this garment. Accused 1 also had an injury upon him to which reference has already been made. He attempted to explain this by stating that he got it when handling an untrained bull when baling water but the deceased stated that he struck accused 1 with a stick.

We agree with the learned Sessions Judge that the evidence proves that both the appellants are guilty of the murder of Krishnama Naicken; and their convictions in the lower Court of that offence must be confirmed. We also confirm the sentence of death passed upon appellant 1 and the sentence of death of transportation for life passed upon appellant 2. The appeal is dismissed.

P.R.S./S.N. *Convictions confirmed.*

A. I. R. 1931 Madras 436

BEASLEY, C. J. AND WALSH, J.

Kanaga Kosvan —Accused —Petitioner.

v.

Emperor —Opposite Party.

Referred Trial No 80 of 1930 and Criminal Appeal No 323 of 1930, Decided on 25th September 1930, by Sess. Judge, Coimbatore, for confirmation of sentence of death passed upon prisoner in Case No. 53 of 1930.

Penal Code, Ss. 304, and 300 Excep. 5—Accused killing woman above 18 years of age with her consent—Accused is guilty of culpable homicide not amounting to murder.

Where the accused kills a woman above the age of 18 years at her request and with her consent, he is guilty of culpable homicide not amounting to murder under the earlier part of S. 304 : 5 *W. R. (Cr.)* 7 ; 6 *W. R. (Cr.)* 67 ; 18 *Cal.* 484; 45 *P. R.* 1917 *(Cr.)*; 33 *All.* 25 ; *A. I. R.* 1928 *Pat.* 497 and *A. I. R.* 1929 *Lah.* 50, *Ref.* ; 62 *I. C.* 414, *Dist.* [P 439 C 2]

K. K. Sridharan —for Accused.

Acting Public Prosecutor —for the Crown.

Beasley, C. J.—The appellant was convicted in the Sessions Court of Coimbatore of the offence of murder and sentenced to death. The charge against him was that on 13th November 1929 he murdered a woman named Unnamalai on a road between two villages not far from the village of Arasapalayam. The murder is alleged to have taken place between cock-crowing time and just after dawn because at the latter time P. W. 7 was informed that a woman was lying dead on the road to the north of the village and he went and saw the body which lay about two furlongs from his house. He identified the body as being that of a woman who had taken her meals and slept in his house the previous night and had left the house a little before cock-crow together with the appellant. The woman and the appellant had come to the house the evening before and

they asked for food and it was given to them and then the woman and the appellant slept on the pial that night. If the evidence of this witness is to be believed—and there is no apparent reason for disbelieving it—then the deceased was last seen in the company of the appellant very shortly before the hour at which she was murdered. The evidence does not stop there because there are other prosecution witnesses who speak to having seen the couple together before this. Two days before the occurrence they went to the house of P. W. 6 at Okkilipalayam and asked to be allowed to sleep on his pial and were allowed to do so and left the following morning. P. W. 14 says that he saw them both together on 7th November and P. W. 16 saw them both together in October-November. The evidence of these witnesses can be believed and indeed it is not disputed by the appellant that they did visit the house of P. W. 6 and the house of P. W. 7 on the days when those witnesses say they did, for he had made a long statement Ex. E in which he admits having done so. This confession was subsequently retracted. His case in this confession is as follows: The deceased was trying in various places to find a house to live in. He accompanied her to these places but no house was available. They were travelling about from one place to another. On the day of occurrence, at about 5 o'clock in the morning after leaving P. W. 7's house the deceased sat down at the junction of the Arasapalayam and Seerapalayam roads refusing to go to her village to which she had been advised by the appellant to return. He endeavoured to persuade her to go to her village saying that they had gone about for five or six days in search of a house but had found none but she lay down and refused to get up. He sat by her, held her by her hand and tried to make her get up. He said to her :

"On account of you they are scandalizing me too. I cannot be here any longer."

She refused to go and lay down. She took the knife out of his waist, put it into his hand and asked him to cut and throw her away and be off. He said he would not do so but she seized the dhoti he was wearing and urged him to cut her. Thereupon he cut her neck with the knife. While she was holding his dhoti the knife hit her first on the left shoulder and caused an injury. He then went away to his village taking the knife with him and when the police questioned him he gave the knife to them on Wednesday.

The learned Sessions Judge came to the conclusion that this confession Ex. E was a voluntary one and with that conclusion I entirely agree. P. W. 1, the Stationary Sub-Magistrate who recorded the confession, says that he warned the accused that he was not bound to make any statement and that any statement he made might be used against him. The appellant had been sent on 28th November 1929 to the witness by the Podanur Police for remand and he also received a requisition from the Sub-Inspector to record his confession ; but the witness did not record it on that day as the appellant had up to that time been in police custody but examined him two days later in the meantime remanding him to the Central Jail, Coimbatore. There is no reason to suppose that the confession was other than a voluntary one. The body of the deceased woman was not officially discovered until the 15th although witnesses for the prosecution had seen it on the 14th without telling the authorities about it. P. W. 7's evidence is corroborated by that of P. W 8 and the dead body was seen by P.Ws 9, 10, 11 and 12. It was P. W. 12 who gave P. W. 13 the Village Munsif the information about the corpse on 15th November. The corpse had two injuries, a cut wound on the neck and one on the shoulder.

The earlier history of the relationship between the appellant and the deceased woman is that the appellant appears to have kept her, up to some four years before the murder but there is no apparent motive for the murder though it is suggested by the prosecution that the appellant feeling that the deceased was an embarrassment, murdered her in order to get rid of her. As against this theory there is the statement of the appellant that he was willingly accompanying the deceased during the last days of her life. An attempt was made to support the case against the appellant by evidence with regard to a gold bangle which, it is alleged, was in the possession of the deceased at the time of her murder. This bangle was recovered from the appellant's mother by the police when the appellant accompanied by the police

asked his mother to give up the bangle to them but the evidence does not in my view, prove that the deceased woman had the bangle at the time of the murder. The bangle is an ordinary thin gold one of which there are many thousands and is one which is ordinarily worn by a male and I am not satisfied that it was on the dead body of the deceased at this time. There can be no dispute about the ownership of M. O. 1 in view of the fact that it was at the request of the appellant delivered to the police. But there is no satisfactory evidence to show that the deceased had the bangle on when she died. An endeavour was made by the defence in the Sessions Court to show that the body was not the body of the woman seen in the company of the appellant but, in my view. the evidence of the witnesses who saw her in the company of the appellant the night before, namely P. W's. 7 and 8 sufficiently identifies the corpse as that of the woman who stayed in P. W. 7's house the night before.

The appellant attempted after retracting his confession to set up an alibi but the evidence in support of it is obviously false. The learned Sessions Judge says that he cannot bring himself to believe that the deceased was a consenting party to the murder and he therefore disbelieves that part of the appellant's confession although he believes most of the other facts stated in it. There are no eyewitnesses of the killing of this unfortunate woman and the possibility that she may have asked the appellant to kill her cannot be dismissed altogether in view of the fact that this unfortunate woman had been wandering about from place to place according to the confession, trying to find a house in which to live but unsuccessfully. It is not impossible that under these circumstances feeling desperate and depressed she asked the appellant to kill her and there is no real motive proved by the prosecution for the appellant deliberately killing her of his own free will. I think that in this state of affairs he must be given the benefit of the doubt and that the whole of his confession must be accepted and that I must find that he killed the deceased at her request. What then is the legal position ? It is argued on his behalf that on these facts the appellant is entitled to the benefit of Excep. 5, S. 300, I. P. C. It reads as follows :

" Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent."

From the evidence it is obvious that the deceased was more than 18 years of age and she was therefore able to consent to her killing. Several authorities on this point were referred to and all of them seem to me clearly to support the appellant's contention. The first of these is *Queen* v. *Baboolun Hijrah* (1), where it was held that if a man above the age of 18 years submits himself to emasculation performed neither by a skilful hand, nor in the least dangerous way, and dies from the injury the persons concerned in the act are guilty of culpable homicide not amounting to murder. In *Queen* v. *Anunto Rurnagat* (2) the accused and his wife being overwhelmed with grief for the loss of their child determined to kill themselves. His wife made repeated requests to him that he should kill her and after a time he did so by striking her three blows with an adze. The Sessions Judge who tried the case was of the opinion that Excep. 5, S. 300, I. P. C., did not apply to the case because he was of the opinion that the woman was killed whilst she was asleep ; but on appeal it was held that the case did come within Excep. 5 to S. 300, I. P. C. and that the accused was guilty of culpable homicide not amounting to murder punishable under S. 304, I. P. C. Then there is *Queen-Empress* v. *Nayamuddin* (3) where in a case in which it was found that accused persons were guilty of rioting armed with deadly weapons in a premeditated and prearranged fight which appeared to be a regular pitched battle or trial of strength between the two parties concerned in the riot and that in the course of the riot and in prosecution of the common object of the assembly, one of the accused attempted to kill a man under such circumstances that his act amounted to an attempt to murder, the question arose whether that act could be said to bear a less grave character by reason of Excep. 5 to S. 300, I. P. C., and it was held that the case did not fall within the exception. O'Kinealy, J., was of the opinion that before Excep. 5 can

(1) 5 W.R. Cr. 7.
(2) 6 W.R. Cr. 57.
(3) [1891] 18 Cal. 484.

be applied, it must be found that the person killed was, with a full knowledge of the facts, determined to suffer death or take the risk of death and that this determination continued up to, and existed at the moment of his death. In *Ujgar Singh* v. *Emperor* (4) the accused killed his step-father, who was an infirm old man, with his consent in order to involve some of their enemies in trouble by charging them with the murder and it was held that the case was covered by Excep. 5, S. 300, I. P. C., and that the accused was guilty of an offence under S. 304, Penal Code. In *Emperor* v. *Bharat Bipari* (5) the accused the parents of a child, offered the child to the crocodiles in a tank in the belief that though the child would be taken away, it would be returned unharmed and thereafter would lead a charmed life and attain to a good old age it was held that they were guilty of an offence under the latter part of S. 304, I. P. C. This case, of course, is not strictly in point as this was not a case of Excep. 5, S 300, I. P. C. In *Emperor* v. *Ramdayal* (6) it was held that persons actively assisting a Hindu widow in becoming a sati are guilty of the offence of abetment of suicide as defined in S. 306, I. P. C. In *Emperor* v. *Vidyasagar Pandya*, *A. I. R.* 1923 *Pat.* 497, *Emperor* v. *Ramdayal* (6) was followed.

In *Masun Ali* v. *Emperor*, *A. I. R.* 1929 *Lah.* 50 a case very much in point the accused strangled his beloved aged 16 years to death upon their decision to die together in despair of the future separation and feeling that they could not live apart and it was held that this was essentially the case where the spirit, if not the letter of Excep. 5 may be applied and though convicted of murder the sentence should be for transportation for life. Had the murdered girl been above the age of 16, the offence would have been culpable homicide not amounting to murder. There is an unreported Madras case viz., *Criminal Revision Case No.* 646 of 1925 where the wife was beaten to death in the belief that it would drive the devil out of her and it was held that the accused was guilty of an offence under S. 304, I. P. C.

It is obvious from all these authorities, the facts of this case being as I have found them, the appellant is entitled to the benefit of Excep. 5, S. 300, I. P. C. and must be convicted only of culpable homicide not amounting to murder under the earlier part of S. 304, I. P. C. His conviction under S. 302 I. P. C. must be set aside and also the sentence of death passed upon him and in respect of his conviction under S. 304, I. P. C., earlier part, he must receive the maximum sentence namely transportation for life.

Walsh, J.—I agree.

P.R.S./K.N. *Order accordingly.*

(4) [1917] 45 P.R. 1917=19 Cr. L.J. 125=43 I.C. 413.
(5) A.I.R. 1921 Cal. 501=62 I.C. 414=22 Cr. L.J 526.
(6) [1914] 36 All. 26=14 Cr.L.J. 634=21 I.C. 682.

A. I. R. 1931 Madras 439

JACKSON, J.

P. K. Subramania Ayyar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 559 of 1930, and Criminal Revn. Petn. No. 520 of 1930, Decided on 3rd February 1931, against judgment of Sess. Judge, Madura, in Criminal Appeal No. 36 of 1930.

(a) Criminal P. C. (1898), S. 227—Court may alter charge at any time before judgment is pronounced.

A Court may alter a charge at any time before judgment is pronounced. Where the alteration has occasioned a failure of justice, the appellate Court may interfere. It is a mistake to cite cases where the Courts have so interfered as though they establish a proposition in law limiting the discretion conferred upon the trial Court by S. 227 and preventing it absolutely from altering the charge at certain stages of the case. A discretion conferred by statute cannot be whittled away by ruling: 41 *Cal.* 446, *Rel. on.* [P 440 C 1]

(b) Penal Code (1860), S. 409—If accused is not entrusted with public funds, he cannot be convicted.

Where an accused, in capacity of an accountant of a Municipality, puts up cheques drawn to self for the Chairman's endorsement persuading the Chairman, who is ignorant of English, that they were for contractors, draws the money from the sub-treasury and misappropriates it, if he is never entrusted with Municipal funds, he cannot be convicted of an offence under S. 409. [P 440 C 1]

F. S. Vaz—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner has been sentenced to two years' rigorous imprisonment under S. 409, I. P. C., for criminal breach of trust.

He was originally charged under S. 477-A, I. P. C, but that count was struck out under S. 227, Criminal P. C. A Court may alter a charge at any time before judgment is pronounced; but of course, if in certain circumstances such alteration has occasioned a failure of justice, the appellate or revisional Court may interfere. It is a mistake to cite cases where the Courts have so interfered as though they establish a proposition in law limiting the discretion conferred upon the trial Court by S. 227, and preventing it absolutely from altering the charge at certain stages of the case. A discretion conferred by statute cannot be whittled away by ruling: *In re an Attorney* (1) at p. 457.

In this case I do not find that any injustice was occasioned by striking out the second count. But the real difficulty is that the first count bears no relation to the facts proved. The accused was an accountant of Palni Municipality and is proved to have put up cheques drawn to self for the Chairman's endorsement persuading the Chairman, who was ignorant of English, that they were for contractors; and then drawing the money from the Sub-treasury and misappropriating it.

Assuming this to be true the accused cheated the person in charge of the Sub-Treasury to pay him out moneys, but this is not entrustment. As the learned Judge puts it,

"the appellant did by means of a series of bogus cheques abstract from the Municipal funds a very large sum of money;"

but the appellant was never entrusted with Municipal funds. He was merely an accountant, and his short answer to the first (and final) count in the charge would be that in the capacity of accountant he was never entrusted with funds.

In the circumstances the only course seems to be to set aside the conviction. It would be highly unsatisfactory that a guilty person should escape in this manner; but the learned Public Prosecutor in this case has produced under instructions certain papers which in any circumstances would have greatly mitigated the sentence, and possibly the miscarriage of justice is not as great as it may seem. This petition is allowed and the petitioner is acquitted.

P.R.S./V.S. *Accused acquitted.*

(1) [1914] 41 Cal. 446=15 Cr. L. J. 49=22 I. C. 321.

A. I. R. 1931 Madras 440

JACKSON, J.

C. Samuel Aaron — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 653 of 1930, and Criminal Revn. Petn. No. 606 of 1930, Decided on 6th February 1931, against judgment of Sess. Judge, North Malabar, in Criminal Appeal No. 6 of 1930.

(a) Penal Code (1860), S. 157—No hiring proved — No conviction under S. 157 can sustain.

For conviction under S. 157 it must be shown that the persons were hired, engaged or employed, and of that if there is really no evidence, a conviction under that section cannot be sustained. [P 440 C 2]

(b) Penal Code (1860), S. 157—Scope.

Volunteers engaged in preparing salt cannot be said to have been hired, engaged and employed by their leader. [P 440 C 2]

C. S. Venkatachariar for *M. C. Sridharan* – for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner has been fined Rs. 1,000 for harbouring in Cannanore certain persons from Travancore and Cochin who were trying to make salt out of sea water. He agrees that they stopped at his vacant hotel, and there is no doubt that he harboured them. But for a conviction under S. 157, I. P. C., it must be shown that they were hired, engaged or employed, and of that there is really no evidence.

The Police-Inspector P. W. 1 infers that their leader employed them; but one might as well infer that a cricket captain employs his team. It is quite possible that they were all volunteers hired, engaged and employed by no one.

In that view of the case the conviction cannot stand; the petition is allowed and the fine ordered to be refunded.

P.R.S./V.S. *Conviction set aside.*

** A. I. R. 1931 Madras 441
Special Bench

BEASLEY, C. J. AND SUNDARAM CHETTY AND STONE, JJ.

In the matter of *P. C. Venkataramanayya Pantulu, Advocate, High Court, Madras.*

Referred Case No. 1 of 1929, Decided on 8th January 1931. Case referred to High Court by Bar Council under S. 12 (3) of the Bar Councils Act.

**** (a) Evidence Act (1872), S. 41—Person declared in insolvency Court creditor of insolvent does not confer "legal character" on him.**

The judgment of insolvency Court declaring a person as creditor of the insolvent does not confer any "legal character" on him within the meaning of S. 41, and hence the declaration does not operate as a judgment in rem : *A. I. R.* 1924 *Mad.* 662, *Rel. on.*; 39 *Mad.* 80; *A. I. R.* 1916 *P. C.* 78; 16 *Mad.* 380 *Cons.*

[P 445 C 1, 2]

*** (b) Evidence Act (1872), S. 41 — Declaration of title to "specific thing" to be conclusive must be made not against specified person but absolutely.**

In order that declaration of title to specific thing should have the conclusive character as against the whole world it is not enough to show that under the judgment of the insolvency Court one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely. A decree declaring that *A* is entitled to a debt is not a declaration of title to a specific thing made, not against a specified person, but absolutely : 33 *I. C.* 798, *not Appr.* [P 449 C 1]

(c) Evidence Act (1872), S. 41—Right to recover debt is not "specific thing."

A right to recover a debt or a chose in action cannot be deemed to be a "specific thing."

[P 449 C 2]

(d) Evidence Act (1872), S. 41 — Term "legal character" should be construed narrowly.

"Legal character" means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in question is. The meaning of "legal character" must be narrowly construed for it must be remembered that an action in rem is not an action against a thing but an action availing against all the world. One must be cautious lest litigation between *A* and *B* be allowed unduly to affect the rights of *C* : 7 *W. R.* 338; 39 *Mad.* 80 and *A. I. R.* 1927 *Mad.* 526, *Ref.* [P 451 C 1]

(e) Insolvency—Judgment declaring judgment debt provable does not declare that alleged debt, that merged in judgment-debt, is proved—Provincial Insolvency Act (1920), S. 33.

A judgment in insolvency, declaring that the creditors' debt, (i. e., a judgment-debt) is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved : *A. I. R.* 1927 *Pat.* 61, *Ref.*

[P 452 C 1]

(f) Evidence Act (1872), S. 41—Finding of fact necessary in making declaration in rem will not bind third parties in subsequent proceedings.

Though it be necessary as a step to making a declaration which will operate in rem, to find a fact, that finding will not bind third parties in subsequent proceedings : 7 *W. R.* 338, *Foll.*

[P 452 C 1, 2]

S. Doraiswami Ayyar—for Advocate-General.

T. M. Krishnaswami Ayyar and *M. Venkatasubbiah* and *G. Pais*—for P. C. Venkataramanayya.

Beasley, C. J.—This case arises on a complaint filed by one P. Kumaraswami Rao. The tribunal of the Bar Council to whom this complaint was referred for enquiry framed the following charge :

"That between 1921 and 1923 you, P. C. Venkataramanayya Pantulu now an advocate of the High Court, Madras and formerly a vakil of the said Court, taking advantage of a remittance in January 1921 by you through one Piratla Subba Rao of a sum of Rs. 1,300 to P. Kumaraswami Rao in Madras on some other account and not by way of loan conspired with the said Subba Rao and one L. V. N. Sastry to prefer a false claim against the said Kumaraswami Rao through and in the name of the said L. V. N. Sastry by filing a suit O. S. No. 282 of 1922 on the file of the District Munsif's Court at Cocanada as upon a promissory note alleged to have been executed by the said Kumaraswami Rao in favour of the said Subba Rao and to have been endorsed by the said Subba Rao in favour of the said L. V. N. Sastry and alleged subsequently to have been lost by the said L. V. N. Sastry and wilfully and fraudulently obtaining an ex parte decree against the said Kumaraswami Rao without proper service of summons and all this with the ulterior purpose of utilizing the same against the said Kumaraswami Rao who was then making some pecuniary claims against you, and further you had the said decree transferred to Madras for execution and had it executed by arresting the said Kumaraswami Rao at or about the time he filed a suit against you in the Presidency Court of Small Causes, Madras, namely, Suit No. 9738 of 1923 and you have thereby made yourself guilty of misconduct which renders you unfit to continue in the profession."

The enquiry before the tribunal has resulted in findings adverse to the advocate. The tribunal does not accept in its entirety the complaint of Kumaraswami Rao. It disbelieves certain of his allegations. It however does not accept the respondent's answers with regard to all important matters either alleged against him or appearing in the course of the enquiry to require an answer. It does not accept the whole of the complainant's case and only accepts a part of the respondent's.

The history of this case is as follows : Kumaraswami Rao was admittedly on terms of close friendship with the respondent from about 1916 up to 1921 except for a short period in 1918 to 1919. He seems to have been more or less a dependant of the respondent and it seems clear that at no time was his financial position a good one. One D. Seshagiri Rao an advocate of the High Court was also at this time very friendly with the respondent and appears to have been sharing the same business premises. In March 1921 arising out of some business transactions the respondent and Seshagiri Rao filed a suit in the High Court against one Subramaniam Chetty claiming Rs. 7,000 from him. Subramaniam Chetty then filed a suit against the respondent in the High Court and another suit against Seshagiri Rao also in the High Court setting up the case in each suit that the respondent and Seshagiri Rao owed him sums of money. All the three suits ended in a victory for the respondent and Seshagiri Rao but the appeals against the decrees in those suits ended in the appeals being allowed and the suits ordered to be remanded for fresh trial. They were subsequently compromised. It seems to be a fact that Kumaraswami Rao was interesting himself in those suits and it appears to have been supposed that he was in a position to assist the respondent in the litigation and it is admitted by the respondent that he believed that Kumaraswami Rao might be useful to him and that he felt that he had to keep him in good humour.

It seems probable that it was supposed by the respondent that Kumaraswami Rao was in possession of correspondence or documents the production or suppression of which might assist the parties to the litigation. At the latter end of January 1921 Kumaraswami Rao after an urgent request by him to the respondent received by the telegraphic money order sums amounting to Rs. 1,300 and it does not appear to be disputed by Kumaraswami Rao that the money was sent to him by one P. Subba Rao. Whose money this really was is one of the important matters in this case. It is represented by Kumaraswami Rao that this money was due to him from respondent on account of business transactions although this version is disbelieved by the tribunal and was the respondent's money and not Subba Rao's. On the other hand the respondent alleges that this money was P. Subba Rao's money and that it was lent by P. Subba Rao to Kumaraswami Rao at the request of the respondent. According to the respondent this therefore was a loan from P. Subba Rao to the complainant and he (the respondent) had nothing whatever to do with it beyond requesting Subba Rao to lend the money to Kumaraswami Rao. The tribunal has disbelieved the respondent's allegation that the money was Subba Rao's and also his denial that it was his (the respondent's). It is alleged by the respondent that after the receipt of the money by Kumaraswami Rao the latter executed at Madras a promissory note in favour of Subba Rao dated 28th January 1921, payable on demand and bearing interest at 18 per cent per annum. This allegation has been disbelieved by the tribunal and the history with regard to this alleged promissory note is another of the important matters in this case. It is a curious one.

It is alleged that the pro-note was assigned by endorsement to one L. V. N. Sastry on 29th January 1922. L. V. N. Sastry is a near relative by marriage of the respondent and a notice of demand was sent by a pleader at Cocanada Mr. Kameswara Rao on behalf of L. V. N. Sastry addressed to the petitioner at 46, Thambu Chetty Street, Madras. This notice was returned undelivered through the Dead Letter Office in February 1922. The alleged promissory note is stated on the respondent's behalf to have been shown to Mr. Kameswara Rao the pleader for the purpose of the beforementioned notice and this statement is supported by the evidence of that gentleman and it may well be that a promissory note purporting to have been executed by the petitioner was shown to him. It is alleged that after being shown to Mr. Kameswara Rao it was lost by L. V. N. Sastry about 14th February 1922 at the Bezwada Railway Station and L. V. N. Sastry had to file a suit, O. S. No. 288 of 1922, in the District Munsif's Court of Cocanada, upon the footing of a lost promissory note. The suit was filed against Kumaraswami Rao as defendant 2, and P. Subba Rao, the endorser, as defendant 2. The address of Kumaraswami Rao is given as 46, Thambu Chetty Street. The

first summons to Kumaraswami Rao was returned unserved as Kumaraswami Rao was not then at the address given, namely, 46, Thambu Chetty Street. The date of the summons is 29th June 1922. The endorsement on it by the bailiff is as follows :

" I went to the within-mentioned premises in search of the defendant, where he could not be found, but I found it is a hotel. The hotel-keeper told me that there is no person living in that hotel by the name of the defendant. So I posted a copy of summons on the outer door of the house No. 46, Thambu Chetty Street, George Town, at 10 a. m. on 9th July 1922."

A fresh summons was ordered on 14th August and it was addressed to the defendant Kumaraswami Rao at the same address and was again returned unserved with a similar endorsement by the bailiff to that which appears on the earlier summons. It must be noted that P. Subba Rao defendant 2 filed a written statement contesting the suit although on what ground it is neither stated nor apparent. L. V. N. Sastry then obtained a decree ex parte against Kumaraswami Rao in this suit but gave up his claim against Subba Rao, defendant 2, who did not press for costs. In support of his claim L. V. N. Sastry filed an affidavit in which he stated that he was present when Kumaraswami Rao, defendant 1, executed the promissory note in favour of defendant 2, that he saw Kumaraswami Rao sign and that he knew his signature. The statement that he was present when defendant 1 executed the promissory note, and that he saw him sign it, has been admitted by L. V. N. Sastry in his evidence before the tribunal to be untrue. The decree in the suit which is dated 22nd September 1922 is as against defendant 1 Kumaraswami Rao alone. As the promissory note was alleged to have been lost L. V. N. Sastry, the plaintiff, filed an indemnity bond in order to obtain his decree. This decree was subsequently transferred to the Court of Small Causes, Madras, for execution. On 9th August 1923 L. V. N. Sastry applied for a warrant of arrest without notice against Kumaraswami Rao and the application is supported by an affidavit dated 8th August. Therein it is stated that defendant 1 (Kumaraswami Rao)

" is not possessed of any immovable property or moveable property sufficient to satisfy the decree,"

and is " unemployed." By this time the decretal amount had with interest risen to Rs. 1,930-8-0. A warrant for the arrest of Kumaraswami Rao was issued and he was arrested. When he was arrested on 20th August he appeared before the Court and got himself adjudicated an insolvent.

It must be noted that Kumaraswami Rao had not taken any steps up to then to set aside the ex parte decree passed against him in the District Munsif's Court of Cocanada. He says that he only learnt of this decree when the warrant of arrest was issued against him. L. V. N. Sastry filed his claim before the Official Assignee based on the ex parte decree obtained by him against Kumaraswami Rao. Kumaraswami Rao repudiated the ex parte decree as falsely and fraudulently obtained. The Official Assignee enquired into that claim and made his report on 11th January 1929 rejecting it as false, and on appeal from the Official Assignee's order Kumaraswami Sastri, J., upheld the Official Assignee's order on 22nd January 1929. Against this an appeal was filed. O. S. A. No. 25 of 1929. This appeal was disposed of by our learned brothers Ramesam and Cornish, JJ., whilst this matter was under enquiry by the Tribunal. The appeal was allowed and L. V. N. Sastry's claim based on the ex parte decree in the Cocanada suit and also on the merits was allowed ; and with regard to this appellate judgment a legal contention has been raised both here and before the Tribunal which has resulted in an argument which has necessarily occupied a great deal of our time. It has been argued that this last judgment is conclusive of the matter now before us and that it was neither open to the Tribunal nor is it open to us now to go into the question of the truth or otherwise of L. V. N. Sastry's claim. Before dealing with that contention, there are some other matters to which reference must be made. It is quite clear that at the time when Kumaraswami Rao received the remittance of Rs. 1,300 he was on friendly terms with or at any rate willing to assist the respondent in his litigation but his attitude changed later on. It is a fact that he was cited as a witness in Subramania Chetty's suits for Subramania Chetty against Seshagiri Rao and the respondent, though he was eventually not examined. In connexion

with Kumaraswamy Rao's changed attitude it must be observed that on 5th April 1921 Kumaraswami Rao put forward an alleged claim against the respondent for payment of Rs. 1,200, the balance stated to be due to him in connexion with transactions he alleged he had had with the respondent for the previous two and half years. The respondent disputed the claim as being false and fraudulent and made a counter-demand for Rs. 357 against Kumaraswami Rao. It is alleged by Kumaraswami Rao that there immediately followed a settlement of his claim and the respondent's claim in the presence of Mr. Ramachandra Raju the respondent's then vakil and Mr. Seshagiri Rao and it is said that the respondent agreed to pay Kumaraswami Rao Rs. 600 in full settlement. Kumaraswami Rao gave a notice of claim on the alleged settlement already referred to on 18th November 1922 (Ex. C), and on 7th August 1923 the Official Assignee filed a suit against the respondent claiming from him the Rs. 600 agreed to be paid by him under that settlement. The plaint in the suit is Ex. J. Although a previous warrant for the arrest of Kumaraswami Rao had been taken out, it was not executed. It is significant that steps to arrest Kumaraswami Rao were again taken immediately the Official Assignee filed the before-mentioned suit in the Court of Small Causes. The position therefore was that Kumaraswami Rao at one time. a great friend of the respondent and able to assist him in his litigation or embarrass him in it, found himself under arrest at the instance of L. V. N. Sastry in execution of the decree in the District Munsif's Court of Cocanada and sought the protection of the Insolvency Court ; and when L. V. N. Sastry's claim was investigated it was rejected by the Official Assignee and that decision was upheld by Kumaraswami Sastri, J., but was reversed on appeal by Ramesam and Cornish, JJ.

This brings me now to the consideration of the important and difficult question of law raised by Mr. T. M. Krishnaswamy Ayyar in the course of his very able argument. That question is whether the judgment of the appellate Court must be deemed to be a judgment in rem within the meaning of S. 41, Evidence Act. If it is, it is conclusive and any other Court is precluded from reopening the same question. It is argued by Mr. T. M. Krishnaswamy Ayyar that the finding of the appellate Court that the debt claimed by L. V. N. Sastry as due to him from Kumaraswami Rao is true is a conclusive finding under S. 41, Evidence Act. What has to be decided is whether the judgment of the appellate Court confers upon or takes away from L. V. N. Sastry any "legal character." The decision of what is a "legal character" within the meaning of that section is not free from difficulty. Mr. T. M. Krishnaswamy Ayyar contends that in insolvency proceedings a declaration that a person is a creditor in the insolvency confers upon him a "legal character." He draws a distinction between a person who is a creditor of an ordinary debtor, not an insolvent, and the creditor of an insolvent and, although he does not admit that the former does not possess a "legal character" he contends that the latter certainly does because directly the claims of a creditor in insolvency are recognized, the Insolvency Act confers upon him special rights and places upon him certain liabilities which he did not formerly possess or have placed upon him, and that he thus becomes clothed with a "legal character." He has of course to establish that position for his client because his client was not a party to the insolvency proceedings. He has therefore to contend that the appellate judgment is a judgment in rem. The term "legal character" is not defined in the Evidence Act nor in any other Act, and we are therefore driven to the consideration of cases where it has been held that a person possesses a "legal character" or status. One of these is *K. P. Ramkrishna Pattar* v. *K. P. Narayana Pattar* (1). That was a case under S. 42, Specific Relief Act. Under that section only a person entitled to any "legal character" or to "any right to property" can institute a suit for a declaratory relief in respect of his title to such legal character or right to property, and on p. 82 the Division Bench state :

"We take it that a man's" legal character is the same thing as a man's status. "A man's status or "legal character" is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinctive mark or dress, as it were, with which the law clothes him apart from the attributes

(1) [1916] 39 Mad. 80=23 I. C. 883.

which may be said to belong to normal humanity in general. According to Holland, the chief varieties of status among natural persons may be referred to the following clauses : (1) sex, (2) minority, (3) patria potestas and manus, (4) coverture, (5) celibacy, (6) mental defect, (7) bodily defect, (8) rank, caste and official position, (9) slavery (10), profession (11), civil death, (12) illegitimacy (13) heresy, (14) foreign nationality and (15) hostile nationality. "

There must of course be other varieties such as, for example, insolvency. To declare a man to be an insolvent is clearly to place beyond all doubt the status of that individual, and it is conclusive as against the whole world. But it is a very different thing to say that to declare a person to be the creditor of an insolvent is to confer a status upon that creditor which is equally conclusive as against the whole world. Apart from an insolvency the creditor's position arises out of a contractual relationship. Does the mere fact that his relationship is recognized in the insolvency Court confer upon him a status? I think that it would be most undesirable to extend the scope of S. 41, Evidence Act, and that the description "legal character" should receive a strict and limited construction. Mr. T. M. Krishnaswamy Ayyar has referred to us cases where a presumptive reversioner under the Hindu law has been held to possess a "legal character," *Sheoparsan Singh* v. *Ramnandan Prasad Singh* (2), a decision of the Privy Council under S. 42, Specific Relief Act, and a legatee or a beneficiary under a will has also been : *Chinnaswami* v. *Hariharabadra* (3). In the latter case it was held that the judgment of a probate Court granting or refusing probate is a judgment in rem and therefore the judgment of any other Court in a proceeding inter partes cannot be pleaded in bar of an investigation in the probate Court as to the factum of the will propounded in that Court. These decisions, though no doubt useful, do not, in my view, carry Mr. Krishnaswamy Ayyar sufficiently far. On the other hand there is a decision of this Court which seems to me to place a very necessary limit on the scope of S. 41, Evidence Act. That is *The Official Assignee of Madras* v. *The Official Assignee of Rangoon* (4). There it was held by Sir Walter Schwabe, C. J., and Ramesam, J., that an order of an insolvency Court, refusing to adjudicate a person insolvent on the ground that he was not a member of a firm which had been declared insolvent, is not a final order which conferred upon or took away from him any "legal character" within the meaning of S. 41, Evidence Act, and hence is not a judgment in rem, and that being a partner in a firm is not a "legal character" as contemplated by that section. On p. 587 (of 46 *M. L. J.*) Sir Walter Schwabe, C. J., states as follows :

"In this case the way the Court in Rangoon arrived at its decision was by saying that Annamalai Chetty was a member of the joint family and that he had disclaimed any interest in the joint family property as against his creditors, that there was no evidence before it that he was a partner and therefore it declared that he was not a partner. It would be a very remarkable thing if that is a binding decision on all the world that a partnership did not exist. For instance, if a creditor, here or elsewhere, were taking proceedings against Annamalai on the basis of the partnership he could set up the decision of the Rangoon Court as a judgment in rem binding on the party here who was not a party in Rangoon. I do not think that was the intention of S. 41 at all."

This case, in my view, is one that is very much against Mr. Krishnaswamy Ayyar's argument. If a partner does not possess a "legal character" then it is difficult to see how a creditor in an insolvency can be entitled to claim for himself such a character. The section does not use the words "legal right" but uses the words "legal character" and Mr. Krishnaswamy Ayyar's argument in the main has been that a creditor has acquired a "legal right" which is a very different thing from saying that he has acquired a status which he can hold as against the whole world. In the absence of any authority for the contention that a creditor in an insolvency has a "legal character," I am not disposed to extend the scope of S. 41, Evidence Act, to include such a person.

Mr. Krishnaswamy Ayyar in the alternative contends that the judgment of the appellate Court declares L. V. N. Sastry to be entitled to a specific thing namely the debt from the insolvent and that S. 41, Evidence Act, makes such a declaration conclusive. Quite apart from the fact that, in my view, a debt is not a "specific thing" referred to in S. 41, Evidence Act, there is the difficulty that the declaration of the Court must be that

(2) A. I. R. 1916 P. C. 78=33 I. C. 914=43 I. A. 91=43 Cal. 694 (P.C.).
(3) [1893] 16 Mad. 380=3 M. L. J. 121.
(4) A. I. R. 1924 Mad. 661=83 I. C. 174.

a person is entitled to that specific thing absolutely and not as against any specified person or in other words the declaration must be that L. V. N. Sastry is entitled to the sum he has claimed as against the whole world absolutely whereas the declaration is merely that he is entitled to it as against the insolvent. Mr. Krishnaswamy Ayyar is unable to point to anything in the Insolvency Act which enables the insolvency Court to declare the title of any person to any specific thing absolutely and not merely as against another person and it is only in the former case that it will have the conclusive character as against the whole world. I have come to the conclusion therefore that neither the Tribunal nor this Court is precluded from going into the question of the genuineness or otherwise of L. V. N. Sastry's claim and I also make the observation that although it is true that the appellate Court did consider L. V. N. Sastry's claim not only on the footing of the judgment-debt but also on the merits it was not, in my view, essential to consider anything more than the former question. Ramesam, J., after holding that it is open to the insolvency Court to go behind an ex parte decree and investigate the nature of the debt if there are grounds for so doing states:

"Where there are no other creditors the reason for examining into the judgment debt especially when the debtor himself allowed the opportunity he had to pass by becomes much less,"

and later on observes:

"I do not think this jurisdiction of the Official Assignee to enquire into debts could be used as a device to escape the execution of a decree where the only debt of the insolvent is the decree and there are no other debts. It seems to me that the insolvency jurisdiction should not be used as a device to evade execution of a decree which has become final and unimpeachable as in the present case."

After those observations it was unnecessary to consider the matter any further and to examine also the question whether in fact there had been the debt upon which the ex parte decree was based. Therefore, in my view, every finding of fact after this point was not essential to the decision of the appellate Court allowing L. V. N. Sastry's claim. Cornish, J., says:

"In my opinion these materials are not sufficient evidence either of collusion or of fraud or of miscarriage of justice,"

and it is quite clear I think that Cornish, J., based his decision chiefly on the grounds that there was not sufficient evidence to justify the insolvency Court setting aside the ex parte decree.

There now remains to be considered whether the findings of the Tribunal upon the facts are to be accepted. The Tribunal has disbelieved the petitioner's case that the respondent was indebted to him in the sum of Rs. 2,500 as alleged but has found that the remittance of Rs. 1,300 to the petitioner by P. Subba Rao was in fact of the respondent's money and at the time he made the remittance he did so with the mental reservation that he should claim it back after everything was over though he did not say so to the petitioner, that at the time he made the remittance he was expecting some help from the petitioner in connexion with his suit against Subramania Chetti, that the petitioner did not execute any promissory note in favour of P. Subba Rao, that the ex parte decree was fraudulently obtained by giving an address for service known to be not the correct address and on a false affidavit proving execution and that L. V. N. Sastry and P. Subba Rao had no motive of their own to resort to any fraudulent procedure and they must have done this at the respondent's instance and on his behalf. I will take the Tribunal's finding upon the first point to be correct and will now deal with the other findings.

* * *

But for the reasons I have already given, I am satisfied that the respondent was guilty of the graver acts. There remains to be considered only the punishment to be inflicted upon him. It is difficult to imagine any more dishonourable conduct than that of the respondent and but for two circumstances such conduct must have resulted in his being ordered to be struck off the rolls. These circumstances are: firstly, that the money sued for was as the Tribunal has found the respondent's although the procedure adopted by him to recover it was wholly crooked and dishonourable and secondly that there does seem to be some ground for believing that the petitioner was blackmailing the respondent and that this was the real reason why the money was sent to him. Taking these matters into consideration in my view the order of the Court should be that the

respondent be suspended from practice for the period of five years.

Sundaram Chetty, J.—During the insolvency proceedings, the Official Assignee enquired into the claim made by L. V. N. Sastri on the strength of the ex parte decree obtained by him and rejected it as false : vide his report dated 11th January 1929. The order of the Official Assignee was upheld by Kumaraswami Sastri, J., (Ex. R). Against that an appeal was filed and it was disposed of by Ramesam and Cornish, JJ. : vide Ex. 13). The learned Judges allowed the appeal, holding that there were no adequate grounds for vacating the ex parte decree passed against the insolvent and also stating that the debt must be regarded as proved. It is strenuously contended by Mr. T. M. Krishnaswamy Ayyar, on behalf of the respondent, that that judgment of the appellate Court in insolvency proceedings should be deemed to be a judgment in rem within S. 41, Evidence Act and as such conclusive, so as to preclude any other Court from reopening the same question. If this contention should prevail the finding of the appellate Court in its insolvency jurisdiction, that the debt set up L. V. N. Sastry as due to him from the insolvency is true, should be taken to be conclusive. It is argued with great insistence that by reason of that judgment the legal character of L. V. N. Sastry as a creditor of the insolvent must be deemed to have been declared so as to be operative as a judgment in rem against all the world.

In order to decide, this question, which is not free from difficulty, the true scope of S. 41, Evidence Act, has to be understood. That section incorporates the law on the snbject of "judgments in rem" as explained in the decision of Sir Barnes Peacock in *Kanhya Lal* v. *Radha Churn* (5). According to that section :

"a final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant."

The section further lays down that such judgment, order or decree is conclusive proof that the legal character conferred or declared accrued to that person at the time when such judgment, order or decree was pronounced and that anything to which it declares any person to be so entitled was the property of that person at that time. Such an effect seems to be of a limited character, and in order to make any such judgment, order or decree conclusive proof operating as a judgment in rem, what was conferred on or taken away from a person should be a legal character within the meaning of that section.

As observed by Messrs. Woodroffe and Ameer Ali in the Law of Evidence, one of the main difficulties has always been to ascertain some principle upon which to rest this class of judgments so as to determine what cases fall within it. The principle is lucidly stated in Phipson's law of Evidence (Edn. 5), at p. 387 as follows :

"The principle of the conclusiveness of judgments in rem, as regards persons, is that public policy for the peace of society requires that matters of social status should not be left in continual doubt, and as regards things, that generally speaking, every one who can be affected by the decision may protect his interest by becoming a party to the proceedings. In addition to it, it has to be remembered that a decision in rem, not merely declares the status of the person or thing, but ipso facto renders it such as it is declared ; thus a decree of divorce not only annuls the marriage, but renders the wife feme sole ; an adjudication in bankruptcy not only declares but constitutes the debtor a bankrupt ; a sentence in a prize Court not merely declares the vessel prize but vests it in the captor."

The expression "legal character" has not been defined in any statute. Its meaning has to be understood in the light of the principles relating to judgments in rem which the legislature must have had in view in framing this section. The same expression "legal character" is found in S. 42, Specific Relief Act. That section says that only a person entitled to any legal character or to any right to property can institute a suit for a declaratory relief in respect of his title to such legal character or right to property. In construing the significance of that expression, a Division Bench of this Court has observed in *Ramakrishna* v. *Narayana* (1), p. 82, as follows :

"We take it that a man's legal character is the same thing as a man's status. A man's status or legal character is constituted by the attributes which the law attaches to him in his individual and personal capacity, the distinc-

(5) [1867] 7 W. R. 333=B. L. R. Sup. Vol. 662 (F.B.).

tive mark or dress, as it were, with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general."

The chief varieties of status as set forth in Holland's Jurisprudence are also mentioned in that decision as illustrations. Now, what is it that the judgment (Ex. 13) has declared? The claim of L. V. N. Sastri as a creditor of the insolvent was allowed; in other words, the debt alleged by him as due from the insolvent, was found to be true.

Mr. Krishnaswamy Ayyar, in the course of his able argument, contends that the declaration that L. V. N. Sastri is a creditor of the insolvent made by the Court in the exercise of insolvency jurisdiction confers upon him a legal character as contemplated in S. 41, Evidence Act. Ordinarily, the right of a creditor is to recover his debt from the debtor. That right arises from a contractual obligation. It cannot strictly be deemed to confer on him any status or legal character. It is however urged that as soon as he is recognized as a creditor to the insolvent's estate, the law gives him a position out of which certain special rights and duties flow. By virtue of the attributes which the law attaches to him, it is argued that a legal character may be deemed to have been conferred on him. The decision in *Ramakrishna* v. *Narayana* (1) shows that a right claimed as arising out of a contractual obligation would not be a right to a legal character within the meaning of S. 42, Specific Relief Act. The grant of probate by a Court in the exercise of probate jurisdiction has been held to be conclusive proof of the truth of the will which has the effect of declaring a person to be an executor, and that is conferring on him a legal character. This is indicated by the decision of the Privy Council in *Sheoprasad Singh* v. *Ramanandan Prasad Singh* (2). From the observations of their Lordships, it may also be taken that a presumptive reversioner under Hindu law has a legal character entitling him to sue for a declaration under S. 42, Specific Relief Act. In *Chinnasami* v. *Hariharabadra* (3), it is stated that by the grant of probate of a will, the legatee or the beneficiary under the will acquires a legal character.

It has been held in the decision reported in *Official Assignee of Madras* v. *Official Assignee of Rangoon* (4), that a declaration by the insolvency Court that one is a partner or not a partner of a firm does not amount to the conferring of a legal character nor the taking away of a legal character from a person within the meaning of S. 41, Evidence Act. At p. 587 (of 46 *M. L. J.*) the learned Chief Justice observes that an order of the insolvency Court refusing to adjudicate one Annamalai Chetty a bankrupt, on the ground that he was not a member of the firm which had been declared insolvent, is not an order conferring upon Annamalai Chetty or taking away from him any legal character within the meaning of S. 41, Evidence Act, which would operate as a judgment in rem binding on all the world. This decision is, in my opinion, the nearest approach to the present case. It is argued that in consequence of the recognizion of a person as a creditor to the insolvent's estate in the course of the Insolvency proceedings certain special rights and liabilities are created by the insolvency Act which may not be applicable to the case of an ordinary creditor. As he is clothed with certain statutory rights and obligations it is urged, that he must be deemed to have been clothed with a legal character. The same thing can be said even in respect of a partner. If a partnership is created by contract among two or more persons, certain special rights and obligations are created by virtue of the provisions of Contract Act, which are not traceable to any contract between the parties. It is not easy to distinguish the position of a partner from that of a scheduled creditor in insolvency, because certain rights and duties imposed by the statute apply to both of them though those do not flow from any particular contract.

If a partner has no legal character within the meaning of S. 41, Evidence Act, as held in *Official Assignee of Madras* v. *Official Assignee of Rangoon* (4), it is difficult to hold that a creditor whose debt is held to be proved by the insolvency Court has acquired a legal character within the meaning of that section. If the expression "legal character" used in S. 41 denotes a status, the acceptance of Mr. Krishnaswamy Ayyar's contention in the present case would amount to saying that "legal character" would mean a legal right, acquired not solely by a contract but by virtue of a

statutory provision. That would be too broad a definition of "legal character" and I do not think that such an unrestricted and wide scope could be given to that expression occurring in S. 41 which deals with judgments in rem, in the absence of any direct authority. The decisions in *Chandrashwar Prasad Narain Singh* v. *Bisheshawar Pratap Narain Singh* (6) and *Kishorbhai Revadas* v. *Komchodia Dubia* (7) do not seem to be quite in point for purposes of the present question. I am therefore of opinion that the final judgment of the insolvency Court (Ex. 13) cannot be deemed to have conferred a legal character on L. V. N. Sastri within the meaning of S. 41, Evidence Act, in which case alone the declaration that he is a creditor of the insolvent would operate as a judgment in rem.

I may now refer to the alternative contention raised by Mr. Krishnaswami Iyer that L. V. N. Sastri must be taken to have become entitled to a specific thing by reason of the finding given by the appellate Court in insolvency jurisdiction : Ex. 13. Here again a difficulty arises in ascertaining what is meant by a "specific thing" in this section. Prima facie, it connotes tangible, moveable property. It would be somewhat strange if an actionable claim such as a right to recover a debt from another person can be deemed to come under "any specific thing" mentioned in this section. It is not enough to show that under the judgment of the insolvency Court one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person, but absolutely. So far as I could see, there is nothing in the Insolvency Act for declaring the title of any portion to a specific thing in the manner provided for in S. 41, of the Evidence Act. The title to the specific thing should be declared absolutely and not merely as against another person, and in such a case only it would have the conclusive character as against the whole world. Such declaration may be made in the exercise of admiralty jurisdiction. However reliance is placed upon a decision of the Allahabad High Court in *Pitaram* v. *Jhujhar Singh* (8). In that decision an adjudication by the insolvency Court as to the title of a claimant in respect of some houses, crops and some moveable property, has been held to amount to conclusive proof of title in respect of the specific things claimed by the applicant within the meaning of S. 41, Evidence Act. That decision would no doubt be an authority which would help the respondent in this case, provided a chose-in-action or a right to recover a debt could be brought under 'any specific thing' mentioned in S. 41. But it seems to me that even as a legal fiction, a right to recover a debt or a chose-in-action cannot be deemed to be a specific thing. It would be going too far if such an extended meaning is attached to it.

For the reasons mentioned above, I am of opinion that the final judgment, Ex. 13, does not amount to a judgment in rem within the meaning of S. 41, Evidence Act, so as to bind persons who were not parties or privies to that case. That being so, there is no legal bar to the Tribunal investigating into the matter at issue and coming to an independent conclusion on the merits. The materials for decision by the insolvency Court do not appear to have been so full as in the present enquiry. The learned Judges of the tribunal have bestowed great care and attention over this case, and due weight must be attached to the conclusions arrived at by them. I am clearly of opinion that the respondent's conduct in respect of the proceedings taken against Kumaraswami Rao which resulted in the passing of the ex parte decree is by no means honourable or honest. That a member belonging to the honourable profession of law should have stooped to have recourse to such objectionable and crooked methods is to be deplored by all right-minded men. In the exercise of the disciplinary jurisdiction of the High Court, a punishment which would meet the ends of justice and serve the interests of the profession has to be awarded. As for the punishment, I agree with my Lord in the order pronounced by him.

Stone, J.—The case raises questions of fact and of law. The question of law is of some importance and one that can be most conveniently considered after one

(6) A.I.R. 1927 Pat. 61=101 I.C. 289=5 Pat. 777.

(7) [1914] 38 Bom. 427=25 I.C. 37.

(8) [1916] 33 I. C. 798.

question of fact has been examined. I accordingly consider first that question of fact which can be expressed as follows : Was the respondent the prime mover in a course of conduct which had for its purpose the securing of a judgment in proceedings (which may be referred to as the Sastri proceedings) against the complainant without giving the complainant an opportunity to enter any defence?

* * *

My conclusion on this question of fact is that the respondent was behind these proceedings. The respondent, by his counsel admits that these proceedings cannot be justified. They are tainted at the source and throughout. If the respondent, an officer of the Court, either inspired them or was responsible for the course they took he was in my view (a view I gathered was taken by his counsel who founded himself on the fact that his client was not connected with or aware of these proceedings) guilty of professional misconduct. I am further of the opinion that this question was one clearly raised by the petition herein.

On the merits therefore it follows that the report of the three experienced advocates who having heard and seen the witnesses have arrived at the conclusion that the respondent is guilty of professional misconduct must be approved. The question remains whether the Court is precluded by S. 41, Evidence Act, from questioning the liability which was the subject-matter of the Sastri suit.

The question of law arises as follows: Granted that the proceedings in the Sastri suit were objectionable, still the decree of culpability is much less if it appears that Sastri was an endorsee of a promissory note than if it appears that there was no note and no debt and consequently that the Sastri suit was a swindle from beginning to end. Thus although on the question of professional misconduct I consider the vital question to be as above stated, when one comes to consider the punishment it is necessary to determine whether there was any debt at all. This issue it was argued the Court was precluded from considering because on appeal from the judgment of Kumaraswami Sastri, J. (which judgment upheld the decision of the Official Assignee disallowing the Sastri claim in the insolvency of the complainant) Ramesam and Cornish, JJ., allowed the claim and one of the Judges used the following words. Ramesam, J.:

"We think the debt must be regarded as proved and we allow the appeal."

The debt here referred to is not the judgment debt but the debt alleged to be due from the complainant herein which was the foundation of the Sastri suit. Cornish, J., does not use any language which can be construed as amounting to a finding that the debt on which the Sastri case was founded is established. He limits himself to the question at issue, viz., whether in all the circumstances the Court should exercise its discretion to go behind the judgment and he holds that there is no sufficient evidence of collusion, fraud or miscarriage of justice to justify the Court's taking such a course. That is, he does not go behind the judgment. Following the judgments delivered by Ramesam and Cornish, JJ., a decree was entered. That decree is in my view the decree made in the case and is the document to be looked at when considering S. 41, Evidenes Act. That decree decreed that the "appellant's debt is proved." The debt in question was the judgment debt, not the debt on which judgment was obtained ex parte. Clearly therefore in no view of the law unless not the decree but the judgment is to be looked at and Ramesam, J.'s above quoted observation is to be treated as a judgment in rem, is this Court,in proceedings between the complainant and the respondent herein, precluded from considering whether the allegation of indebtedness in the Sastri suit was well founded.

The argument, as I understand it, is that the judgment in question is a judgment declaring that a debt is owed to *S* by an insolvent, that accordingly it clothes *S* with a character he would not otherwise possess, for it makes him a creditor, and that although the term "legal character" does not embrace ordinary creditors it does embrace creditors in an insolvency, for such creditors by the very fact of insolvency, have their rights varied by act of law. The argument thus amounts to this; that even as insolvency alters the legal character of the insolvent so also it alters the legal character of the creditors of the insolvent. I do not agree. "Legal character" here means something

equivalent to status: see *Kanhya Lall* v. *Radha Churn* (5), *Gangadhar Roya* v. *Umasoondery Dossee* (9) and *Ramakrishna* v. *Narayana* (1). The legal character assigned to a person announces to all the world what the legal status of the person in question is. The meaning of "legal character" must be narrowly construed for it must be remembered that an action in rem is not an action against a thing but an action availing against all the world. One must be cautious lest litigation between *A* and *B* allowed unduly to affect the rights of *C*. The sort of danger is clearly shown in *Official Assignee of Madras* v. *O. R. M. O. R. S. Firm* (10). The point there taken was similar to the point here taken and it failed. In *Official Assignee of Madras* v. *Official Assignee of Rangoon* (4) at p. 587 (of 46 *M. L. J.*) it was held that a declaration that *A* is a partner in a firm is not a declaration of legal character. The extraordinary consequence that would flow if a declaration of partnership or of nonpartnership in litigation between *A* and *B* were held to conclusively bind *C* is there pointed out. Yet it can hardly be doubted that the condition of being a partner much more nearly approaches status than the condition of being a creditor in an insolvency.

The decision of the Judicial Committee in *Sheoparson Singh* v. *Ramnandan Prasad Singh* (2) does not assist. That case decides that where an action is founded upon the vital allegation of intestacy once it appears that a probate Court has affirmed the will of the alleged intestate the action fails in limine because that decision is binding and conclusive, there is therefore a will, and there is therefore no intestacy. The cases cited in *Kishorbhai Revadis* v. *Kanchodia Dhulia* (7) and *In re Ivory Hankin, Hankin* v. *Turner* (11) amount to no more than this that where a Court of Probate has declared a will to be valid or has made a declaration as to next of kin the fact of the will or of the declared next of kin cannot be disputed in another Court. Neither case purports to construe S. 41. The case of *Kolandapuree Natchiar* v. *Dorasinga Tevar* (12) at p. 191 does not in my opinion touch the point under decision. It does not even establish that a reversioner is a person clothed with a legal character within the meaning of S. 42, Specific Relief Act, for it is obvious from Sir Barnes Peacock's remarks at p. 174 that the suit for a declaration of title was one to which the reversioner was not in that case entitled. *Sirpatrao* v. *Shankarrao* (13) is of assistance only as showing that a declaratory suit is not maintainable by a creditor as such; that the condition of creditor is not a legal character. This however is conceded.

It is next argued that assuming that the judgment that the debt was proved does not confer a legal character, yet it declares a right to a specific thing and to a specific thing not against a specific person but absolutely. Upon this latter point *Pitaram* v. *Jhujhar Singh* (8) at p. 799 is relied upon. There the Allahabad High Court observed:

> "We think the decision of the insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely within the meaning of S. 41, Evidence Act."

There *A* was claiming certain specific articles which he alleged were his but which being in the possession of the insolvent had been taken by the receiver. He had two remedies: (1) to apply to the insolvency Court; (2) to institute a suit for recovery in the Munsif's Court. He pursued (1) and lost. He did not appeal but commenced Suit No. (2).

Obviously the earlier decision was binding on him on the ordinary principles of res judicata. The above quoted observation would therefore appear to be obiter. I doubt whether a finding of a bankruptcy of any other Court in a contest between *A* and *B* as to whether certain property belongs to *A* amounts to anything more than a finding that as against *B* it belongs to *A*. I cannot believe that in such a contest the rights of *C* to such property can be conclusively determined. It is no use urging that under the Insolvency Rules *C* could afterwards come and claim. Ex hypothesi if the judgment in the suit between *A* and *B* is in rem and conclusive against

(9) [1867] 7 W. R. 347=B. L. R. Sup. Vol. 672.
(10) A. I. R. 1927. Mad. 526=101 I. C. 12=50 Mad. 541.
(11) [1879] 10 Ch. D. 372=27 W. R. 20=39 L. T. 285.
(12) [1838] 2 I. A. 169=23 W. R. 314=15 B. L. R. 83=3 Sar. 456 (P.C.).
(13) A. I. R. 1930 Bom. 331=127 I. C. 330.

strangers *C* would be met with a conclusive finding. I can well understand that in an admiralty action in rem against the ship there would be a declaration made effective against the whole world, but as at present advised I find it difficult to conceive how otherwise the judgment could declare title to a specific thing to be in *A* against the whole world as distinct from a specific person. However that may be, in this case the point does not arise for I am clearly of the opinion that a decree declaring that *A* is entitled to a debt is not a declaration of title to a specific thing made not against a specific person but absolutely. By the very nature of the case by the time you have made the chose-in-action a specific thing (assuming that it can be regarded as a specific thing to which I have doubts) you have specified the debtor.

Finally I observe that a judgment in insolvency, declaring that the creditors' debt (i.e., a judgment debt) is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved. In *Chandreshwar Prasad Naram Singh* v. *Bisheswar Pratab Naran Singh* (6) at 817 (*of* 5 *Pat.*) it is observed that

"all that is essential to the decision that the executor was entitled to probate must be taken to have been conclusively determined."

It is argued therefore that it was essential to the decision arrived at by Ramesam and Cornish, JJ. to hold that the alleged debt was proved and that therefore not only the judgment debt but the alleged debt which was the foundation of the Sastri suit is conclusively established against the world. I am not to be taken as assenting to the above citation, but assuming that it is a correct statement it is not applicable, for it was not necessary for the Court in the insolvency proceedings to hold the alleged debt in the Sastri proceedings was proved. Judgment could have been given without any such finding of fact and one of the learned Judges (Cornish, J.) gave such a judgment. But even had it been a necessary step I incline to the view that the observations to be found on p. 343 (*of* 7 *W. R.*) *Kanhaya Lall* v. *Radhachurn* (5) express the true position. Though it be necessary as a step to making a declaration which will operate in rem to find a fact, that finding will not bind third parties in subsequent proceedings.

I am accordingly of the opinion that the tribunal was at liberty to consider whether the alleged liability founded upon an alleged promissory note and sued for in the Sastri suit ever existed. On this issue of fact I see no reason for thinking that the tribunal arrived at a false conclusion or one unsupported by evidence. There remains the fact mentioned in the report at p. 76, lines 40 to 44 of the printed case that this is a stale complaint. Whether this is very material in considering the degree of delinquency is a matter of doubt. I concur in the view expressed by the Chief Justice as to the gravity of the offence and as to the proper punishment therefor.

P.R.S./S.N. *Reference answered.*

A. I. R. 1931 Madras 452

RAMESAM, J.

Venkatakrishna Reddy and *others*—Defendants—Appellants.

v.

Srinivasachariar and *others*—Plaintiffs—Respondents.

Second Appeal No. 545 of 1927, Decided on 17th December 1930, against decree of Sub-Judge, Cuddalore, in A. S. No. 4 of 1925.

Civil P. C. (5 of 1908), O. 1, R. 8 — Sanction to prosecute or defend suit given to individual persons —One of them dying—Right does not survive to his heirs — Proper procedure in such cases indicated.

Where sanction is originally given by the Court to a certain number of persons either to prosecute or defend a suit and one of them dies his heirs are not competent to prosecute or defend the suit because the sanction was accorded to certain individual persons eo nominee and not to their heirs and unless the order can be construed so as to confer the right on the legal representatives also the right does not survive. In such a case the proper procedure is for the remaining persons to apply to the Court for directions. They should bring to the notice of the Court that one of the persons to whom the original sanction was given is dead and request the Court for directions whether the Court will be pleased to permit the remaining persons to continue to prosecute or defend the suit or if it thinks that if the original number is necessary, directions should be given authorizing an additional person who need not necessarily be the legal representative of the deceased person to join the survivors; and when the Court gives the necessary orders the suit will proceed. To say that in all such cases, first that the legal representatives should be brought on record, secondly that if they are not brought on record, the suit abates is to defeat the ends of justice: *A. I. R.* 1925 *Lah.* 124; 46 *P. R.* 1919;

A. I. R. 1923 *Lah.* 31; *A. I. R.* 1927 *Mad.* 505 and *A. I. R.* 1928 *Cal.* 184, *Dist.* [P 454 C 1]

Advocate-General and *R. Ramamurthi Ayyar*—for Appellants.

Govt. Pleader, T. M. Krishnaswami Ayyar and *T. E. Ramabhadrachariar*—for Respondents.

Judgment.—The suit out of which this appeal arises was filed by four plaintiffs in a representative capacity for a declaration that Survey No. 65/6 in the village of Singanur of extent of about 77 or 78 cents is kalam poramboke and for an injunction restraining the defendants from having a Droupadi Amman temple in any portion of that land. The original extent of the land was about 83 cents, but in the north-east corner of it there is an old Perumal temple. Both the Courts below found that the suit land is kalam poramboke. I will first deal with the preliminary objection that has been taken by the learned advocate for the respondents. He contends that the appeal cannot proceed because it was originally filed by defendants 1 to 5 who were permitted by the District Munsif to defend the suit on behalf of those villagers who were of the same opinion as themselves but the second appellant died and his legal representatives were not brought on the record and the remaining four appellants are not persons who were authorized to carry on this appeal. The first case relied on for this contention is *Wali Muhammad* v. *Mahlu* (1). In that case certain persons filed a suit on behalf of themselves and several others under O. 1, R. 8, Civil P. C. Some of the persons so represented were also plaintiffs. They obtained a decree. In second appeal one of the persons who obtained sanction to represent others died and an application to bring his legal representatives on record was made in time but some of the other plaintiffs also died, but their legal representatives had not been brought on record. It was held that it was a joint decree obtained by all the plaintiffs, and, though after sanction under O. 1, R. 8, the second set of plaintiffs were not necessary plaintiffs, they having been parties to the suit and the appeal, their legal representatives ought to be brought on the record and the order under O. 1, R. 8 will not relieve the appellants from the necessity of impleading all the decree-holders or their legal representatives and therefore the appeal will abate in toto. An earlier decision of the same Court in *Rama Diyal* v. *Mohammad Raju Shah* (2) was distinguished on the ground that the persons who died never applied to be made parties to the suit and were not on the record. They were only represented by one person who obtained sanction under O. 1, R. 8, Civil P. C. The decision in *Wali Mohammad* v. *Mahlu* (1) relies on and follows another decision of the same Court in Appeal No. 3169 of 1918 decided in 1922 and the two cases were said to be on all fours. These decisions were followed in *Samail* v. *Haji* (3). In this case five of the respondents were permitted to defend the appeal on behalf of others by an order under O. 1, R. 8, and there is no death among these respondents. But there were other respondents in the appeal as originally filed and some of these died. It was contended by the appellants' advocate that the appeal did not abate, but the Court held that the other respondents having obtained a decree and having been made parties to the appeal their representatives also ought to be made parties and, if they are not made parties the appeal will abate.

In my opinion these two cases are distinguishable on the facts from the case before me. In the second appeal before me I have not got the complication of the parties other than those who obtained sanction under O. 1, R. 8, being parties in appeal. In the first place those are cases where the deaths occurred among the respondents and because the original respondents obtained a joint decree it was held that the appeal could not proceed without the legal representatives of all the respondents. But in the present case the death of parties is among the appellants and all the appellants were only those who obtained sanction under O. 1, R. 8. Another case mentioned is *Srinivasulu Chetty* v. *Guraviah* (4). In that case several plaintiffs obtained a decree for joint possession. There was an appeal; one of the plaintiffs-respondents died and his legal representatives were not brought on record. This case cannot help the

(1) A. I. R. 1925 Lah. 124=86 I. C. 592=5 Lah. 429.

(2) [1919] 46 P. R. 1919=51 I. C. 437.
(3) A. I. R. 1926 Lah. 31=89 I. C. 378.
(4) A. I. R. 1927 Mad. 505=101 I. C. 655.

respondents in the present second appeal. It being a joint decree for possession in favour of several parties, all of them or their legal representatives ought to be respondents on the record. There is no order under O. 1, R. 8 Civil P. C., in that case. Another case relied on before me is the decision of the Calcutta High Court in *Naimuddin Biswas* v. *Mamruddin Lakhkar*, *A. I. R.* 1928 *Cal.* 184. Here there is a decree against four landlords. They appealed; one of them died and his heirs were not brought on record. It was held that the whole appeal abated. There the rule was laid down that if the appeal can be heard in the absence of the deceased appellant the appeal can proceed but if the appeal cannot be so heard then only the appeal abates; and whether the appeal can be so heard or not depends upon the nature of the suit. In this case also there is no order under O. 1, R. 8. In my opinion none of the cases cited governs the present case.

It seems to me that where sanction was originally given by the Court to a certain number of persons either to prosecute or defend a suit and one of them dies his heirs are not competent to prosecute or defend the suit because the sanction was accorded to certain individual persons 'eo nominee' and not to their heirs and unless the order can be construed so as to confer the right on the legal representatives also the right does not survive. In such a case the proper procedure seems to me for the remaining persons to apply to the Court for directions. They should bring to the notice of the Court that one of the persons to whom the original sanction was given is dead and request the Court for directions whether the Court will be pleased to permit the remaining persons to continue to prosecute or defend the suit; or if it thinks that if the original number is necessary directions should be given authorizing an additional person who need not necessarily be the legal representative of the deceased person to join the survivors; and when the Court gives the necessary orders the suit will proceed. To say that in all such cases, first that the legal representative should be brought on record, secondly that if they are not brought on record the suit abates seems to defeat the ends of justice. In the present case I give sanction to the remaining four appellants to proceed with the appeal on behalf of their party and disallow the preliminary objection.

The only question in the case is whether the right of the villagers to use the suit land as kalam poramboke is infringed if the defendants use a considerable portion of it for the Droupadi temple and its festivals. The District Munsif gave a decree according to which the Government was to fix a site of 2 cents in extent in the south-west corner of the suit land towards the west of the pathway running across the land and the defendants will remove their temple to that site from the present spot A. There is also an injunction to that effect and also prohibiting animal sacrifices on the suit land. There was an appeal by the defendants and a memorandum of objections by the respondents to the Subordinate Judge of Cuddalore. The Subordinate Judge dismissed the appeal and allowed the memorandum of objections. He found that the suit land is a kalam poramboke and that building a temple and carrying on festivals on it would be a substantial infringement of the right of the villagers to use the land as a kalam and that the lower Court had no power to direct the Government to select a particular spot for the temple. Defendants file this second appeal.

I may now state some of the facts either admitted or found. The image of Droupadi was first brought to this village in about 1912 from Peramandur. Originally the villagers intended to construct the temple of Droupadi Amman at a spot C towards the east of the village. At that time all the villagers seemed to co-operate together as the resolutions embodied in Ex. C show. A contract was given to one Mr. Doraiswami Mudaliar to look after the construction at the spot C. Rs. 600 were spent in raising some superstructure at the spot C, but afterwards it was found that the necessary ground which has to be purchased for the site of the temple could not be purchased except at a very heavy cost and the whole scheme had to be dropped. Meanwhile the image was installed and a temporary temple was constructed at a spot B towards the southern end of the suit land. The actual ground covered by the temple is about 2 cents, but a some distance from it there is a pit for-

fire walking and also some similar shrines for Arjuna and Duryodhana. Now if it is only 2 cents of land that is required for the Droupadi festival, obviously the matter is one that ought to be settled in an amicable way, whatever the strict legal rights may be ; and it is apparently in this spirit that the Munsif gave his judgment. If a small slice of two cents is cut off from this plot of 77 cents, not only will the defendants' party be satisfied, but the inconvenience that can be caused to the villagers in the way of using the suit land as kalam would be very little. I may mention here that after the District Munsif's decree the Government have selected a spot towards the west of the extent of two cents but the defendants are not satisfied. It is said one reason why the defendants want to remove the temple from the spot B in the south to the spot A is that some houses in the village took fire and the defendants believe in the superstition that because the goddess had her eye on the houses therefore the houses took fire, and if the temple is removed to a spot whence the goddess can command only the street there will not be such accidents. This superstitious belief is the reason for the defendants' desiring a change.

At first sight one feels that such superstitions should not waste the time of the public Courts. However we have to decide the case according to the legal rights. When the case came on before Phillips and Madhavan Nair, JJ., they directed that the Government should be made a party. The Government has been made a party and the Government Pleader stated that the Government have selected a spot of two cents according to the direction of the District Munsif, but the defendants are not willing to take it. He also questioned the correctness of the Sub-Judge's observations in para. 64 of the judgment. It is unnecessary to decide this question. The truth of the matter is that defendants want not two cents but a good deal more. One of the points raised before me by the learned Advocate-General is that unless the plaintiffs can show special damage the suit is not sustainable. But I am not able to agree with this contention. We are not concerned here with a public right or a pathway as to which there is an obstruction and a private party cannot maintain a suit unless there is special damage. In this case the kalam poramboke is dedicated to the use of the villagers as a threshing floor, the actual ownership being vested in the Government. The suit is filed on behalf of all the villagers. The villagers do not sue as members of the public, but as the persons who have the right of using the suit land as a threshing floor. This objection of the learned Advocate-General must therefore be disallowed. He then mentioned a case in *Ramaswamy Iyer* v. *Secy. of State* (5) in which there was a communal land a part of which (of the extent of 41 cents) was granted to some potters. It was found that there was still left 1 acre 54 cents for communal purposes and there was also another plot of 2 acres 77 cents available for the same purposes. In the case before me there is no other land and the extent of the suit land is 77 cents. In my opinion the present case is distinguishable from the one cited. If it is only two cents that are wanted for the defendants, it may be that one is inclined to help the defendants. But a perusal of defendant 1's deposition shows that they cannot be content with a plot of two cents. This is apparently the reason why they would not accept the selection made by the Government. At p. 60 he says:

"I want 33 cents in all for the purpose of the temple and only one cent for temple construction purposes."

In re-examination he says the 33 cents are wanted for the purpose of the kuttu which lasts for 18 days in a year. He also says that in the Bhajana temple 200 people will assemble. The Commissioner appointed in the case states that the buiiding portion measures 40 links east to west and 27 links north to south; the shed extends to 10 links more towards the east and 2 links more on other sides, and the Dhwajasthambam is 15 links distant from the shed. We have got altogether a plot of 67 by 31 links. This is about two cents. About 20 links to the east of the Dhwajasthambam there is the idol of Duryodhana on an elevated spot measuring 20 links in length. At another spot, 55 links, there is the image of Aravan. 45 links to the east there is a water pit and just to the east of it a fire pit. These are 43 links east to west

(5) A. I. R. 1931 Mad. 213=129 I. C. 630.

and 20 links north to south. There is another space of 60 by 80 links required for some sacrifice, probably animal sacrifice. It is clear that, unless all these necessary regions are also provided, the defendants cannot carry on the Droupadi Amman temple festivities in the way they want to. At first I thought that I might pour oil over troubled waters by suggesting a compromise and restoring the Munsif's decree by consent, that is, by allotting a space of 2 cents and enclosing it in such a manner, that is, leaving an opening only towards the west so that the other villagers need not be disturbed by the festivities of the temple ; and I made a suggestion to this effect to the Advocate-General and I reserved judgment for nearly a fortnight expecting that his clients would come and state their willingness or otherwise in respect of this suggestion ; but I have heard nothing more about this matter.

Two or three points emerge clearly from the whole record. Any plot to be given for this new temple sought to be erected by the defendants must be a very small plot. It cannot take away a substantial slice out of the kalam poramboke. Secondly it ought not to be a source of nuisance or disturbance to other villagers. For that purpose it should be situated towards the western extremity and the opening of the temple should face the west and there should be no accessory regions attached to the temple for other subordinate festivities. Apparently the defendants cannot be satisfied with these conditions. In these circumstances I think the Subordinate Judge's decree is right and the second appeal is dismissed with costs of the plaintiffs-respondents.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 456

MADHAVAN NAIR, J.

Venkatarama Ayyar—Appellant.

v.

Mirthinjaya Ayyar and *another*—Respondents.

Second Appeal No. 1525 of 1927, Decided on 11th November 1930, against decree of Sub-Judge, Mayavaram, in A. S. No. 55 of 1925.

Limitation Act (1908), S. 6—Child in mother's womb cannot be regarded as minor for purposes of S. 6.

A person cannot be held to be a minor until he is born and therefore S. 6 does not apply to the case of a son who is born subsequent to the alienation objected to. The minority begins at birth and not at conception : 54 *I. C.* 838 ; *A. I. R.* 1929 *Lah.* 254, and 14 *I. C.* 60, *Foll:* *A. I.R.* 1924 *All.* 912, *A. I. R.* 1921 *Oudh* 196, *Ref.* [P 457 C 2]

M. Patanjali Sastriar—for Appellant.

K. Krishnaswami Iyengar and *A. Seshachariar*—for Respondents.

Judgment.— The plaintiff is the appellant. The only question of law for decision in this second appeal is whether the plaintiff's suit to set aside the alienation made by his father of 45 cents of land included in the sale deed, Ex. C, is barred by limitation under Art. 126, Limitation Act.

Both the lower Courts have found that the alienation was not supported by necessity and this finding has not been questioned before me. Art. 126, Limitation Act, provides 12 years as the period of limitation for a suit by a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property. The starting point of the limitation is the date " when the alienee takes possession of the property." The alienation was made on 26th June 1901 and it is admitted that the alienee took possession of the property on the same date. The suit, having been brought only on 16th August 1922, that is more than 21 years after the date of taking possession by the alienee, prima facie is barred by limitation under Art. 126. On 26th June 1901, when the alienee took possession of the property, the appellant was in his mother's womb and was not born. He was born only on 18th August 1901. S. 6, Limitation Act, provides that

" where a person entitled to institute a suit . . . . is, at the time from which the period of limitation is to be reckoned, a minor. . . . . he may institute the suit within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in Col. 3, Sch. 1.

On behalf of the appellant it is argued that he is entitled to claim the benefit of S. 6, Limitation Act and that the plaintiff, though he was not born on 26th June 1901, should be deemed to be a minor at that date as he was in his mother's womb and that the period of limitation should be reckoned from the date of his birth, 18th August 1901. If this is permissible then the suit will be within time having been instituted

two days before the lapse of time. The appellant's argument is based on the ground that a child in the mother's womb is supposed to be born for certain purposes such as for partition, and the making of a will etc. He argues why should not, on the same reasoning, a child in the mother's womb be regarded as a minor for purposes of S. 6, Limitation Act. On the other hand, the respondents argue that the term "minor" used in S. 6 can be understood only with reference to persons physically in existence and that it is meaningless to apply it with respect to an unborn being in the womb. The question is whether the plaintiff, who was born on 18th August 1901, should be deemed to be a minor on 26th June 1901 when the alienee took possession of the property.

This question has not arisen for decision in this Court. In the Punjab Chief Court, the Lahore High Court and the Allahabad High Court, the view of S. 6, suggested on behalf of the appellant, has not been accepted. In *Kehar Singh* v. *Hazara Singh* (1) it was held by Chevis, J., of the Punjab Chief Court, that S. 6, Limitation Act, does not apply to the case of a son who is born subsequent to the alienation objected to and that minority begins at birth and not at conception. In *Miran Ditta* v. *Behari Lal* (2) it was held by the Lahore High Court that

"the principle of law is perfectly clear that a plaintiff cannot take advantage of the exemption (provided in S. 6, Limitation Act) unless he is a minor and is in existence at the time when the right to sue accrues, and that a minor is not entitled to the benefit of the provisions of S. 6 in respect of a right to sue which accrued before his birth."

In *Muhammad Khan* v. *Ahmad Khan* (3) the same proposition was again affirmed. The judgment of the learned Chief Justice in this case is very instructive as it deals with the special reasoning on which the appellant's argument is based. He observes thus:

"We are aware of the legal fiction by which a child in the mother's womb is supposed to be born for certain purposes, but the learned counsel for the appellant has not been able to invite our attention to any authority in support of his argument that this fiction governs the rule laid down by the statute. If a son in embryo is deemed to be a minor in existence on the date of the conception, the period of eighteen years, which would determine his disability, would run from that date. But it is clear that that date can never be ascertained with any degree of certainty, and the contention urged by the learned counsel would lead to the absurd result that the plaintiff would attain the age of majority for the purposes of the law of limitation when he was only 17 years and a few months old, though he would be a minor at that time for all other purposes."

"There can be little doubt that a person cannot be held to be minor until he is born. This proposition is so obvious that it does not require any authority, but I find that the matter is by no means res integra."

He then refers to the decision in *Miran Ditta* v. *Bihari Lal* (3) and *Kehar Singh* v. *Hazara Singh*, (1). To the same effect are also the decisions of the Allahabad High Court . . . . : see *Sankar Narain Pande* v. *Ram Bhoros* (4) and *Dhanraj Rai* v. *Ram Naresh Rai* (5); and the Oudh Chief Court has also taken a similar view in *Chokkey Singh* v. *Hardeo Singh* (6). Having regard to the express language of S. 6, Limitation Act, which in terms refers to a "minor", I do not think that any other view is possible. In my opinion a person cannot be held to be a minor until he is born. S. 3, Majority Act of 1875, relied on by the appellant, which states that

". . . . subject as aforesaid every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before,"

does not in any way help us in deciding this question. Following the decisions referred to above I hold that the appellant could not be said to have been a minor at the time of the sale though he was in his mother's womb at that time. (The rest of the case deals with only questions of fact.) In the result, the second appeal fails and is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

(1) [1912] 14 I. C. 60.
(2) [1919] 54 I. C. 838.
(3) A. I. R. 1929 Lah. 254=116 I. C. 545=10 Lah. 713.
(4) A. I. R. 1924 All. 677=79 I. C. 1010.
(5) A. I. R. 1924 All. 912=79 I. C. 1019.
(6) A. I. R. 1921 Oudh 196=64 I. C. 757=24 O. C. 330.

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* A. I. R. 1931 Madras 457

VENKATASUBBA RAO, J.

C. Abdul Hakim Sahib and *another*—Plaintiffs.

v.

Chattanadha Iyer and *others*—Defendants.

Civil Suit No. 532 of 1930 and Transferred Appln. No. 2257 of 1930, Decided on 26th November 1930.

*** (a) Court-fees Act (1870), Ss. 3 and 4—Act directly applies to extraordinary original civil jurisdiction of High Court—High Court cannot make rules overriding the Act.**

So far as the ordinary original civil jurisdiction of the High Court is concerned the Court-fees Act does not itself prescribe the fees chargeable. To that extent the High Court's power to frame rules is undoubted. But as regards the extraordinary original civil jurisdiction of the High Court the Act directly applies and the High Court cannot frame rules for observance in cases falling within this jurisdiction overriding the provisions of the Act. To that extent such rules are ultra vires of the High Court. It therefore follows that when a suit is transferred under Cl. 13, Letters Patent Madras, the court-fees leviable are governed by the Court-fees Act and not by the High Court Fees Rules: *A.I.R.* 1914 *P.C.* 41, *Ref.*

[P 459 C 1, 2]

(b) Madras City Civil Court Act (1892), S. 14—Suit transferred to High Court from City Civil Court—How credit is to be given to plaintiff in respect of fees payable in High Court stated.

Where a suit is filed in City Civil Court and has been transferred to the High Court, the court-fees payable are those in force in the High Court as a Court of ordinary civil jurisdiction. Then the procedure indicated under S. 14 is this. A certain amount is the aggregate of the court-fees payable in the High Court, the institution fee being one item of such court-fees. Towards this total the plaintiff must get credit for the court-fees already paid on his plaint in the City Civil Court. [P 460 C 2]

V. V. Srinivasa Iyengar and *K. P. Ramakrishna Ayyar*—for Plaintiffs.

J. A. Pinto—for Defendants.

Judgment.—This matter has been posted for being spoken to. While the ruling I gave the other day, applies generally to suits removed to the High Court under Cl. 13, Letters Patent, it cannot govern cases transferred from the City Civil Court, as a special Act applies in that case. The question at present arises in such a case and I therefore desire to amplify my ruling so as to make it applicable also to cases of that description.

The questions I have to decide may be thus stated:

(1) When a suit is removed and tried by the High Court as a Court of extraordinary original jurisdiction, are court-fees leviable under the Court-fees Act, or under the High Court Fees Rules?

(2) When a suit filed in the City Civil Court is so removed, does it follow the general rule or is it governed by any special provisions?

I must first turn to the Court-fees Act. Chap. 2 of that Act, relates to fees in the High Courts and in the Presidency Small Cause Courts; Chap. 3 to fees in other Courts and in public offices: see titles at head of these two chapters. What we have to deal with at present is Chap. 2, which consists only of three sections. The first of those sections is S. 3. The distinction between Ss. 3 and 4 must be carefully observed. Whereas the latter section prescribes the court-fee, the former, subject to an exception which I shall notice presently, merely regulates the mode of collection. S. 4 enacts that no document specified in Sch. 1 or 2 of the Act as chargeable with fees shall be filed in or received by the High Court in certain cases, unless, in respect of such document, there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document. The cases are thus specified.

Cases coming before the High Court:

(1) In the exercise of its extraordinary original civil jurisdiction;

(2) in the exercise of its extraordinary original criminal jurisdiction;

(3) in the exercise of its jurisdiction as regards appeals from the judgments of one or more Judges of the said Court or of a Division Court; original side appeals are however excluded;

(4) in the exercise of its jurisdiction as regards appeals from the Subordinate Courts;

(5) in the exercise of its jurisdiction as a Court of reference or revision.

It follows from this section, that in cases coming up before the High Court in the exercise of its other jurisdictions, the fees prescribed by the Court-fees Act are not, as such, leviable. For instance, in original side suits and original side appeals, the fees chargeable are not governed by the Court-fees Act. S. 4 in its language resembles S. 6 which occurs in Chap. 3. With these remarks, let me now examine the other section to which I have referred, namely S. 3.

It provides that the fees:

(1) payable by the clerks and officers of the High Court by virtue of the power conferred by S. 15, High Courts Act 1861 (now S. 107, Government of India Act);

(2) chargeable in such Courts under No. 11 of the first and Nos. 7, 12, 14, 20 and 21, Sch. 2 of the Act;

(3) chargeable in the Presidency Small Cause Courts and their offices;

shall be collected in the manner prescribed by the Act.

This is a most clumsily worded section. The Court-fees Act, it has been repeatedly pointed out, is full of defects and imperfections: see the valuable introduction to Mr. Satyamurthi Ayyar's Commentaries on the Court-fees Act. (Edn. 1930). I am not aware of any decision which has adverted to this particular defect; but S. 3, in my opinion, is clearly an instance of bad drafting. So far as its language goes, it does not profess to prescribe a court-fee; it purports on the contrary to deal only with the mode of collecting it. But by implication it prescribes a court-fee in certain cases. That is the effect of Cl. 2 which runs thus:

"Or chargeable in each of such Courts under No. 11 of the first Schedule and Nos. 7, 12, 14, 20 and 21 of Sch. 2 to this Act annexed."

Of those mentioned above, Art. 11 of Sch. 1 and Art. 12 of the second, deal with certain matters falling within the High Court's exercise of testamentary jurisdiction, and similarly Arts. 7, 14, 20 and 21 deal with matters pertaining to its matrimonial jurisdiction.

The effect of the two sections may then be shortly stated thus. In certain cases coming before the High Court, the Court-fees Act itself prescribes the fee leviable: S. 4, Cl. 2 of S. 3. In all other cases coming before that Court, the Court-fees Act lays down only the mode of collecting the court-fee: S. 3, Cl. 1. In the case of the Presidency Small Cause Courts also, it merely prescribes the mode of collecting the fee (S. 3, Cl. 3).

As I have said, the question I have to decide is, what are the court-fees leviable in a case tried by the High Court in the exercise of its extraordinary original civil jurisdiction. The Court-fees Act says, that, in such a case, the fees leviable are those prescribed by the Act itself. But the High Court has framed its own court-fees Rules. In the preamble to those rules, it is stated that the tables of fees set forth shall be used and observed in the High Court in all cases inter alia coming before it "in the exercise of its ordinary and extraordinary original jurisdiction." So far as the ordinary original civil jurisdiction is concerned, the Court-fees Act, as I have shown, does not itself prescribe the fees chargeable. To that extent, the High Court's power to frame its own rules is undoubted. But as regards the extraordinary original civil jurisdiction of the High Court, the Court-fees Act directly applies. Can the High Court make rules for observance in cases falling within this jurisdiction, overriding the provisions of the Court-fees Act? This is the question I have now to decide. I must first mention that the preamble as it originally stood did not contain the words "and extraordinary." These words were added by an amendment made in 1927. Then we must enquire from where the High Court derives its power to make rules in regard to its court-fees. Barring S. 107, Government of India Act (repealed S. 15, High Court Charter Act), no other provision conferring the power is traceable. That section says that each of the High Courts may settle tables of fees to be allowed to the sheriffs, clerks and Officers of Courts.

Section 3, Court-fees Act, assumes that the fees payable to such clerks and officers are by virtue of this very section. It is these fees that S. 3 prescribes shall be collected in the manner provided by that Act. The mode of collection is regulated by S. 25, which enacts inter alia that the fees referred to in S. 3 shall be collected by stamps. My reason for referring to sections of the Court-fees Act in this connexion is, that it fortifies my view that the High Court's power to make rules is derived from S. 107, Government of India Act. That section is not happily worded. Its marginal note indicates that it deals only with the High Court's powers in respect of subordinate Courts. Cls. (a), (b), (c), and (d) deal only with such Courts. But Cl. (e) is more general and deals with all Courts including the High Courts. (The word "such" is absent in Cl. (e)).

If, then, it is from S. 107 that the High Court derives its power to make rules, does it place any limitation on such power? The proviso to S. 107 says that the table of fees to be framed shall not be inconsistent with the provisions of any Act for the time being in force. The Fees Rules which the High Court has framed in respect of its extraordinary original civil jurisdiction are inconsistent with the provisions of the Court-fees Act. To that extent, they are ultra vires of the High Court. It therefore follows that when a suit is transferred under Cl. 13, Letters Patent,

the court-fees leviable are governed (subject to the exception to which I shall presently refer) by the Court-fees Act and not by the High Court Fees Rules.

The same result follows from another line of reasoning. It has been held that the powers of the High Court in dealing with suits transferred under Cl. 13, Letters Patent, are those which, but for the transfer, might have been exercised by the Court from which the suit is transferred. *Annie Beasant* v. *Narayaniah* (1). This is enacted by Cl. 20, Letters Pattent, which runs thus :

"And we do further ordain that, with respect to the law of equity and rule of good conscience to be applied to each case coming before the said High Court of Judicature at Madras, in the exercise of its extraordinary original civil jurisdiction, such law or equity and rule of good conscience shall be the law or equity and rule of good conscience which would have been applied to such case by any local Court having jurisdiction therein."

Then as to suits transferred from the City Civil Court S. 14, Madras City Civil Court Act (Act 7 of 1892) provides :

"When under S. 13, Letters Patent for the the High Court, dated 28th December 1865, or under S. 25, Civil P. C., (corresponding to S. 24, of the present Code (Act 5 of 1908), the High Court has removed for trial by itself any suit from the City Court, fees on the scale for the time being in force in the High Court as a Court of ordinary original civil jurisdiction shall be payable in that Court in respect of the suit and proceedings therein.

Provided that, in the levy of any such fees which, according to the practice of the Court, are credited to the Government, credit shall be given to the plaintiff in the suit for any fee which in the City Court he had already paid under the Court-fees Act, 1870, on the plaint."

This section expressly enacts that the fees leviable shall be on the scale in force in the High Court as a Court of ordinary original civil jurisdiction. It has been argued, that on a true construction, this section does not apply to the pleadings, but only to such proceedings as are taken subsequent to the transfer. This argument fails to give effect to the words "the suit" as contrasted with "and proceedings" in the above section. Moreover, the proviso makes the matter perfectly clear. It says, that in the levy of the fees, credit shall be given to the plaintiff for any fee which in the City Court, he has already paid on the plaint. How is this credit to be given ? Let us take a concrete case. Supposing on the plaint when it was filed in the City Civil Court, a stamp of the value of Rs. 130 was affixed ; the suit is then transferred to the High Court. Credit has to be given under the section for Rs. 130. It specially confers on the plaintiff that benefit. When credit is being given, is the total of the court-fees payable in the High Court, to be taken into account or such total, minus the institution fee ? Under the High Court Fees Rules, there are certain court-fees payable in addition to the stamp on the plaint ; for instance, a sum of Rs. 10 is leviable on the hearing of a suit for the first day and of Rs. 20 for every subsequent day ; for each exhibit marked at a hearing a sum of Rs. 2 has to be paid. If the total court-fee is taken into account in giving credit, the result would be to make the plaintiff pay the excess fee on the plaint. But if the argument advanced is accepted, it leads to this. You must only take into account, the total minus the institution fee that is the Rs. 130, which the plaintiff has already paid, goes merely in reduction of such fees as are payable exclusive of the stamp on the plaint. In other words, the plaintiff in a suit transferred, may say:

"I have already paid Rs. 130 in the City Civil Court. Give me credit to that extent in the hearing and exhibit fees."

The result would then be, that for his plaint in the High Court he would have paid no fee at all. A construction that leads to such an absurdity must be rejected. The procedure indicated under the section is this. A certain amount is the aggregate of the court-fees payable in the High Court, the institution fee being one item of such court-fees. Towards this total, he must get credit for the court-fee already paid on his plaint.

It is also contended that the policy of the Court-fees Act, is to forbid the filing of a document not properly stamped and that when a plaint is received in the High Court by reason of the transfer of a suit, it cannot be said that there is a filing of the plaint. This may or may not be a correct statement of its policy ; but I have nothing to do with it. The present point is governed by an express statutory provision and it is my duty to give effect to it. I therefore hold that in cases removed from the City Civil Court the court-fees payable are those in force in the High Court as a Court of ordinary original civil jurisdiction.

(1) A. I. R. 1914 P. C. 41 =24 I. C. 290 = 41 I. A. 314=38 Mad. 807 (P. C.).

The suit now transferred is what was filed in the City Civil Court. The written statement contains a counter-claim. The plaint and the statement bear stamps of the value prescribed by the Court-fees Act ; but if the High Court-fees Rules apply, a higher fee is payable, certain excess sums in respect of the plaint and the counter-claim, which the office has demanded. In my judgment these sums must be paid. I direct the plaintiff to pay them.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 461

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

V. Abdul Kareem Sahib — Appellant.

v.

A. Abdul Kareem Sahib—Respondent.

Appeal No. 18 of 1927, Decided on 9th October 1930, against decree of City Civil Court, Madras, in Original Suit No. 579 of 1925.

(a) Tort — Trade-mark-- Infringement of property mark—Action for injunction and damages—Actual deception of purchaser not required — Only that defendant's mark should have such resemblance to that of plaintiff's as to be calculated to mislead incautious purchaser.

Every one may use any mark or combination of marks or symbols that he likes, unless some other person by user acquired a reputation which couples his name with that mark or symbol. In that case the user acquires a property in that mark or symbol which the law is bound to protect. No one else has a right to copy it or even to appropriate any part of it if by such appropriation unwary purchasers may be induced to believe that they are getting goods which are made by the plaintiff firm. It is not necessary to prove that anyone has in fact been deceived and the facts of reputation and deception may be inferred from the attendant circumstances: 15 *M. L. J.* 45 and *Somerville* v. *Schembri*, 12 *A.C.* 453, *Rel on.*

[P 462 C 2 ; P 463 C 1]

(b) Tort—Trade-mark—Action for infringement of property mark—Delay does not disentitle plaintiff to grant of injunction.

In a suit by the plaintiff for infringement of a property mark delay in bringing such an action is no ground for assuming plaintiff's acquiescence to such infringement and does not disentitle the plaintiff to the grant of an injunction prohibiting the defendant from making use of such mark : *Rowland* v. *Michell*, 13 *Rep. Pat. Cas.* 457 and *Fullwood* v. *Fullwood*, 9 *Ch. D.* 176, *Ref.* [P 434 C 1]

(c) Tort — Trade-mark — Infringement of property mark—Action for injunction—Objection to use of name—Extent of, stated.

The objection which in general may attach to an injunction restraining a man from using his own name does not extend in the same degree to the use of that name as the descriptive part of the trade designation of an article. There is in principle no distinction between a case in which the name of the use of which the complaint is made, is the name of the person carrying on the business and the case in which it is not : *Valentine Meat Juice Co.* v. *Valentine Extract Co.*, 83 *L. T.* 259 and *Reddaway* v. *Benham*, (1896) *A. C.* 199 *Ref.* [P 464 C 1, 2]

K. S. Krishnaswami Iyengar and *K. B. Krishna Rao Naidu* and *S.A.K. Shah* —for Appellant.

C.P. Ramaswami Iyer and *G. Renukha Ayyar* and *Abdul Rahim Sahib*— for Respondent.

Curgenven, J. — The plaintiff is a manufacturer of beedies or Indian cigarettes, which he sells wholesale in packages of a thousand. He sued to restrain the defendant, who is also a manufacturer, from selling beedies in wrappers got up to resemble his own. He also claimed damages as compensation for loss incurred, but disallowing these, the learned City Civil Judge has given him a decree restraining the defendant from imitating his wrappers in certain respects, and from this the defendant now appeals. The plaintiff has filed a memorandum of objections with respect to a particular feature of the defendant's imitation. Both parties, it will be seen have the same name with only a difference in the first initials. The plaintiff in his evidence has stated that he manufactures as many as ten lakhs of beedies per day, that he has 95 branches for this work, and that he pays tax on an income of Rs. 15,000 per annum. He adds that his beedies are very popular and has acquired a reputation in the market. These statements have not been challenged by cross-examination, nor have they been disputed before us. The defendant on the other hand is clearly in quite a small way. After deposing that he made from Rs. 500 to Rs. 1,000 per mensem, he had to confess that he paid neither income-tax nor professional tax, that he owned no property, that he was living in a rented house, that he was in the same condition ten years after he started trading and that he keeps no accounts of his transactions, although he boasts that he gets orders from half a dozen places in the Madras Presidency. The wrapper upon which the plaintiff founds his claim was actually introduced by him in 1920, but the earlier history of the defendant's conduct is not without its bearing on the points which we have to decide.

In 1915 the plaintiff adopted as a sort of trade-mark, although of course trade-marks in the strict sense are not legislated for in India, a single violet hemisphere, Ex. B-3, which was registered on 24th February 1915 by the local Chamber of Commerce. Such registration, it may be explained, does not carry with it any legal rights. At the same time the plaintiff designated his goods as "Karim Beedies." The defendant followed also with a hemisphere which he impressed in violet ink with a rubber stamp on his own packages. In February 1911 the plaintiff changed to a pair of hemispheres joined together and the defendant countered in November 1917 with a similar mark. These were both registered with the Chamber of Commerce, but it is noteworthy that, while the defendant registered his design in black he actually printed it in violet, the colour adopted by the plaintiff. This was followed by an exchange of lawyer's notices, Exs. 2 and 3, and the plaintiff filed two successive criminal cases, with the fate of which we need not specially concern ourselves because admittedly they were misconceived. They seem however to have resulted in an undertaking given by the defendant to alter his design, which he did not fulfil.

In 1920 the plaintiff adopted yet another design of wrapper, Ex. B-2, registering the whole wrapper with the Chamber of Commerce on 29th January 1920. At some date not precisely fixed, but probably in November 1920, the defendant made a corresponding change. The actual printing of his new wrapper, he says, was on 5th November, and this is supported by a printer's bill of that date. On 29th November the plaintiff sent him a lawyer's notice, Ex. 8, imputing to him that he was fraudulently and dishonestly making use of a colourable imitation of the plaintiff's wrapper. The two wrappers are produced as Exs. B-2 and X the corresponding packages which are made up with them being M. Os. 1 and 3. There can be no question of the striking similarity between these two packages. Each is a rectangular package of precisely the same size and shape and the whole get-up of the plaintiff's wrapper, the letterpress and the hemispheres which form its distinctive devices are imitated in colour, size and distribution of marks on all the six sides of the defendant's wrapper. Even apart from previous history of the defendant's efforts, which we have summarized, an inspection can leave no doubt that the defendant's wrapper was deliberately designed as an imitation of the plaintiff's. We are further satisfied that the imitation is close enough to deceive an unwary purchaser. The imitation is of course directed not to deceive the retail vendor, who must know the source from which he obtains his stock-in-trade and whose co-operation the defendant has endeavoured to enlist by selling his packages at one anna cheaper than those of the plaintiff. These packages are exposed by the beedi-sellers in their shops, and customers come and buy one or more single packets of beedies out of them. Such a customer would have two ways of indicating what he wants, either by naming the article or by pointing to it where it is in the shop. The defendant, as has been said, happens to have the same name as the plaintiff, and describes his beedies on the wrapper as "Karim Beedies." The customer who points, and who perhaps cannot read, would naturally be guided by the general appearance of the wrapper and we think that the defendant's wrapper is a close enough imitation of the plaintiff's to deceive anyone into the belief that the goods are the plaintiff's.

It has been sought to cast doubt on one necessary element in the plaintiff's case, that the public had come to identify his goods by the external appearance presented by his wrappers. It must no doubt be proved, before an action of this kind can succeed, that the imitation is of some marks or other appearances associated in the minds of the customers with the plaintiff's goods. There must, in other words, be evidence of repute : see Kerely on Trade-marks, Edn. 6, p. 559. The position was clearly put by Benson, J., at p. 98 in *Nooroodeen Sahib* v. *Charles Sowden* (1) as follows :

> "Every one may use any mark or combination of marks or symbols that he likes unless some other person has by user acquired a reputation which couples his name with the mark or combination of marks or symbols."

In that case the user acquires a property in the mark or combination which the law will protect just as much as if it were a registered trade-mark. As ob-

(1) [1905] 15 M. L. J. 45.

served by the Privy Council in *Somerville* v. *Schembri* (2):

"As soon, therefore as a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the exclusive property of that firm, and no one else has a right to copy it or even to appropriate any part of it, if, by such appropriation, unwary purchasers may be induced to believe that they are getting goods which were made by the firm to whom the trade-mark belongs."

It is not necessary to prove that anyone has, in fact, been deceived. It is enough if

"the defendant's trade-mark bears such a resemblance to that of the plaintiff's as to be calculated to mislead incautious purchasers. per Lord Kingsdown in *Leath Cloth Company* v. *American Leather Cloth Company*."

No length of time during which the plaintiff's goods must have been exposed for sale in these wrappers can be laid down, the questiou whether an association of ideas has been created in the minds of customers being dependent on the special circumstances of each case and being of course, a question of fact; nor as the above citation shows is it necessary to adduce the 'direct evidence of purchasers. The facts of reputation and deception may be inferred from the attendant circumstances. In cases like the present it seems legitimate to argue that, unless the imitated wrappers had become associated with the goods of a manufacturer of popular articles the defendant would not have undergone the trouble and incurred the risk of so sedulously imitating them. Apart from that it will be clear from what we have said of the dimensions of the plaintiff's business that many thousands of his packages must have been exposed for the sale of beedies in shops in Madras and elsewhere during the period, not far short of a year, which intervened between the introduction of the two wrappers. We feel no reason to doubt that the plaintiff's wrapper had become clearly identified with his beedies in the minds of purchasers when the defendent placed his imitation upon the market.

Having adverted to the degree of closeness to which the defendant's wrapper resembles the plaintiff's we turn to the actual terms of the decree, which restrains the defendant

"from using on the wrappers of his packets of beedies the two red transverse stripes and the green lines of latitude and longitude that he places on his green hemispheres."

That is the respect in which he has been forbidden to imitate the plaintiff's wrapper and we have no hesitation in saying that an order in such moderate terms is justified, and perhaps more than justified, by the facts. The defendant has gone so far as to copy not only the position, size and colour of the plaintiff's hemispheres but to a large extent the distribution of colour and design within them and it is in this latter respect only that the injunction has been passed against him. On the conclusions which we have already expressed there can be no ground for interference with an order in these terms.

Before however confirming the decree we think we ought to advert to the contention that the plaintiff has been guilty of considerable delay in pursuing his remedy. The cause of action arose at the end of 1920 and the suit was not filed until September 1925. The plaintiff's first step was to send the notice Ex. 8, which elicited a reply, Ex. 9, from the defendant denying that he had infringed any right. The plaintiff sent another notice (Ex. 6) in 1922, specifically complaining that the defendant was using wrappers exactly similar to his own and in particular bearing two green globes with transverse red stripes. The defendant's reply to this is Ex. 7 and certainly is in very unsatisfactory terms. No further correspondence took place between the parties before the institution of the suit. The plaintiff's excuse for not taking action in the meanwhile is that the defendant's trade went to pieces, he himself being implicated in a murder case. It does not seem true that he completely lost his trade because there are certain printing bills etc. which point to the contrary, but it may very well be the case that his interference with the plaintiff's business was not serious enough to make it worth while to sue him, especially as the plaintiff says that during 1922-23 he had to file three suits for infringement against other persons. There is one document, Ex. 12. which purports to be a circular issued by the defendant to his customers explaining that he had had for some time past to dispense with the use of labels and wrappers in selling his beedies, and which, if genuine, certainly points to a

(2) [1887] 12 A. C. 453 =56 L. J. P. C. 61 =56 L. T. 454.

failure to maintain his trade. The defendant repudiates this document and, although from internal evidence it seems probable that he issued it, and it first appears in evidence in his own deposition it may be objected to as not proved by legal evidence. We think on the whole however that there is no substance in this objection on the score of delay. Certainly there is no ground to assume from it any acquiescence on the part of the plaintiff, and mere delay should not, it has been held in cases of this character, disentitle the plaintiff to the grant of an injunction: see *Rowland* v. *Michell* (3), at pp. 464-5 and *Fullwood* v. *Fullwood* (4).

We accordingly dismiss the appeal with costs.

In his memorandum of objections the plaintiff protests against the dismissal of his claim for injunction as regards the trade name " Karim Beedies " which the defendant equally with the plaintiff has been in the habit of using on his wrappers. The learned City Civil Judge has gone into the whole question of the use by the defendant of his name upon these wrappers. There seems no doubt that step by step he has altered it into closer and closer resemblance to the plaintiff's. Thus he was originally V. A. P. Abdul Karim Saheb, then he dropped the "P" and later the "Saheb," adding " & Co." These changes seem obviously designed for the purpose indicated and certainly show a lack of bona fides on the part of the defendant. Nevertheless, it is not now contended that he should be restrained from using his name, in whatever form, but only the word " Karim " as a descriptive epithet in " Karim Beedies." Now there can be no doubt that the adoption of this description has led, and has indeed been designed to lead, to the confounding of his beedies with those of the plaintiff. Further, the objection which in general may attach to an injunction restraining a man from using his own name does not extend, at any rate, in anything like the same degree, to the use of that name as the descriptive part of the trade designation of an article. The principles which should be applied in such circumstances have been very fully enunciated by the Court of appeal in *Valentine Meat Juice Co.* v. *Valentine Extract Co., Ltd.* (5). There is in principle no distinction between a case in which the name, of the use of which the complaint is made, is the name of the person carrying on the business and a case in which it is not ; the law, as laid down in *Reddaway* v. *Banham* (6) is, equally in the two cases, that " nobody has any right to represent his goods as the goods of somebody else." The only difficulty that arises is in the application of this proposition to the facts of the particular case. We should have had little hesitation in enlarging the injunction by restraining the defendant from making use of the description " Kareem Beedies " were it not for certain circumstances which we are bound to consider. His own use of this description appears to date from 1915, when it is found in association with his single hemisphere (Ex. B-3). As early as 1917 the defendant began to make use of the phrase (see Exs. B and 15), and he has used it ever since. Although in the notice Ex. 2 it is stated that the plaintiff's beedies are well known in the market as " Kareem Beedies," complaint is rather directed against the use of his trade-mark and design than specifically against the appropriation of this designation.

After the criminal cases, the plaintiff, in his notice Ex. 7 states that the parties had come to an arrangement that the defendant should not " use the same or similar trade-mark and property mark " as that used by the plaintiff ; but should adopt three globes instead of two. The written memorandum to this effect referred to in the notice is not forthcoming, but the defendant appears to confirm the nature of his undertaking when he says : " before the Magistrate I agreed thenceforth to use three globes." It cannot be said therefore that the plaintiff made use of this opportunity to insist upon the defendant abandoning the description. Later again, in the notice Ex. 6 emphasis is laid upon the similarity in the appearance of the packages and the trade-mark, the content showing that the hemispheres were referred to, no express allusion being made to the

(3) [1896] 13 Rep. Pat. Cas. 457.
(4) [1878] 9 Ch. D. 176 =47 L. J. Ch. 459=38 L. T. 380=26 W. R. 435.
(5) [1901] 83 L. T. 259=17 Rep. Pat. Cas. 673 =16 T. L. R. 522.
(6) [1896] A. C. 199=65 L. J. Q. B. 381 = 74 L. T. 289=44 W. R. 638.

use of the description "Kareem Beedies." We think that there is here something more than mere delay in seeking a remedy. There is something like actual abstention from such a course, and considering that the defendant began to use the term only two years after the plaintiff, and the plaintiff did not bring his suit until eight years after that use began, we do not think that we ought to vary the decree in the manner prayed. The memorandum of objections, is dismissed with costs.

P.R.S./B.V. *Appeal & Memorandum of objections dismissed.*

A. I. R. 1931 Madras 465

PANDALAI, J.

Ramnath Chunilal—Petitioner.

v.

Grandhi Sattirazu and *others*—Respondents.

Civil Revn. Petn. No. 1416 of 1927, Decided on 3rd February 1931.

Civil P. C. (1908), O. 21, Rr. 89, 92 (2) and 93 Property mortgaged prior to sale but after attachment—Mortgagee applying under R. 89—Decree-holders applying for rateable distribution of sale-proceeds are not entitled to notice under O. 21, R. 92, and order passed setting aside sale is binding on them for purposes of Civil P. C. (1908), O. 21, R. 93.

In an application wherein a person, who has obtained a mortgage from the judgement-debtors of the property sold in execution of a decree prior to the sale, but after the atrachment of the property, applies under O. 21, R. 89, for setting aside the sale, the decree-holders who have applied for rateable distribution of the sale proceeds have no such direct or proximate interest as to make them persons affected thereby and are therefore not entitled to notice under O. 21, R. 92, as such decree-holders have only a contingent interest in the sale contingent on its not being set aside by payment of the particular debt. At the most the omission to give notice is a mere irregularity which does not affect the validity of the order setting aside the sale and such order is binding on them for purposes of O 21 R. 93: *A. I. R.* 1916 *P. C.* 238; 41 *Mad.* 265 and *A. I. R.* 1928 *Cal.* 267, *Ref.*; 48 *I. C.* 38, *Dist.* [P 467 C 1]

B. Sitarama Rao and *P. Kameswara Rao*—for Petitioner.

G. Lakshmanna, *P. Somasundaram*, *T. Ramachandra Rao* and *C. Rama Rao*—for Respondents.

Judgment.—Two questions arise in this petition.

Before an execution sale is set aside under O. 21, R. 92, on an application under O. 21, R. 89, is notice of the application necessary to other decree-holders who have applied for rateable distribution of the purchase money deposited by the purchaser?

If such notice is necessary, but has been given to some but not to all such decree-holders, can the purchaser whose sale has been set aside enforce repayment of the purchase money under R. 93 against those decree-holders who have not received notice but have received their share of the purchase money.

The facts are as follows:

In execution of the decree in O. S. 38 of 1923 in the District Court of East Godaveri immovable properties belonging to the debtors were sold on or about 5th January 1925 and purchased in different lots of which one lot was purchased by the petitioner, a stranger to the decree, for Rs. 4,000 and he deposited the purchase money in the usual course. There were a number of other decrees against the same judgment debtors the holders of which, including respondents 2 to 4 and the petitioner himself who held one of them, had applied under S. 73 for rateable distribution of the assets when realized. The sale was never confirmed because on 4th February 1925, i. e., within 30 days of the sale, respondent 5, who had obtained a mortgage from the judgment-debtors of the property prior to the sale but after its attachment, deposited the amount of the decree in O. S. 38 of 1920 for payment to that decree holder together with 5 per cent. of the purchase money for payment to the purchasers and applied under O. 21, R. 89, and R. 92 (2) for the sales being set aside. To that petition the decree-holders in O. S. 38 of 1920, the judgment-debtors and the auction-purchasers, including the present petitioner, were added as respondents Of the holders of other decrees two had the notice of the petition, i. e, the present petitioner who was impleaded, was himself the holder of another decree. Respondent 3, another decree holder, intervened with a petition objecting to the sale being set aside as he had attached the money paid by the mortgagee to set aside the sale. The petition was dismissed by the District Judge on the ground that respondent 5 had no right to apply as his mortgage, though before the sale, was subsequent to the attachment of the property sold. But this Court, in appeal on 25th February 1926, set aside that decision and held that

respondent 5 had a right to apply and set aside the sales: see *Viranna* v. *Sattiraju* (1). In the appeal the same persons were impleaded as in the first Court and though respondent 3 was not formally impleaded it is impossible to believe that he being a local pleader of position and having intervened in the lower Court was not aware of the proceedings in appeal. After the decision in appeal the petitioner, on 16th Angust 1926, applied to the District Court under R. 93 for repayment of the purchase money and for payment of the 5 per cent on it to which he was entitled and as in the meanwhile respondents 2 to 4 had received their rateable shares, they were impleaded. The learned Judge has held that respondents 2 to 4 having received rateable distribution out of the purchase money are persons affected under the proviso to R. 92 (2) to whom notice of the application to set aside the sale should have been given, that they had no such notice, and that therefore they are not bound by the order in the appeal or liable to repay what they received under R. 93.

The learned Judge's order results, as he himself says, in the obvious injustice that the purchaser by Court sale, whose sale has been set aside by the Court not at his own instance as in applications under R. 91, but at the instance of the judgment-debtor's alienee and who according to the law applicable both to private and Court sales has the right to get back his money if the sale falls through without his default, is deprived both of the property and his money. The only decision referred to by the learned Judge is the one reported: *Krishnamacharlu* v. *Danoji* (2). That was a case of an application under R. 91 by the purchaser himself on the ground that the judgment-debtors had no saleable interest in the property sold. He succeeded in his application, but did not make parties to the proceeding certain other decree-holders who had obtained orders for rateable distribution of the sale proceeds before the application was made to set aside the sale. The District Munsif held on an application by the purchaser under R. 93 that those decree-holders were not bound by the order setting aside the sale and therefore were not bound to repay the money they had received. Abdur Rahim, J., in upholding this order did so on the ground that even if the District Munsif had erred in law he was not disposed to interfere in revision. He however made the observation that:

> "if it were necessary to express any view on this point I should be inclined to hold that persons who had obtained orders for rateable distribution are persons affected by an application to set aside the sale within the meaning of S. 92 and an order made behind their back cannot bind them for the purpose of R. 93."

This is not a decision. Giving every weight to the observation of so learned a Judge, it was made in a case in which the facts were different from those in this case. In the first place the present is a case of an application under R. 89 by the judgment-debtor's alienee whereas that was an application by the purchaser himself under R. 91. Assuming for the moment that persons who have got orders for rateable distribution are "persons affected" within the meaning of S. 92, in applications both under S. 89 and S. 91, with which I will deal presently; still the consequences of a failure to make such a person a party need not be the same when the failure was by the judgment-debtor or his alienee as where it is by the purchaser himself. Secondly there is nothing to show that before the application was made on 4th February 1925, any of the respondents had obtained orders for rateable distribution. It is impossible that any such order could have been made because 30 days had not then elapsed after the sale and I cannot imagine how any order for rateable distribution can be made before the sale is confirmed and the title passes. These orders were in all probability passed after the District Judge dismissed the petition. If therefore only those who have obtained orders as distinguished from those who have merely applied for rateable distribution before the sale of the application had to be impleaded in the present application, none of the respondents come within that class. Lastly, so far at least as respondent 3 is concerned, he intervened on his own petition in the present matter before the District Judge and was heard, and, as I have stated must have had notice of the proceedings in appeal.

But it seems to me that in applications under R. 89 at any rate persons (decree-

(1) A. I. R. 1927 Mad. 445=100 I. C. 82.
(2) [1918] 48 I. C. 38.

holders) who have applied for rateable distribution of the sale proceeds have no such direct or proximate interest as to make them persons "affected thereby," and are therefore not entitled to notice under R. 92. No doubt, if the sale is upheld, they have a chance of getting a share of the sale proceeds and if it is set aside they lost that chance. But that chance they derive not because they are purchasers of the property for whose loss of bargain a solatium is provided by R. 89, or the decree-holder who has brought it to sale for whose satisfaction (and not that of other decree-holders) that rule specially provides, or the judgment-debtor for whose benefit that rule provides a period of grace of 30 days for paying the particular decree debt (and not the debts of other decree-holders) and avoiding the sale. In short the chance for other decree-holders of getting rateable distribution is entirely contingent on the sale being confirmed which itself is contingent on the judgment-debtor or his alienee not paying up the particular decree debt plus 9 per cent within 30 days of the sale. The provision thus being one intended to relieve the judgment-debtor and for that purpose of satisfying only the particular creditor who has taken the trouble to execute his decree and to bring the debtor's property to sale and the purchaser who has advanced cash for the price, those are three classes of persons affected by a petition under R.89. The other decree-holders have only a contingent interest in the sale, contingent on its not being set aside by payment of the particular decree debt. As observed by the Privy Council in a case under the Code of 1882 which equally applies to the present Code

"to bring S. 295 (present S. 73) into play, certain conditions are necessary and one of them is that there should be assets held by the Court." *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (3): cf. *Annamalai Chettiar* v. *Palamalai* (4).

It is difficult to see how other decree-holders if they were given notice under R. 89 are in any position to affect the decision of a petition under that rule, by which, read with R. 92 (2), as soon as the steps necessary are taken (as to which see *Narayana Sahu* v. *Pentamma*) (5) the Court is bound to set aside the sale. In the case just cited it was held that it is not essential for an order under Rr. 89 and 92 (2) that the auction purchaser should be included in the petition if it is filed in time or that the notice to him should be taken out or served within the 30 days so long as he is served before the order. No more do I see any necessity for complicating proceedings under R. 89 by requiring that other decree-holders who have but a contingent interest in the matter should be notified.

In this view it becomes unnecessary to decide whether if respondents 2 to 4 were entitled to notice in proceedings under R. 89 the absence of notice to some of the decree-holders like respondents 2 and 4 though others had notice invalidates the order setting aside the sale as against those who had no notice. In this case I asked the learned advocates for the respondents to say in what way the absence of notice had prejudiced them, in other words, how they could have avoided the sale being set aside, if respondent 5 being held to be entitled to apply, had paid the necessary sums and made the application in proper time. They replied that they were entitled to rely on the statutory requirement of notice and that in the absence of such notice the order passed behind their back cannot bind them. I find it difficult to reconcile myself to the position that a sale conducted by the Court could be declared invalid so far as the judgment-debtor and decree-holder and purchaser are concerned, and yet be valid as against another creditor because a notice which should have been sent to him was not sent. In such a case I should say that the omission was a mere irregularity which did not affect the validity of the order: *Umesh Chandra* v. *M. T. Safizatunnessa*, *A. I. R.* 1928 *Cal.* 267, and in any case there would be no difficulty in view of S. 151, Civil P. C., to regularize the matter by treating the original petition to set aside the sale as still pending so far as the respondents who had no notice are concerned and in disposing of the matter in their presence. Seeing that the respondents have absolutely no merits but have to rely solely on what is at best an omission, the result would be the same and the sale

(3) A. I. R. 1916 P. C. 238=40 I. C. 242=44 I. A. 72=44 Cal. 662 (P. C.).
(4) [1918] 41 Mad. 265=43 I. C. 539 (F. B.).
(5) A. I. R. 1929 Mad. 763=121 I. C. 855=52 Mad. 861.

would again be set aside. It is however unnecessary to pursue the matter.

It may be unnecessary but perhaps as well to say that I say nothing about the persons affected in petitions under Rr. 90 and 91.

In the result the order of the learned Judge is set aside and the petitioner is declared entitled to recover from respondents 2 to 4 such sums as they may have received by way of rateable distribution out of the purchase money deposited by him together with interest at 5 per cent from the date of receipt to date of payment. The petitioner is also entitled to 5 per cent of his purchase money out of the amount deposited by respondent 5. The lower Court will ascertain the amounts payable by each respondent and make order accordingly. The petitioner and respondent 5 will have their costs in the lower Court and here from respondents 2 to 4 in proportion to their respective liabilities.

P.R S./P.N. *Order set aside.*

A. I. R. 1931 Madras 468

MADHAVAN NAIR, J.

Abdul Majid Saib (died) and *others*—Plaintiffs—Appellants.

v.

Ramiza Bibi Sahiba (died) and *others* —Defendants Respondents.

Second Appeal No. 1895 of 1926, Decided on 9th December 1930.

(a) Mahomedan Law — Alienation by mother of minor son's property—Mother has no power.

A Mahomedan mother has no power to alienate the property of her minor sons. The alienation made by her is absolutely void: *A. I. R.* 1918 *P. C.* 11, *Foll.* [P 468 C 2]

(b) Specific Relief Act (1877), S. 41—Void lease—Court may require compensation to be made to other party.

Though a transaction is declared to be void the Court may under S. 41 require the party to whom relief is granted to make compensation to the other party which justice may require: 30 *Cal.* 539, *Dist.* [P 469 C 1]

In setting aside the mortgage made by a Mahomedan mother who had no power to alienate the property of her minor son the Court has discretionary power under S. 41 to make it a condition that the minors should refund the amount by which they and their estate were benefited: *A. I. R.* 1926 *Lah.* 170, *Appl.*; *A. I. R.* 1921 *Cal.* 572: 28 *Bom.* 181 and *A. I. R* 1925 *Bom* 499, *Ref*; 21 *I. C.* 879; 53 *I.C.* 14; 32 *I.C.* 804; and *A.I.R.* 1929 *Lah.* 331: and *A. I. R.* 1921 *Mad.* 172, *Dist.* [P 469 C 2]

B.C. Seshachala Ayyar—for Appellants.

A. Viswanatha Ayyar and *A. Ramaswami Ayyar*—for Respondents.

Judgment.—The plaintiffs are the appellants. The parties to this second appeal are Mahomedans. The suit out of which this second appeal arises was instituted by the plaintiffs to set aside an alienation of property made by their mother, defendant 1, during their minority. They also sued for partition of the property, 7/8ths going to themselves and 1/8th to their mother. The alienation is evidenced by Ex. 6 and the consideration for it was Rs. 1430. The alienee, defendant 2, contended that she paid the full consideration for Ex. 5, that the money was utilized to pay off the plaintiffs' deceased father's debts binding on the estate and that she also effected improvements on the property from the date of her purchase. The lower Courts held that the alienation was invalid "as it was made by the mother of Mahomedan minors" and gave a decree to the plaintiffs for 7/8th share of the properties but the recovery of the share was made conditional on the plaintiffs depositing in Court 7/8th of Rs. 1,430 that is Rs. 1,251-4-0. The plaintiffs were also directed to pay Rs. 750, the value of the improvements effected on the property.

In second appeal it is not argued that the alienation is valid nor is it seriously argued that the plaintiffs are not bound to pay the value of the improvements; what is strongly contended is that the lower Courts should not have directed the plaintiffs to refund to the alienee the proportionate amount of the purchase money in respect of their shares of the property.

It is settled law as laid down by their Lordships of the Privy Council in *Imambandi* v. *Mutsuddi* (1) that a Mahomedan mother has no power to alienate the property of her minor sons. The sale of the suit property by defendant 1 in favour of defendant 2 is therefore absolutely void. It is argued for the appellants that when a transaction is void, the person in whose favour it has been declared to be void is not bound to refund any moneys in respect of that transaction, and strong reliance in support of this proposition is placed on the ruling of the Privy Council in *Mohori Bibee* v *Dharmodas Ghose* (2) in which it

(1) A. I. R. 1918 P. C. 11=47 I. C. 513=45 I. A. 73=45 Cal. 878 (P.C.).

(2) [1903] 30 Cal. 539=30 I. A. 114=8 Sar. 374 (P.C.).

was held that a contract by a minor, such as a mortgage, is void and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money on a decree being made declaring the mortgage invalid. It is true that their Lordships held relying on *Thurstan* v. *Nottingham Permanent Benefit Building Society* (3) affirmed by the House of Lords in *Nottingham Permanent Benefit Building Society* v. *Thurston* (4):

"a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the legislature has declared to be void"

but at the same time it is clear from that judgment that in a proper case having regard to S. 41, Specific Relief Act, the Court may in adjudging the cancellation of an instrument require the party to whom such relief is granted to make compensation to the other which justice may require. The following observations of their Lordships are relevant in this connexion.

"Another enactment relied upon as a reason why the mortgage money should be returned is S. 41, Specific Relief Act (1 of 1877) which is as follows:

"Section 41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

"Section 38 provides in similar terms for a case of rescission of contract. These sections no doubt give a discretion to the Court, but the Court of first instance and subsequently the appellate Court in exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

In my opinion the decision of the Privy Council is an authority for the proposition that, though a transaction is declared to be void, the Court may under S. 41, Specific Relief Act, require the party to whom relief is granted to make compensation to the other party which justice may require. In the case before them their Lordships declined to exercise the discretion in favour of the mortgagee as they agreed on that point with the Calcutta High Court which held that the circumstances of the case did not call for the exercise of any such discretion. On the authority of this decision it was held in *Rang Illahi* v. *Mahbub Illahi* (5) that in setting aside the mortgage made by a Mahomedan mother who had no power to alienate the property of her minor son, the Court had discretionary power under S. 41, Specific Relief Act, to make it a condition that the minors should refund the amount by which the estate and themselves were benefited. This decision is very similar to the present case. In the present case also the minor plaintiffs have been benefited as the debts binding on their father's estate were paid off by the sale of the property. In support of their conclusion the learned Judges of the Lahore High Court relied also on two decisions of the Bombay High Court *Dattaram* v. *Vinayak* (6) and *Limbaji Raoji* v. *Rahi* (7) which held that in setting aside a sale made on behalf of a minor by an unathorised person, the Court may under S. 41, Specific Relief Act, make it a condition that the minor should refund the amount by which his estate and himself were benefited. The decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2) is relied on in all these cases in support of their conclusions by the learned Judges.

Besides the decision in *Mohori Bibi* v. *Dharmodas Ghose* (2) as I have shown does not altogether preclude the repayment of moneys advanced for a transaction when it is declared to be void, the learned counsel for the appellant relied also on the decisions in *Marimuthu Udayan* v. *Ramaiengar* (8), *Guruswamy Pantulu* v. *Lall Khojanchee* (9), *Doulatuddin* v. *Dhaniram Chhutia* (10), *Khair Din* v. *Shah Muhammad*, A. I. R. 1929 Lah. 331 and *Baluswami Ayyar* v. *Lakshmana Ayyar* (11). As I shall show presently none of these decisions supports him to any extent. In *Marimuthu Udayan* v. *Ramaiengar* (8) the present question arose for decision; but the learned Judges, Sankaran Nair and Tyabji, JJ., for different reasons thought it was unnecessary to decide it and the question

(3) [1902] 1 Ch. 1.
(4) [1903] A. C. 6=72 L. J. Ch. 134=87 L. T. 529=51 W. R. 273=67 J. P. 129.
(5) A. I. R. 1926 Lah. 170=94 I. C. 25=7 Lah. 35.
(6) [1904] 28 Bom. 181=5 Bom. L. R. 916.
(7) A. I. R. 1925 Bom. 499=88 I. C. 643=49 Bom. 576.
(8) [1913] 21 I. C. 879.
(9) [1919] 53 I. C. 14.
(10) [1916] 32 I.C. 804.
(11) A.I.R. 1921 Mad. 172=63 I.C. 374=44 Mad. 605.

was therefore left open. In *Guruswami Pantulu* v. *Lall Khaianchee* (9) it was held that a minor mortgagor who enters into a transaction misrepresenting his age is under no equitable obligation to refund the money when the transaction turns out to be void. The judgment of the High Court is a very short one ; but the judgment appealed against makes it clear that there was in that case no room for applying S. 41, Specific Relief Act, for the circumstances of the case showed that the mortgagee

"was aware that defendant 2 (the mortgagor) was a minor and took documents which accompanied the mortgage for purposes of throwing a favourable colour on the transaction."

In *Doulatuddin* v. *Dhaniram* (10) the learned Judges declined to apply Ss. 38 and 41, Specific Relief Act, because as they pointed out there was

"neither cancellation of any document nor recission of a contract."

In that case the suit by the plaintiff was for compelling the defendant to execute a sale-deed in respect of certain properties. If this is not well founded distinction, I think the decision would be contrary to the decision of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2). In this connexion it is interesting to note that refund of a proportionate amount of the purchase-money was ordered by the Calcutta High Court in *Laloo Karikar* v. *Jagat Chandra Saha* (12), when the transaction in question was set aside as void. In that case a Mahomedan died leaving his widow and infant children. He had debts, and to satisfy the decree obtained by one of the creditors against some of the heirs the widow acting on her own behalf and on behalf of her children sold a certain property and made over delivery of possession. The children on attaining majority sued jointly with the widow to recover possession of the property on a declaration of title. The alienation except as regards the share of the mother was set aside as the mother had no power under Mahomedan law to alienate. The learned Judges held that the

"decree for possession in favour of the plaintiffs should be conditional on repayment of a proportionate share of the ancestral debts payable out of the assets left by the original debtor and each heir who was competent to sell her own share and cannot subsequently ignore her act was liable to satisfy the debt to the extent of the assets in her share :" see the head note.

In the judgment no reference is made to S. 41, Specific Relief Act. The learned Judges proceeded upon the general principle that

"the essence of the matter is that each of the heirs is liable to satisfy the debt to the extent of the assets in his share."

It is obvious that this will be an important consideration for applying S. 41, Specific Relief Act, as under it relief by way of compensation will be granted only if justice requires it. The decision in *Laloo Karikar* v. *Jagat Chandra Suha* (12) was followed in *Jhanda* v. *Sapuran Singh*, *A. I. R.* 1925 *Lah.* 509, an exactly similar case. The decision in *A. I. R.* 1929 *Lah.* 331 does not help the appellants as in that case equitable relief was not granted to the vendee because the minors were not benefited in any way by the transaction and on this ground the case was distinguished from the decision in *Rang Illahi* v. *Mahtub Illahi* (5) relied on by the respondents. The last case relied on by the appellants was *Baluswami Aiyar* v. *Lakshmana Ayyar* (11) in which it was held that where a managing member of a joint Hindu family for purposes not binding upon the other coparceners and without their concurrence agrees to convey a specific item of property the purchaser cannot enforce specific performance of the entire contract ; but Courts will grant specific performance by a conveyance of the share which the vendor had in the property at the date of the contract if the purchaser elects to pay the entire consideration.

On the strength of that decision it is argued that in this case since the vendee has got the mother's share of the property she should be content to retain it for the whole of the purchase money. That decision clearly has no application to the facts of the present case. It turned upon the provisions of Ss. 15 and 17, Specific Relief Act, and related to an executory contract, whereas in the present case, we are dealing with an executed contract. In considering the rights of parties in respect of a conveyance which has been perfected, principles and equities different from those applicable to cases which rest on an executory contract will have to be applied ; and this appears to be clear from the judgment of Kumaraswami Sastri, J., in *Baluswami Aiyar* v. *Lakshmana Ayyar* (11). In the present case the vendee is not seeking to enforce specific performance of any contract. She is only

(12) A.I.R. 1921 Cal. 572=62 I.C. 428.

contending that since the transaction is declared to be void, compensation should be paid to her to the extent it has been set aside. Whether she should be compensated would depend upon the circumstances of the particular case.

In the present case, both the lower Courts have found that the minor's estate was benefited by the use of the purchase money obtained from the vendee and so it is equitable when the transaction is set aside as regards their share that they should pay a proportionate amount of the purchase money on the principle of the decision in *Mohori Bibee's* case (2) and as was decided in the various cases referred to above. In my opinion the decisions of the lower Courts are right and this second appeal should be dismissed with costs. I may state that this judgment will not affect the amendment made in the lower Court's decree subsequent to the filing of the second appeal.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 471

BEASLEY, C.J. AND WALSH, J.

V. Adinarayana Chetti — Defendant 1 —Petitioner.

v.

Kopparam Narasimha Chetti and *another* —Plaintiffs—Respondents.

Civil Revn. Petn. No. 1399 of 1925, Decided on 13th November 1930, from order of Sub-Judge, Vellore, D/- 22nd December 1924, in I.A. No. 107 of 1924.

Civil P. C. (1908), S. 2—Court finally decided controversial matter in issue—Decision misnamed as "decretal order"—Decision forms decree over which appeal is remedy and not revision—Civil P. C. (1908), Ss. 96, 115.

The mere fact that a judgment is headed as an "order" does not make the judgment any the less a judgment, nor does the fact that the office chose to endorse upon the decree that it was a "decretal order" make any difference. Where therefore a Court, even though it does not conform to the form of a final decree, conclusively determines the rights of the parties with regard to controversial matters in suit, but describes its decision as "decretal order" it nevertheless is a decree, the proper remedy over which is by way of appeal and not by revision : *A. I. R.* 1925 *All.* 737 ; 51 *I. C.* 967 ; *A. I. R.* 1929 *Lah.* 376 ; *A. I. R.* 1921 *Mad.* 699 ; 23 *Mad.* 517 and *A. I. R.* 1924 *All.* 144, *Dist.*

[P 474 C 1]

V. C. Seshachariar and *A. C. Sampath Iyengar*—for Petitioner.

S. Varadachariar—for Respondents.

Beasley, C. J.—Two worshippers of the Sri Kanyakaparameswari Temple in Walajah filed a suit O. S. No. 14 of 1913 in the Court of the Subordinate Judge, Vellore, praying for the settlement of a scheme for the proper management of the temple and its properties, for the appointment of a fit and proper person as the trustee, for an account by defendant of his management of the trust properties belonging to the temple, for a direction to defendant 2 to hand over the jewels belonging to the temple to the trustee so appointed and for a direction to defendant 3 to hand over the account books relating to the temple and its properties in his possession. It was alleged in the plaint that in consequence of the irregular and improper conduct on the part of defendant 1 and his supporters the public worship in the temple had ceased to be performed daily. A written statement was filed on behalf of the defendants but the suit was compromised and a compromise decree passed on 30th November 1923. By that decree a scheme was settled, approved and annexed to the decree and by that scheme two members of the Komati caste were to be elected trustees by the majority at a general meeting of the members of the community subject to the confirmation of the Court.

Two trustees were duly elected and their election was confirmed by Court on 26th July 1924. In the decree there is a direction that either the plaintiffs or defendant 1 should apply for the appointment of a commissioner to go into the accounts as between the defendants and the temple and that the newly elected trustees are to take possession of the temple and its properties only on payment to defendant 1 whatever sum that might be found due by the commissioner to all or any of the defendants. In pursuance of this decree the plaintiffs filed a petition C. M. P. 107 of 1924 in the Subordinate Judge's Court asking for the appointment of a commissioner to take the accounts of the defendants and on 15th March 1924 by consent a commissioner was appointed. The commission was returned on 18th November 1924 and both sides having filed objections to the commissioner's report, the Subordinate Judge gave his decision upon it on 22nd December 1924. It was ordered and declared that no amount

was due by the temple to any of the defendants and that defendant 3 owed Rs. 197-2-3 and defendant 1 Rs. 2202-5-5 to it and it was further ordered that defendant 1 was to pay to the temple trustees on behalf of the temple the sum already stated, that defendant 3 was likewise to pay the sum found due by him and that both defendants 1 and 3 were to pay to the temple trustees on behalf of the temple Rs. 140-4-0 being their costs of the petition and finally that the trustees of the temple were to execute the decree on behalf of the temple only on payment of Rs. 217-7-0 being the court-fee on the amounts decreed. It must be mentioned that endorsement on the back of the final order is "decretal order" and that the learned Subordinate Judge's considered decision is headed "order". Defendant 1 has now filed this civil revision petition against the before mentioned order of the learned Subordinate Judge.

Mr. Varadachari on behalf of the respondents to this petition takes the preliminary objection that no civil revision petition lies because in his submission the order of the learned Subordinate Judge is a "decree" from which there is an appeal and therefore it is not open to the petitioner to come to the High Court by way of revision. For the petitioner it is argued that the proceedings in the learned Subordinate Judge's Court were by way of a petition, that his order was an "order" and not a "decree" and that hence, there being no appeal, the petitioner's only remedy is by way of a revision petition to the High Court. In support of his argument it is pointed out that the application for the appointment of a commissioner was made by a civil miscellaneous petition, that the learned Subordinate Judge's order is headed "order" and that when the learned Subordinate Judge's order was drawn up it was drawn up as a decretal order. These things, it is argued, show that it was not a "decree" but merely an "order." It is further contended that in the mufassil such matters as are left over for determination after the decree is passed such as the appointment of a commissioner as in this case are usually dealt with on a petition, and that even assuming that such a practice is irregular and the learned Subordinate Judge should not have adopted such a practice, he has done so and delivered an order and that therefore the right of the petitioner to come by way of a revision petition cannot be defeated. A number of cases were referred to by the learned counsel for the petitioner in support of his argument which, to put it shortly is that where the Court purports to act under a certain provision although not entitled to do so, it must be taken to have assumed its jurisdiction under that provision. One of the cases relied upon is *Bilas Singh* v. *Emperor*, *A. I. R.* 1925 *All.* 737, where it was decided that where jurisdiction is usurped by a Court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order could not be defeated on the ground that the order was made without jurisdiction. It must be noted that in that case the action of the Court was to deprive the applicant of his right of appeal. In the present case that is not the position at all.

The action of the learned Subordinate Judge in passing the order, if it can be described as an order, does not deprive the petitioner of a remedy. In *Khamasa Bewa* v. *Promothonath Roy Chowdry* (1), the question was whether the litigant was by excess of jurisdiction deprived of his right to appeal and it was held that he was not. What happened in that case was that a suit was instituted in a Court the presiding officer of which at the time of the institution of the suit had no Small Cause Court powers. It was held nevertheless that an appeal lay to the District Judge.

In *Kuram Nawaz* v. *Runka*, *A. I. R.* 1929 *Lah.* 376 it was held by a single Judge that the right of appeal is determined not by what the Court should have done but what the Court did or purported to do. Another case relied upon is a Full Bench decision of this High Court, namely, *Muthiah Chettiar* v. *Lodd Govindoss Krishnadoss* (2). There an order which purported to be passed under O. 22, R. 10, Civil P. C., was held to be an appealable order though on the facts the order should not have been passed under that rule. In *Abdul Rahiman Saheb* v. *Ganapathi*

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(1) [1919] 51 I. C. 967.
(2) A. I. R. 1921 Mad. 599=69 I. C. 337=44 Mad. 919.

Bhatta (3), the Judge had no power to pass orders under S. 492, Civil P. C., as regards the issue of an injunction and under S. 503 as regards the appointment of a receiver and it was held that as orders under both the sections were appealable, the High Court was not barred from treating the orders as having been passed thereunder for the purpose of entertaining an appeal against those orders.

That again was a perfectly clear case because the Judge had passed an order attaching property, in itself an order seriously affecting the property of a person, and had also appointed a receiver and neither of those orders could be made without such orders being subject to an appeal. Here again it was the question of whether or not by the adoption of a wrong procedure by a Court the litigant was to be deprived of his remedy. That is not the case here. In *Nasir Khan* v. *Itwari* (4), it was held that the right of appeal does not depend on what a Court ought to have done but on what it actually did. In that case the Court dismissed an appeal on the merits although it ought to have dismissed it not on the merits but for default of appearance by the appellant. No appeal lay from an order dismissing the appeal for default. The matter is quite shortly dealt with on p. 670 (*of* 45 *All.*) in the judgment of the Court as follows :

" The right of appeal does not depend on what the Court ought to have done but on what it actually did. What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal * * * * * * The respondent's reasoning would deprive the aggrieved party of the right of appeal just in those cases in which it is most needed."

It is contended that these cases are strong support of the petitioner's argument. It is argued that the order, the subject of this revision petition, was on the face of it an order, that it does not conform to the form of a final decree passed after a preliminary decree directing the taking of an account and that as before mentioned it is described by the Subordinate Judge as an " order " and is embodied in the decree as a decretal order.

It is argued therefore that the learned Subordinate Judge purported to pass an " order " from which there is no appeal and which can only be revised by means of a petition and that however wrong he may have been in doing so, that is what he has done and not what he should have done. It is further pointed out that the order is stamped as a decretal order under Art. 7, Sch. 1, Court-fees Act, that S. 96, Civil P. C., has no application here as that only gives the right of appeal from a decree but that S. 105 applies. In reply Mr. Varadachari contends that the order of the learned Subordinate Judge by what it does was clearly a " decree " as defined in S. 2, Civil P. C., because it conclusively determined the right of parties with regard to the matters in controversy in the suit and was a final determination of such matters, and with that contention I entirely agree. The order of the learned Subordinate Judge by reciting that the decree provided for, namely, the taking of the accounts and states :

" It is to give effect to this direction in the decree that an application was made to the Court by the plaintiffs to appoint a commissioner. The Commissioner has now submitted his report. Objections have been filed to it on either side and so on. He then gives his decision with regard to the commissioner's findings."

It is just as if the learned Subordinate Judge had treated the matter as one where, a preliminary decree had been passed. He ends up by stating :

" There will therefore be a declaration to the effect that there is no amount due by the temple to any of the defendants and that on the other hand defendant 3 owes Rs. 197-2-3 and defendant 1 Rs. 2,202-5-5 to it and a direction requiring the said defendants 1 and 3 to pay the temple trustees on behalf of the temple the sums respectively due by them as aforesaid with costs subject to this decree being liable to be executed only upon the payment of the adequate court-fee upon the amounts decreed."

There was no mistake here and it is clear that the learned Subordinate Judge intended to finally dispose of the matter between the parties and that his order was to be a " decree." On the face of it, it was a decree and no one could possibly have been misled. The mere fact that the learned Subordinate Judge's judgment is headed " order " does not make his judgment any the less a judgment nor does the fact that the office chose to endorse upon the decree that it

(3) [1900] 23 Mad 517=10 M. L. J. 305.
(4) A. I R. 1924 All. 144=74 I. C. 905=45 All. 669.

was a decretal order make any difference.

The test to be applied is what it was and it completely satisfied the definition of a "decree" in the Civil Procedure Code. In my opinion para. 2 of the learned Subordinate Judge's order is conclusive of the matter and there can be no ground whatever for saying that he purported to act under a non-appealable procedure. That being so, the authorities referred to by the petitioner have no application whatever. It is probable that no commissioner was appointed by a decree of 30th November 1923 because that was a compromise decree and that it was left to the parties to agree upon the commissioner. Otherwise no doubt the decree would have directed the taking of the accounts by a named person and not left it to the parties to apply afterwards for the appointment of a commissioner to take the accounts. The learned counsel for the petitioner has asked the Court to be allowed to alter the petition into an appeal but I am not disposed to accede to that request as I think it is clear that the procedure of coming by way of a civil revision petition has been adopted in order to save court-fees. This civil revision petition must be dismissed with costs.

Walsh, J.—I agree and have nothing to add.

P.R.S./B.V. *Petition dismissed.*

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* A. I. R. 1931 Madras 474

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

Official Receiver of Secunderabad—Appellant.

v.

Gummidelli Lakshminarayana and *others*—Respondents.

Original Side Appeal No. 55 of 1929, Decided on 2nd October 1930, against order of Kumaraswami Sastri, J., D/- 23rd April 1929.

*** Provincial Insolvency Act (1920), S. 56—Vesting order by competent foreign Court operates on insolvent's property in British India—Such vesting does not give way to prior attachment of that property.**

In general a vesting order made by a competent foreign Court operates upon property of the insolvent within British India creating a title in the Official Receiver so invested. This title so operates with effect from the date of the order. The judgment-creditors of the insolvents who had attached the insolvent's property before the said vesting order was passed, cannot be said to have any prior equities, such as a charge or a lien and hence the vesting order of the foreign Court has not to give way to such an attachment because no equities are created by an attachment and because such vesting order is not a private transfer but a transfer by law. The Secunderabad Court is a foreign Court: *A. I. R.* 1914 *P. C.* 129; *Holthausen, In re*, (1875) 9 *Ch. A.* 722; *Secy. of State* v. *Charles Worth Piling Co.*, (1901) *A. C.* 373; *Galbraith* v. *Gimshaw*, (1910) *A. C.* 508; *Joselyne, In Re Watt*, (1878) 8 *Ch. D.* 327 and *Chatterton* v. *Watney*, 17 *Ch. D.* 259, *Ref.*; *Levasseur* v. *Mason & Barry*, (1891) 2 *Q. B.* 73; *Singer & Co.* v. *Fry*, 94 *L. J. K. B.* 2025, *Dist.*; 26 *Mad.* 673 and 25 *Cal.* 179; *Rel. on.* 28 *Cal.* 419, *held Overruled by* 29 *Cal.* 428, (*F. B.*). [P 476 C 1; P 477 C 2]

T. Ramchandra Rao and *A. Venkata Subba Rao*—for Appellant.

V. Radha Krishnayya and *A. K. Ramachandra Ayyar*—for Respondents.

Curgenven, J.—The question of law which this appeal raises is whether a vesting order made by the District Court of Secunderabad prevails against a prior attachment of a decree effected by a Court in British India. In 1922 a preliminary decree for partition was passed in C. S. 420 of 1922 on the file of this Court. In 1926 a creditor of the plaintiff in that suit, who had obtained a decree in Bombay, attached this preliminary decree. In 1928 the plaintiff was adjudicated an insolvent by the District Court of Secunderabad under the provisions of the Provincial Insolvency Act 5 of 1920, which is in force in that area, and an order was passed vesting his property in the Official Receiver of Secunderabad.

The legal argument divides into two stages: (1) what is the status of the District Court of Secunderabad; and (2) what is the effect within British India of a vesting order passed by that Court. The former question presents little difficulty. Although administered by the Governor-General in Council, Secunderabad, is part of the Nizam's Dominions, and lies outside British India. Jurisdiction over this area, as over a number of similar areas, is derived from the Foreign Jurisdiction Act, 1890, the preamble to which recites that the sovereign "by treaty, capitulation, grant, usage, sufferance, and other lawful means" has jurisdiction within divers foreign countries. S. 1 runs as follows:

"It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has, or may at any time hereafter have within a foreign

country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

By the Indian (Foreign Jurisdiction) Order in Council of 11th June 1902, powers under the Act were delegated to the Governor-General of India in Council for the purposes of constituting Courts and determining the law and procedure within areas extra-territorial to British India; and by a Notification of 1913 the specific Act, with which we are concerned,—the Provincial Insolvency Act 3 of 1907—was declared applicable to Secunderabad. S. 3, Foreign Jurisdiction Act provides that

"every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country."

This is the principle upon which the Judicial Committee decided *Secy. of State* v. *Charlesworth Piling Co.* (1) where the question arose as to what law the English or the Mahomedan, the Consular Court in Zanzibar should administer. Their Lordships say :

". . . . . throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired, and which is within its limits, a sovereign power. It results that a Judge acting with these limits is a Zanzibar Judge, and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case before him."

The theory upon which extra-territorial jurisdiction is based is one of authority delegated for this purpose by the ruler of the territory over which it is exercised, in the present instance, the Nizam.

But although, in the case of India, the authority so delegated, and the jurisdiction so exercised, is derived through His Majesty from the Governor-General in Council, and although the law may be identical with the law in force in British India and may be administered by British Officers the Court so erected is a foreign or extra-territorial Court. In the contemplation of the general law of British India, it seems that there are only two kinds of Courts—British Indian Courts and foreign Courts—and that whatever is not a British Indian Court is a foreign Court; so that quoad the Courts of British India, the Courts, for example, of foreign countries, British Colonies and assigned tracts like Secunderabad stand upon an equal footing as foreign Courts, subject of course to the test of recognition as competent Courts. It is true, as Mr. Varadachariar points out, that the Civil Procedure Code, does distinguish another class of Court. Under that Act, and for its purposes, a "foreign Court" means

"a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council,"

so that by virtue of the concluding words a Court such as we are dealing with is not a "foreign Court" within the definition. Special provisions affecting such Courts are to be found in Ss. 10, 43 and 45 of the Code dealing with lis pendens and the reciprocal execution of decrees. But outside the Code this distinction does not appear to be drawn, and there is no reason to hold that for the purpose, for example, if insolvency jurisdiction, it should be imported, nor even if imported, that it would affect whatever conclusions are to be drawn as to the effect of judgments passed by such extra-territorial Courts upon the proceedings of Courts in British India.

The statutory provision which declares that the judgment in rem of a competent Court is conclusive proof that any legal character which it confers accrued as from the date of that judgment is S. 41, Evidence Act; and this applies, it is not disputed, to the foreign judgments of a competent Court no less than to domestic judgments. The English law draws a distinction between the assignment of a bankrupt's immovable property to the trustee in bankruptcy and the assignment of moveables, an assignment by a foreign Court of the former kind operating, and of the latter kind not operating, upon property situate in England: Dicey, Edn. 4, Rr. 123 and 124. An exception is made in favour of assignments of immovables under the Irish, Scotch and Indian Acts (Loc. Cit., Rule. 122). We are not concerned here with the assignment of immovables, and it seems clear that, in general, a vesting order made by a competent foreign Court operates upon property of the insolvent within British India, creating a title in the Official Receiver so invested. This title so oper-

(1) [1901] A. C. 373=70 L. J. P. C. 25=84 L. T. 212=17 T. L. R. 265.

ates with effect from the date of the order, the case *Galbraith* v. *Grimshaw* (2), being sufficient authority in dispute of the proposition that a foreign receiver may take advantage of any "relating back" provision which his own Act may contain.

Accepting then that the insolvent's property in the decree in O. S. 420 of 1922, vested in the Official Receiver of Secunderabad upon his adjudication on 15th October 1928, issue 2 arises, whether such vesting will prevail against the respondent's earlier attachment of that decree We have heard a good deal of argument upon this point based upon English decisions as to the effect of what in England corresponds most closely to the attachment of a debt in this country —a garnishee order nisi. It appears to me that the two proceedings differ in one critical particular which vitiates the analogy it is sought to draw. Under R. 1, O. 45, of the rules of the Supreme Court, a garnishee may, upon the application of a person who has obtained a judgment, against his debtor, be called upon to "show cause why he should not pay to the person who has obtained such judgment, so much of the debt as may be sufficient to satisfy the judgment;" and R. 2 declares that service of such an order upon the garnishee "shall bind such debts in his hands." The legal consequences of an order nisi, have been considered in several cases cited before us, especially with reference to a competing claim in bankruptcy. In *Ex parte Joselyne, In re Watt* (3) James L., J. said:

> "The moment the order of attachment was served upon the garnishee the property in the debt due from him was absolutely transferred from the judgment-debtor to the judgment-creditor. The garnishee could then only pay his debt to the judgment-creditor of his original debtor. The property in the debt was transferred, and there was complete and p rfect security the moment the order of attachment was served."

The other two learned Judges of the Court of appeal, Cotton and Thesiger L. JJ., expressed the view that by virtue of the order the judgment-creditor became a secured creditor, and that may be a way of putting the position preferable to saying that the property in the debt was transferred. This latter proposition has in fact been dissented from in later cases, for instance in *Chatterton* v. *Watney* (4). The question of these competing claims again arose in *Galbraith* v. *Grimshaw and Baxter* (5), where the debtor had been adjudicated bankrupt in Scotland, and the trustee laid claim to a debt in respect of which a garnishee order nisi had been passed in England. I have already referred in another connexion to this case, which went up to the House of Lords as *Galbraith* v. *Grimshaw* (2). In the Court of appeal Farwell, L. J., observes of the garnishee order nisi, no doubt having in mind the language of James, L. J., cited above.:

> "It does not, it is true, operate as a transfer of the property in the debt, but it is an equitable charge on it, and the garnishee cannot pay the debt to anyone but the garnishor without incurring the risk of having to pay it over again to the creditor."

In this view Buckley and Kennedy, L. JJ., concurred. In the House of Lords Lord Loreburn, L. C., after dealing with the question of relating back, proposed as a test whether the bankrupt could have assigned to the trustee, at the date when the trustee's title accrued, the debt which had already been made the subject of a garnishee order nisi. However appropriate such a test may be in England, it is certain that the rights of a receiver under either of the Insolvency Acts are not necessarily delimitated by it. Lord Macnaghten, by saying that the Scottish Court can only claim the free assets of the bankrupt, had, I think, in view the principle of an equitable charge arising out of the order, and I do not read any of the observations in this case as amounting to a pronouncement that, irrespective of this principle, the Scottish Court, merely because it was a foreign Court, could not interfere with the claim under the attachment.

Mr. Duraiswami Ayyar has sought to draw some conclusions from two cases in which the respective claimants were the trustee in a foreign bankruptcy—French in the one case and Scottish in the other —and a receiver appointed in execution: *Levasseur* v. *Mason and Bany* (6) and *Singer & Co.* v. *Fry* (7). The decisions

(2) [1910] A.C. 508=79 L. J. K. B. 1011=103 L. T. 294=17 Manson 183=54 S. J. 634.
(3) [1878] 8 Ch. D. 327=47 L. J. B. K. 91=38 L. T. 661=26 W. R. 645.
(4) [1881] 17 Ch. D. 259=50 L. J. Ch. 535=44 L. T. 391=29 W. R. 573.
(5) [1910] 1 K. B. 339.
(6) [1891] 2 Q B. 73=60 L. J. Q. B. 659=64 L. T. 761=39 W. R. 596.
(7) [1915] 84 L. J. K. B. 2025=113 L. T. 552=1915 H. B. R. 115.

turn upon the incidents attaching to such a receivership and I do not, I think, afford much help in deciding upon the rights of an attaching creditor under Indian law. It will be clear from Lord Esher's judgment in the former case that a receivership shares this feature with a garnishee order nisi, that it is directed to the satisfaction of the claim of the judgment-creditor who secured the appointment of the receiver, and of his claim alone.

It is precisely in this respect that an order of attachment of a debt under the Code of Civil Procedure differs. The difference will be apparent upon a comparison of the form for a garnishee order nisi (form No. 39, Appendix X, Rules of the Supreme Court) and the form for attaching a debt (form No. 17, Appendix E, Civil P. C.) In the one the attachment is expressly made with a view to satisfying the judgment debt; and that debt only. The other does no more than prohibit and restrain the garnishee from paying, and his debtor from receiving, the debt until further orders. It is of purely negative effect, designed only to preserve the status quo, and cannot operate to create any lien or security in favour of the garnisher. So far as a domestic insolvency is concerned, the priority of an Official Assignee's claim over that of an attaching creditor was pronounced upon by a Bench of three Judges of this Court in *Krishnaswamy Mudaliar* v. *Official Assignee of Madras* (8).

The effect of an attachment, it was observed, following a dictum of the Privy Council in *Motilal* v. *Karra Buldin* (9), was to prevent alienation; it does not confer title. In that case, too, an attempt was made to support the claim of the attaching creditor by reference to English cases dealing with a garnishee order nisi, but though recognizing that such cases might have their use by way of analogy the learned Judges considered that the question had to be decided upon the terms of the Civil Procedure Code and of the Insolvency Act in force in this country. In Calcutta a contrary view was at first taken in *Miller* v. *Lakhimani Debi* (10). The judgment is only of interest here because it proceeded upon the principle that the Official Assignee stood in the shoes of an insolvent, and could not occupy a better position. This is very much the ratio decidendi adopted by Lord Loreburn in *Galbraith* v. *Grimshaw* (2).

This Calcutta case was overruled by a Full Bench in *Frederick Peacock* v. *Madan Gopal* (11), similar arguments to those adopted in the Madras case being accepted. Reference may also be made to the Privy Council judgment in *Raghunath Das* v. *Sundar Das Khetri* (12).

I can find no ground for distinguishing in this matter between the rights of a foreign and of a domestic receiver in insolvency. In each the debtor's property vests subject to any prior equities such as a charge or lien, and no such equities are created by an attachment. Under S. 64, Civil P. C., any private transfer or delivery of the property attached is void as against all claims enforceable under the attachment. A vesting order passed by a foreign Court is, I should suppose, a transfer by operation of law, though not of British Indian law; at any rate, it is not a private transfer, and therefore it has not to give way to an attachment.

The result will be that the appeal is allowed. The order of the learned Judge continuing the attachment and giving leave to the attaching creditor (now dead and represented by respondent 7) to execute the preliminary decree is set aside and the application dismissed. The contesting respondent 7 will pay the appellant's taxed costs here and in the trial Court.

The remainder of that Court's order as to costs will stand.

Bhashyam Ayyangar, J.—I concur, and having nothing to add on the first question on which my learned brother has held in concurrence with the learned trial Judge that the Secunderabad Court is a foreign Court for the purposes of this case. I only wish to say a few words on the second question, namely what is the effect in British India of a vesting order made by the said Court? The jurisdiction or competency of that Court to pass the order of adjudication is not challenged, and it is conceded that,

(8) [1903] 26 Mad. 673.
(9) [1898] 25 Cal. 179=24 I.A. 170=7 Sar. 222 (P.C.).
(10) [1901] 28 Cal. 419=5 C.W.N. 761.
(11) [1902] 29 Cal. 423=6 C.W.N. 577 (F.B.).
(12) A.I.R. 1914 P.C. 129=24 I.C. 304=41 I.A. 251=42 Cal. 72 (P.C.).

under the order passed by that Court vesting the insolvent's estate in the Official Receiver of that Court, all the moveable property of the insolvent situate (even) in British India became vested in that officer. The only point is whether the judgment-creditors of the insolvent who had attached the decree in question before the said vesting order was passed are entitled to any lien over it, or "equity" as the learned trial Judge calls it, as against the said officer. On this point the learned trial Judge has observed:

"I do not think that such adjudication will put an end to all execution proceedings in British India against the person adjudicated there. So far as British India is concerned, the Official Assignee takes the properties subject to all the equities. I may in this connexion refer to *ex parte Holthausen in re Scheibler* (13) and *Galbraith* v. *Grimshaw* (2). It is stated that there is some difference as regards the effect of attachments in British India and English Courts, but I do not think that makes much difference, the principle on which the cases are decided being that the trustees in bankruptcy or Official Receiver in a foreign Court cannot take advantage of the provisions of law applicable to Courts in British India as regards the antedating."

Speaking with the greatest respect, I am unable to agree with this decision. It is thoroughly settled that an attachment under the Civil Procedure Code does not confer any title or create any charge and that it merely prevents and avoids a private alienation but does not invalidate the alienation by operation of law, such as is effected by a vesting order passed on the adjudication of the judgment-debtor: see *Krishnaswamy Mudaliar* v. *The Official Assignee of Madras* (8) and *Raghunath Das* v. *Sundar Das Khetri* (12). If the present were a case of an adjudication and a vesting order made by a British Indian Court, there can be no question that the attaching creditors cannot claim any charge or priority over the receiver in insolvency. Why should it make any difference on this point because the adjudication and the vesting order were passed by a foreign Court? No Indian authority has been referred to which recognizes any such difference. The learned trial Judge bases his decision on the analogy of similar proceedings in England but an attachment in this country and what corresponds to it in England have different significance and effect as pointed out in the judgment of my learned brother.

Indeed the learned trial Judge himself concedes some difference between the two. He however states that it does not affect the point, the ground given by him being that the provisions of law applicable to Courts in British India as regards the antedating are not available to the Official Receiver in a foreign Court. Now, the doctrine of law of antedating is had recourse to only for invalidating a prior title which would otherwise be valid. That doctrine may be relevant with reference to an English attachment, which creates a charge, but is not relevant with reference to an attachment under the Civil Procedure Code which unless followed up by proper subsequent proceedings, does not in any way affect the existing title. In the present case the Official Receiver, Secunderabad, has no need to and does not invoke the help of the said doctrine at all. I think for these reasons that the conclusion of the learned trial Judge cannot be sustained and that the Official Receiver of Secunderabad has a prior claim over the attaching creditors. I agree with the order pronounced by my learned brother.

P.R.S./B.V. *Appeal allowed.*

(13) [1875] 9 Ch. A. 722=44 L.J. B.K. 26=31 L.T. 13.

A. I. R. 1931 Madras 478

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Subbarathnammal—Appellant.

v.

Seshachala Naidu—Respondent.

Civil Misc. Appeal No. 459 of 1930, Decided on 18th February 1931. against order of Dist. Judge, Chittoor, D/- 10th November 1930.

Guardians and Wards Act (1890), S. 12—Scope—Any one residing outside British India cannot be appointed guardian of minor's person.

It is against the intention of the Act that any one residing outside British India should be appointed guardian of a minor's person, as over such guardian the Court cannot exercise its proper control: 13 *I.C.* 16, *Rel. on.* [P 479 C 1]

K. Rajah Ayyar and *S. Narasinga Rao*—for Appellant.

S. Varadachariar and *S. V. Venugopalachariar*—for Respondent.

Judgment.—In this case it appears that the appellant is a resideut of Mysore.

It is clearly against the intention of the Guardians and Wards Act that any one residing outside British India should be appointed guardian of a minor's person, as over such a guardian the Court could not exercise its proper control: see *Muthu Veerappa Chetty* v. *Ponnuswamy Chetty* (1). The appellant therefore cannot herself be appointed guardian of the minor under the Act. For this reason without going into any of the other questions raised we find it unnecessary to interfere in the appellant's favour with the order of the learned District Judge. This will not preclude the appellant from seeking any other remedy open to her.

The appeal is dismissed.

P.R.S./R.M. *Appeal dismissed.*

(1) [1912] 13 I.C. 16.

A. I. R. 1931 Madras 479

SUNDARAM CHETTY, J.

Grandhi Pothanna — Plaintiff—Petitioner.

v.

Simhadri Satyananda Charyulu and *another*—Defendants—Respondents.

Civil Revn. Petn. No. 821 of 1930, Decided on 24th February 1931.

(a) Court-fees Act (1870), S. 7, Cl. 9—Suit for redemption is also suit for surplus profits due to mortgagor—Court-fee payable is regulated by principal amount on mortgage bond—Civil P. C. (1908), O. 34, R. 9.

A suit for redemption is a suit not only for the recovery of possession of the property but also of the surplus profits due to the mortgagor. A suit of this kind is a suit for redemption coming within the purview of S. 7, Cl. (9), Court-fees Act, and the court-fee payable in such a case would be regulated by the principal amount of the mortgage bond: 29 *All.* 471; *A. I. R.* 1923 *All.* 261 and 17 *I. C.* 442, *Ref.* [P 479 C 2]

(b) Jurisdiction—Redemption suit—Principal amount determines jurisdiction.

The principal amount of the mortgage in a suit for redemption should be taken as the criterion for determining the jurisdiction of the Court also: 5 *Mad.* 284 (*F.B.*) and 39 *Mad.* 447, *Foll.* [P 480 C 2]

Y. Suryanarayana—for Petitioner.

P. Somasundaram—for Respondents.

Judgment.—The revision petition has been filed by the petitioner-plaintiff against the order of the Subordinate Judge of Vizagapatam directing him to pay additional court-fee in a suit for redemption of a mortgage brought by him. The plaintiff is the mortgagor. He now seeks to redeem the usufructuary mortgage created by him and to recover possession of the immovable property together with surplus profits which the mortgagee is alleged to have derived from out of that property in excess of what was due to him towards the principal and interest.

The principal amount of the mortgage bond is admittedly Rs. 1,500. The plaintiff asks for an account of the profits and estimates the amount of surplus profits due to him at Rs. 5,654. He has paid court-fee on the sum of Rs. 1,500 which is the principal amount of the mortgage bond. The learned Subordinate Judge states that the right to redeem is distinct from the right to recover the profits and therefore court-fee should be paid on the amount of the profits also.

Under R. 9, O. 34, Civil P. C., in a suit for redemption of a possessory mortgage the Court may order an account to be taken of the profits in respect of the immovable property mortgaged and pass a decree in favour of the mortgagor for any amount found to have been received by the mortgagee as surplus profits over and above what was legitimately due to him. It is clear that a suit for redemption is a suit not only for the recovery of possession of the property but also of the surplus profits due to the mortgagor. That is the view taken by the Allahabad High Court in a number of decisions: vide *Husaini Khanam* v. *Huzain Khan* (1) and *Chhiddu Singh* v. *Jhanian Rai* (2). A suit of this kind was regarded as a suit for redemption coming within the purview of S. 7, Cl. (9), Court-fees Act, and the court-fee payable in such a case would be regulated by the principal amount of the mortgage bond. According to this view, it must be held that the plaintiff has paid the requisite court-fee. The learned Subordinate Judge is in error in stating that the right to redeem is distinct from the right to recover profits. On the other hand, the right to recover profits is incidental to the right to redeem a mortgage and cannot be said to be a distinct right unconnected with the right to redeem. But the difficulty is created by the wording of Cl. (9), S. 7, Court-fees Act.

(1) [1907] 29 All. 471=(1907) A. W. N. 133=4 A. L. J. 375.

(2) A. I. R. 1923 All. 261=79 I. C. 303=45 All. 154.

In the marginal note, the words used indicate that the clause covers a suit for redemption of a mortgage. But the wording in the clause itself is as follows: "in suits against a mortgagee for the recovery of the property mortgaged." In construing this clause, a Division Bench of this Court in a case reported in *Venkatappa Row* v. *Bamala Suryanarayana* (3) has observed that according to the language of this clause a suit for the recovery of possession of the mortgaged property is alone covered by it. Some doubt has been expressed as to whether this clause would cover a suit in which not only recovery of possession of the property is sought but also recovery of the surplus profits. The question does not however seem to have been finally settled, beyond expressing a doubt as to the interpretation of this clause. In the case of a simple mortgage it is observed by Sadasiva Iyer, J., in the same decision, that a suit by the mortgagor to redeem a simple mortgage would be a suit for the recovery of the property mortgaged within the meaning of this clause, because the relief to be given to the mortgagor in such a suit might be the reconveyance to him of the interest which was vested in the mortgagee. If so much could be imported into the aforesaid clause in the Court-fees Act, I may observe with great respect, especially considering the marginal note, that a suit for the redemption of a usufructuary mortgage wherein the recovery of possession of the property and also of surplus profits is claimed may well nigh be deemed to be included in this clause.

Moreover, in the case of a usufructuary mortgage, not only the corpus of the property but also the future profits derivable therefrom should be taken to have been secured in favour of the mortgagee for the realization of his mortgage debt. In one sense, the property mortgaged in such a case would be the corpus of the property and also the future profits derivable therefrom. If in a suit for redemption the mortgagor seeks to recover not only the corpus of the property but also the profits which accrued therefrom and which were realized by the mortgagee in excess of what was due to him, such a suit may well be deemed to be one for the recovery of the property mortgaged within the purview of Cl. (9), S. 7, Court-fees Act. I am therefore inclined to hold that the present suit is covered by Cl. (9), S. 7, Court-fees Act, and therefore the proper court-fee payable by the plaintiff is on the principal amount secured by the mortgage bond and no additional court fee need be paid on the amount of surplus profits sought to be recovered after an account is taken.

The suit has been filed in the sub-Court and the question next arising is, whether the valuation of the suit for purposes of jurisdiction would be the same as the valuation for purposes of court-fees. A suit for redemption is not a suit covered by S. 8, Suits Valuation Act, nor is it one of those suits in respect of which the Local Government can make rules for determining the jurisdiction value under the power vested in it by S. 3 of the Act. We have therefore no guide in the Suits Valuation Act so far as the present suit is concerned. But the question is covered by authority so far as this High Court is concerned. The Full Bench decision in *Zamorin of Calicut* v. *Narayana* (4) is relied on in a later case reported in *Jallaldeen Marakayar* v. *Vijiaswami* (5), wherein the learned Judges have observed that the authority of the aforesaid Full Bench decision is unaffected by the Suits Vaiuation Act (7 of 1887). The view taken in both those decisions is to the effect that the principal amount of the mortgage in a suit for redemption must be taken as determining the jurisdiction under the Civil Courts Act. Following these rules, I must hold that the principal amount of the mortgage in the present case should be taken as the criterion for determining the jurisdiction of the Court also. While holding that the plaint is properly stamped, I should direct the Subordinate Judge to have the valuation of the plaint for jurisdiction purposes amended in the aforesaid manner and on such amendment, to return the plaint for presentation to the proper Court.

In the circumstances of the case, I would direct the parties to bear their own costs of this petition. The costs of the suit incurred in the Sub-Court will be costs in the cause.

P.R.S./B.V. *Revision allowed.*

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(3) [1918] 17 I. C. 442.

(4) [1882] 5 Mad. 284 (F.B.).

(5) [1916] 39 Mad. 447=28 I. C. 624.

A. I. R. 1931 Madras 481

BEASLEY, C. J. AND WALSH, J.

Duraiswami Naicken and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 169 and 183 of 1930, Decided on 14th August 1930, against order of Asst. Sess. Judge, Chingleput Division, in Case No. 3 of 1930.

(a) Criminal P. C. (1898), S. 297—Persons charged with dacoity—Judge in charging jury saying "When in committing theft or in carrying property a person voluntarily causes hurt or wrongful restraint, offence amounts to robbery" and further that "If five or more persons take part in the offence, it amounts to dacoity"—Direction to jury held insufficient.

In a case of dacoity the Judge in charging the jury said "When in committing the theft or in carrying away property a person voluntarily causes hurt or wrongful restraint, the offence amounts to robbery" and further said: "If five or more persons take part in the offence, it amounts to dacoity."

Held: that it was an insufficient direction to the jury as the jury must be told that it must be proved that hurt or wrongful restraint was caused for the purpose of enabling the robbers to commit robbery or theft and further the Judge ought to have told the jury that they must be satisfied that it was the common intention of all the persons charged to commit robbery and that they were acting conjointly: 38 *I. C.* 730; 5 *C. W. N.* 372 and 6 *C. W. N.* 72, *Ref.* [P 482 C 1]

(b) Criminal P. C. (1898), S. 297—Six persons charged with dacoity—Jury returning verdict of guilty against three accused and acquitting other three—Effect of such verdict should be explained to jury.

Where six persons are charged with dacoity and the jury return a verdict of guilty in respect of three persons and acquit the other accused it should be explained to the jury what the effect of the verdict was and it should be pointed out to them that in order to return a verdict of guilty of dacoity against the three accused persons they must be satisfied in their minds that there were at least two other persons present when the offence was committed.

[P 482 C 1, 2]

V. L. Ethiraj, *G. N. Thirumalachari* and *P. S. Narayanaswami Iyer*—for Appellants.

Ag. Public Prosecutor—for the Crown.

Judgment.—The three appellants were charged with three other persons before the Assistant Sessions Judge of Chingleput Division with the offence of housebreaking by night and dacoity on the night of 17th October 1929. The jury returned a unanimous verdict of guilty against the appellants in respect of both the charges but acquitted the other accused. The appellants were sentenced to five years' rigorous imprisonment in respect of each of the convictions, the sentences to run concurrently.

The points taken here by Mr. Ethiraj in these appeals are that the trial Judge wrongly directed the jury as to the law, in that he did not tell them correctly what the offences of robbery and dacoity consisted of, and further that he did not direct the jury with regard to the possible acquittal by them of some of the accused which would reduce the number of the persons present to below five; that they would have to consider whether there were other persons, unidentified in order to justify a conviction of the remaining accused persons for the offence of dacoity. Mr. Ethiraj further complains that in his charge to the jury the Assistant Sessions Judge has not put many of the facts in the case favourable to the defence.

Dealing with the first point, in charging the jury with regard to the offence of robbery, the learned Assistant Sessions Judge said:

"When in committing the theft or in carrying away property a person voluntarily causes hurt or wrongful restraint, the offence amounts to robbery."

He is there defining robbery. He then goes on to say:

"If five or more persons take part in the offence, it amounts to dacoity. That is one of the charges in this case."

Now, dealing with his definition of the law with regard to robbery, the criticism made is that the learned Assistant Sessions Judge did not tell the jury that it was essential, in order to convict the accused of the offence of robbery, that hurt or wrongful restraint should have been caused for the purpose of the theft. What, it is said, the learned Assistant Sessions Judge has done is to leave it open in the mind of the jury that they were entitled to convict the accused persons of robbery even if merely in the course of committing theft some violence or wrongful restraint was caused to others. We have been referred to a decision of a Bench of this Court *Karuppa Goundan* v. *Emperor* (1), a decision of Spencer and Napier, JJ. There it was decided that, to constitute the offence of dacoity it is necessary that death or hurt or wrongful restraint or fear of such

(1) [1917] 18 Cr. L.J. 316=38 I.C. 730.

instant evil should be caused by the offenders not only in order to the committing of theft or in committing theft, or in carrying away property obtained by theft, but also for that end, and that five or more persons should be acting conjointly. That of course is almost setting out word for word the words of the section, but that case is a clear decision and it follows two decisions of the Calcutta High Court, namely *Otaruddi Manjhi* v. *Suddi Manjhi* (2) and *King-Emperor* v. *Mathura Thakur* (3) at p. 79. These cases clearly lay down that it is essential in order to convict persons charged with the offence of robbery that it should be shown not only that violence or hurt or wrongful restraint was caused during the committing of the theft but also that it must be caused for the purpose of enabling theft to be carried out. It is unnecessary for us to say whether the decision of this High Court already referred to is right to the full extent to which it goes. According to the judgment in that case it is necessary for the Judge in charging the jury to tell them that hurt or wrongful restraint must be committed for that end in addition to telling them that it must be committed in order to the committing of robbery or in committing robbery. It is unnecessary for us to consider that case except to say that it does lay down that the jury must be told that it must be proved that hurt or wrongful restraint was caused for the purpose of enabling the robbers to commit robbery or theft. In this case the proper direction was not given to the jury by the learned Assistant Sessions Judge.

Then there is a further point that he did not tell the jury that they must be satisfied that it was the common intention of all these persons charged to commit robbery and that they were acting conjointly. The learned Assistant Sessions Judge contents himself with saying :

"If five or more persons take part in the offence it amounts to dacoity."

That, we think, is an insufficient direction to the jury.

Then we come to another objection, namely that, as the trial resulted in the acquittal of three of the accused leaving only three convicted persons, the jury should have been told, or it should have been explained to the jury, that the effect of that verdict was that the effence of dacoity had not been committed. Without going so far as to say that it is right or proper for a trial Judge to ask questions of the jury as to their reasons after they have arrived at a decision, we certainly think that in a case such as this it should have been explained to the jury what the effect of the verdict was and it should have been pointed out to them that, in order to return a verdict of guilty of dacoity against the three convicted persons, they must be satisfied in their minds that there were at least two other persons present when the offence was committed. The learned Assistant Sessions Judge did not ask them to bear that matter in mind and we think that here also he went wrong.

In these circumstances, it does not seem to be necessary for us either to set out the facts of the case or to express any opinion as to whether his dealing with the facts of the case in his charge to the jury was or was not satisfactory. We have come to the conclusion that the conviction of the accused in this case must be set aside in respect of both the charges. Their bail bonds will be cancelled.

P.R.S./P.N. *Conviction set aside.*

(2) [1901] 5 C.W.N. 372.
(3) [1902] 6 C.W.N. 72.

A. I. R. 1931 Madras 482

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

V. Guruvappa Chetty—Plaintiff—Appellant.

v.

Thayarammal and *others*—Defendants—Respondents.

City Civil Court Appeal No. 13 of 1928, Decided on 27th October 1930, against decree of City Civil Judge, Madras, in Original Suit No. 477 of 1927.

Husband and wife—Restitution of conjugal rights—Consent order under S. 488 is no bar to civil suit for restitution of conjugal rights—Criminal P. C. (1898), S. 488.

Although an order under S. 488 has been passed with the consent of both the parties, yet it cannot operate as a bar to a civil suit for restitution of conjugal rights unless it were expressed in the consent given that the consenting party agreed that in all circumstances the wife should live apart from the husband and be entitled to maintenance agreed upon. [P 483 C 2]

R. V. Seshagiri Rao—for Appellant.

P. Viswanatha Ayyar and *V. N. Srinivasa Rao*—for Respondents.

Curgenven, J.—The plaintiff sued as against his wife, defendant 1, for restitution of conjugal rights, and as against defendants 2 to 4, who are respectively his wife's parents and brother, for an injunction restraining them from in any manner interfering with him and his wife and from keeping his wife away from him without his consent. The learned City Civil Judge has dismissed the suit upon a finding upon what may be termed a preliminary issue, the second.

The plaint was filed on 5th August 1927 and it appears that on 31st May of that year a consent order was passed by the Presidency Magistrate, Georgetown, between the same parties under S. 488, Criminal P. C., in these terms:

"By consent of both parties, a sum of Rs. . . . per mensem is ordered for the maintenance of the petitioner by her husband, the counter-petitioner."

The learned City Civil Judge is of opinion that, as the plaintiff has expressly consented to such an order, it operates as a bar to his suit for restitution of conjugal rights. Now it is not contended that, where an order is passed under S. 488 after contest, it operates as such a bar. In fact there is now statutory recognition of the independence of the City Civil Court in this matter by the enactment of sub-S. 2, S. 489, Criminal P. C., the Magistrate being required to modify his order in consequence of any decision of a competent civil Court. Does the circumstance that the order in this instance was a consent order make any difference?

We think that it clearly makes no difference unless it appears that something more than a consent to the order of the Magistrate was involved. In considering what the consequence of consent to such an order must be, we must consider the scope of the order which was consented to, and there is no reason to suppose that such an order, even when passed after consent, would have an effect in excess of an order passed without such consent. For instance, we cannot suppose that the provisions of S. 488 (4) and (5), which enable a Magistrate to cancel his order, or S. 489 (1), which enable him on proof of a change in the husband's circumstances to modify it, would be affected by the fact that the original order was not passed on an adjudication but by consent. Now would the fact of consent exclude the operation of sub-S. (2), S. 489, already alluded to. Unless therefore it were expressed in the consent given that the consenting party agreed that in all circumstances the wife should live apart from him and she should be entitled to the maintenance agreed upon, we are clearly of opinion that it cannot operate so as to extend the scope of the order or to restrict the jurisdiction of the civil Court to supersede it. We have been asked to frame an issue inquiring whether in the circumstances of the present case the consent given was not merely to the order in the terms in which it is drafted but was more unqualified and in effect a consent that the wife should live apart and should receive maintenance without such limitations as the order necessarily imposes.

But we cannot find any such position taken up in defendant 1's written statement as would warrant such a course. In fact in para. 8 it is clearly said that the plaintiff agreed to a consent order on the maintenance application if the hurt case which was filed at the same time by defendant 1 was compounded, that the hurt case was accordingly compounded and a consent order passed, and para. 12 carries the matter no further because it only expresses the contention that the suit is not sustainable until the consent order of maintenance is set aside. We think therefore that the order carrying as it must the ordinary consequences of an order passed under S. 488, Criminal P. C., is no bar to the plaintiff's claim and we must accordingly answer Issue 2 by saying that the suit is maintainable.

We accordingly set aside the decree of the lower Court and remand the suit for trial upon the remaining issues. Costs will abide the event. The appellant will be entitled to a refund of the court-fees paid on the memorandum of appeal.

P.R.S./B.V. *Appeal allowed.*

A. I. R. 1931 Madras 484

BEASLEY, C. J. AND CORNISH, J.

Public Prosecutor—Appellant.

v.

Vadlamudi Satyanarayana and *others*—Accused.

Criminal Appeal No. 382 of 1930, Decided on 4th December 1930, against acquittal of accused ordered by Sess. Judge, Kistna, in Criminal Appeals Nos. 11 and 16 of 1930.

Penal Code (1860), Ss. 143 and 145—Police order barring processions without license—Taking out procession against such order is resistance to law—Police Act (1861), Ss. 30 and 32.

Where the District Superintendent of Police in his discretion issues a notice under S. 30, Police Act, barring all processions along a particular way without a license, and where the accused take out a procession without a license and in spite of their knowledge of such an order they are deemed to resist the execution of the law. Though such an order may not be a legal process, yet it is an execution of the law.

Where there is a refusal to disperse at the command of the police that clearly constitutes an overt act. But a conviction under S. 143 does not require any refusal to comply with an order to disperse at all. Resistance to the execution of the law is one thing and refusal to comply with an order to disperse is another thing. Hence, when the procession is taken out in spite of the police ban, it is resistance to the execution of the law denoting an overt act: *A.I.R.* 1923 *Pat.* 1, *Ref.* [P 485 C 2, P 486 C 1, 2]

P. Satyanarayana Rao—for Accused.

Judgment.—The three respondents who were accused 8, 10 and 9 in the Court of the Subdivisional First Class Magistrate, Bandar Division at Masulipatam, were convicted together with accused 1 to 7 for offences under Ss. 143 and 145, I. P. C., and S. 32, Police Act 5 of 1861. They were sentenced under S. 143, I. P. C., to one month's rigorous imprisonment and under S. 145 to rigorous imprisonment for six weeks each, the sentences to run concurrently; and they were called upon to execute bonds for Rs. 200 each with two sureties each for similar amounts to keep the peace for one year after the expiry of the sentences. As the accused had been sentenced under Ss. 143 and 145, I. P. C., no sentence was passed with regard to the charge under S. 32, Police Act. The accused 8, 9 and 10 appealed to the Sessions Judge of Kistna Division who set aside their convictions under Ss. 143 and 145, I. P. C., but upheld the conviction under S. 32, Police Act. The facts of the case are as follows: His Excellency the Governor of Madras paid a visit to Masulipatam on 8th February last. Some public meetings were held there by Congress adherents and resolutions for boycotting the Governor's visit, for bringing about a hartal of shops in the town on the day of his visit and for taking a procession at the time of his visit of persons carrying black flags in their hands and crying "Governor, go back," were passed. The Circle Inspector of Police of Masulipatam, apprehending a breach of the peace, made a report to the District Superintendent of Police, Ex. C., and the latter, after obtaining the permission of the District Magistrate, issued an order under S. 30 (2), Police Act, to the effect that persons collecting assemblies or directing or promoting processions as contemplated were to apply to him for a license before so doing.

This notice is Ex. B, and was given to Valluri Rama Rao, one of the leading spirits at the meeting already referred to. A similar notice, Ex. F, was issued, which is a notice generally to all concerned. These notices are dated 7th February 1930. On the morning of 8th February, when His Excellency the Governor was expected to arrive, a procession of about sixty people started at about 8 o'clock in the morning and went along the Fort Road towards the Robertson Square which included a part of the route along which His Excellency was to go. Accused 1 and 2 were at the head of the procession and the other persons included in the procession were the other accused and the three respondents. The Sub-Inspector of Police, P. W. 1, met the procession on the way and told its members about the order, Ex. B, and served copies of it on accused 1 and 2 who were leading the procession individually. The procession then turned back and entered the premises of the Spinners and Weavers Association and a meeting was held there inside the building. The Sub-Inspector of Police followed the procession to the Association, but did not enter the premises but waited outside on the road. There is no evidence on the prosecution side as to what took place within the building although there is some evidence on the defence side. Accused 1 and 2 came out of the premises and, according to the

prosecution case, formed themselves into a procession carrying black flags and crying "Governor, go back." As before stated accused 1 and 2 were leading the procession. P. W. 1 asked them whether they were going to disobey the order, and when they said that they were, he arrested them then and there. It must be remembered that they had already been served with copies of the notice Ex. B. Accused 3 then came forward and tried to lead the procession. He was also served with a copy of the order, but on persisting in his attempt he was also arrested. The learned Sessions Judge finds that after accused 1, 2 and 3 were arrested accused 4 to 11, one after the other, put themselves at the head of the procession and began to direct it and this finding of fact is of considerable importance in this case. They were arrested by P. W. 1 one after the other. The prosecution case is that before arresting these persons P. W. 1 gave oral orders to all persons in the procession to disperse, but that they refused to do so. It is only of course on those facts being found that the accused can be convicted under S. 145, I. P. C. The learned Sessions Judge goes on to say with regard to the conduct of accused 4 to 11:

"At that time they were not merely in the rank and file of the procession. They had begun to direct it."

The defence version with regard to the accused at this time is ,that it was resolved inside the premises in view of the order of the Superintendent of Police that they should not go out in procession, but that each man should go his own way carrying a black flag shouting "Governor, go back." That sets up the case that each person was acting individually and not collectively with the others. That version is not accepted by the learned Sessions Judge in view of the evidence of D. W. 2 and D. W. 11. The learned Sessions Judge however acquitted the three respondents of the charge under Ss. 143 and 145, I. P. C., and, in acquitting them, adopts the dissenting judgment of Das, J., in *Emperor* v. *Abdul Hamid* (1) and dissents from the rulings of the two Judges forming the majority of the Special Bench which decided that case. He says that there is no evidence that the respondents acted together with others with the common object of resisting the execution of the District Superintendent's order and also holds that in this case there was no order to disperse and therefore no refusal, and that there was no overt act of resistance. With regard to the evidence in this case of an order to disperse, we think that the prosecution evidence does not sufficiently prove that any such order was given Therefore the respondents cannot be convicted under S. 145, I. P., C. of having refused to disperse after such an order. There remains however their conviction under S. 143, I. P. C. For the prosecution it is contended that Cl. 2, S. 141, applies to this case. S. 141 defines an unlawful assembly as follows:

"An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing the assembly is: (2) to resist the execution of any law or of any legal process."

The prosecution case is that the respondents resisted the execution of the law namely by directing a procession without a license. For the accused it is argued that the order Ex. B is not a law, that neither was the law being executed and that there has been no resistance. To constitute resistance an overt act, it is argued, is required and there is the authority in *Emperor* v. *Abdul Hamid* (1) already referred to in support of that argument. In that case it was held that resistance connotes some overt act and that mere words when there is no intention of putting them into effect will not be sufficient to prove an intention to resist. Where there is as in the Patna case, a refusal to disperse at the command of the police that clearly constitutes an overt act. Here it is argued by the defence that in this case there was no order to disperse given by the police and therefore no refusal and that there has been no overt act which would connote resistance. This argument appears to us to be based upon a mistake which the learned Sessions Judge has made. Resistance to execution of the law is one thing and refusal to comply with an order to disperse is another thing. S. 145 is an aggravated offence. A conviction under S. 143 does not require any refusal to comply with an order to disperse at all. The question to be considered is whether the accused in this case have been guilty of some overt act and in para. 11 of his

(1) A. I. R. 1923 Pat. 1=68 I. C. 945=23 Cr. L. J. 625=2 Pat. 134.

judgment the learned Sessions Judge finds facts which clearly do amount to overt acts because he agrees that accused 4 to 11 one after the other put themselves at the head of the procession and began to direct it. If the police order not to direct a procession without a license is the execution of the law, then clearly the direction of the procession after such an order or after the respondents became aware of such an order amounts to resistance of the execution of the law. It is perfectly clear that after the procession had been stopped in the first instance and accused 1 and 2 personally served with a copy of Ex. B the procession turned back to the premises of the "Spinners and Weaver's Association" and there held a meeting. It is obvious that the subject under discussion at the meeting was the police order not to continue the procession without a license. At the end of the meeting the accused came out the first two at the head of the crowd and after they had been arrested the other accused in turn put themselves at the head of the procession. Obviously it had been decided at the meeting that the procession should go on without a license from the police and the learned Sessions Judge has rejected the defence story that each of the accused was acting independently of his fellowmen in going out and carrying black flags. The evidence clearly points to an agreement by all the members of the procession to defy the police order and that all the accused had that common object. We are amazed at the statement of the learned Sessions Judge in para. 9 of his judgment where he says:

"So far as these appellants are concerned there is not even an iota of evidence on the prosecution side tending to show that they either collected assemblies of men or directed or promoted processions along with others forming an association of five or more with the common object of resisting the execution of law. P. W. 1's very words quoted above only show that each one of the accused 4 to 11 acted individually when he came forward to direct the procession and his evidence renders it impossible to attribute concerted action and a common object to these appellants."

In view of the fact that in para. 3 he has rejected that contention of the respondents his observations in para. 9 are amazing and in para. 11 he contradicts what he has said in para. 9. If any support to the prosecution case is required the evidence of D. W. 2 provides it. He says:

"From the conduct of the procession I inferred and thought that the decision was to go out in procession and disobey the orders issued under the Police Act. I thought that they were purposely disobeying orders."

This being so the only question that remains to be considered is whether the police order was the execution of any law. In *Emperor* v. *Abdul Hamid* (1), to which reference had already been made the majority view was thus expressed:

"When a notification is issued by an executive authority in exercise of a power conferred by statute that notification is as much a part of the law as if it had been incorporated in the body of the statute at the time of its enactment. The command is in effect a command by the appropriate legislative authority. In the present case if the notification was in compliance with S. 30, Police Act, then in my opinion it was a law and certainly a legal process."

We are not prepared to say that such an order is a legal process but it appears to us quite clear that the police order is an execution of the law. The law is enacted in S. 30, Police Act and it is that under certain circumstances persons directing a procession shall apply for a license. The conditions are that such a procession in the judgment of the Magistrate of the District or the Subdivisional Magistrate if uncontrolled would be likely to cause a breach of the peace. Then in such cases the District Superintendent of Police or the Assistant District Superintendent of Police may issue an order requiring the person directing such procession to apply for a license. The issuing of the order by the Police is the execution of the law as laid down in S. 30, Police Act and it seems to us to make no difference whatever that a discretion is given to the District Superintendent of Police or the Assistant Superintendent of Police to execute the law. When he exercises his discretion in issuing a notice he is executing the law and for the reasons already stated the respondents in directing the procession after the promulgation of the notice by the police and after they were aware of such a notice were resisting the execution of the law. Hence their conviction under S. 143, I. P. C. by the Subdivisional Magistrate of Bandar was perfectly correct. We agree that the conviction of the respondents under S. 145, I. P. C. cannot be upheld and that the learned Sessions Judge was correct in

setting it aside. The order here is that the judgment of the learned Sessions Judge setting aside the conviction of the three respondents under S. 143, I. P. C. must be reversed and the order of the Subdivisional Magistrate, Bandar, restored. As the respondents cannot also be sentenced under S. 32, Police Act, the sentences passed upon them by the learned Sessions Judge under that section must be set aside.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Mabras 487

JACKSON, J.

C. Doraisami Naidu and *others* — Accused—Petitioners.

v.

Kanniappa Chetti — Complainant — Respondent.

Criminal Revn. Case No. 337 of 1930 and Criminal Revn. Petn. No. 316 of 1930, Decided on 27th January 1931, against judgment of Sess. Judge, Chingleput Division, in Criminal Appeal No. 21 of 1929.

(a) Penal Code (1860), S. 499, Excep. 8—Petition to President of Union Board that certain person is disqualified for election on account of leprosy does not amount to defamation — Madras Local Boards Act (14 of 1920), S. 55. (*Obiter*).

A petition to the president however malicious that a certain person was not qualified for election as a member of a Local Board on account of his suffering from leprosy, under S. 55, Madras Local Boards Act (14 of 1920) comes very near to Excep. 8 to S. 499. (*Obiter*). [P 487 C 2]

(b) Evidence Act (1872), Ss. 35 and 13—Recitation in order of President of Union Board is not admissible under Ss. 35 or 13.

A recitation in the order of a President of a Union Board is not admissible under S. 35 or 13 in evidence unless such president has been examined with regard to that recitation : *A. I. R.* 1922 *Mad.* 71, *Relt. on.* [P 487 C 2]

(c) Penal Code (1860), S. 500—"Publication" illustrated.

If *A* and *B* conspire to draw up a document defaming Y and leave it with *B* there is no publication. [P 488 C 1]

V. L. Ethiraj, T. R. Ramachandra Ayyar, K. R. Venkatarama Sarma and *S. R. Dikshit* — for Petitioners.

Public Prosecutor — for the Crown.

L. A. Govindaraghava Ayyar — for Respondent.

Order. — The eight petitioners have been fined each Rs. 75 under S. 500, I. P. C., Rs. 300 being given in compensation to the complainant.

It was complained that the petitioners conspired with one Abboy Naidu, the President of the Tiruvallur Union Board, and maliciously got up a petition to the effect that the complainant was suffering from leprosy.

Under S. 55, Madras Act 14 of 1920, a person is disqualified for election as a member of a Local Board if such person is a leper ; and the complaint suggests that the accused maliciously reported the complainant to be suffering from leprosy in order to disqualify him from nomination.

Leprosy is not defined in the Act, which is a serious omission, because leprosy is not a scientific term and in popular usage it means either Elephantiasis Graecorum or Lepra Graecorum, that is to say, either a skin disease, or corrosive leprosy. The complainant had white marks on his foot. The accused called the attention of the President to this circumstance; the President gave the matter his judicial consideration, and ultimately decided that the complainant was a leper.

It is not necessary for this Court to decide the point, but it may be observed that this case comes very near to Excep. 8 to S. 499.

Nor is it really necessary to decide whether there was proof of publication such as that section requires, when the Court was left to a bare inference from Ex. C that the accused had presented their petition to the President. The President himself was not called, and it was very strenuously argued by Mr. L. A. Govindaraghava Ayyar, that the statement in the President's order, Ex. C.

"there is another petition filed by several people of the town"

proves that these accused presented to him this petition. In the light of Evidence Act and of the Full Bench decision in *Seethapati Rao Dora* v. *Venkanna Dora* (1) that argument is more surprising than convincing ; and I am also surprised that the President was never examined when there is a note on the record of the complainant's deposition as P. W. 2, that the prosecution was pressing to examine the President and he would be examined as soon as that deposition was finished.

But the case can be disposed of on the short point that the complaint definitely charges the President with being one of the conspirators who got up the defama-

(1) A.I.R. 1922 Mad. 71=66 I.C. 230=45 Mad. 332 (F.B.).

tory petition, and in his deposition as P. W. 2 the complainant says that he saw the President and accused 1, 2, 3, 5 and 8 go upstairs in the President's house. Then one Rathina Mudaly told him that he had heard all the accused except the seventh conspiring in the President's house. Of course this hearsay evidence should never have been led, but the complaint taken with the legitimate evidence makes it plain that the President is accused of being one of the conspirators. Now if *A* and *B* conspire to draw up a document defaming *Z*, and leave it with *B*, there is no publication. No doubt in this case the President's vakil produced *B* in a civil suit under summons, but it has never been suggested that that was the publication.

It must therefore be found that there was no publication, and no case under S. 500 can lie. The petition is allowed. The accused are acquitted. The fines are ordered to be refunded.

P.R.S./V.B. *Petition allowed.*

A. I. R. 1931 Madras 488 (1)

JACKSON, J.

Samarapuri Chetti —Accused — Petitioner.

v.

Corporation of Madras — Complainant —Respondent.

Criminal Revn. Case No. 793 of 1930, Criminal Revn. Petn. No. 736 of 1930, Decided on 30th January 1931, against judgment of Third Presidency Magistrate, George Town, Madras, in C. C. No. 11237 of 1930.

(a) Madras City Municipal Act (1919), S. 287 — Separate license is necessary for each process with regard to same article.

A separate license is necessary for each process such for example as manufacturing storing; packing etc., in respect of the same article. [P 488 C 2]

(b) Municipality—Recourse should not be had to Courts of law in routine matters.

It is not desirable that recourse should be had to Courts in matters not involving question of law but relate merely to municipal routine or what should be done in office. [P 488 C 2]

K. S. Jayarama Ayyar, K. Bashyam Ayyangar and *P. Sundararaja Ayyangar* —for Petitioner.

C. Unikanda Menon—for the Crown.

Order.—The petitioner has been fined Rs. 76 under S. 287, Madras City Municipal Act 4 of 1919 read with S. 357. It is found that he is liable to pay a license fee of Rs. 50 for storage of oil on his premises and Rs. 26 for a fifth press. Apparently the demand for the fifth press was not disputed.

By the wording of the statute it is clear that for the use of premises for any purpose specified in Sch. 6 the owner must under S. 287, apply for a license. He cannot get a license for manufacturing oil, and then pack or store it without a license. But it is obviously inequitable to charge a person the same fee for manufacturing and packing or storing. This point was raised before the Standing Committee of the Municipal Council, and on 12th September 1923 it resolved that no separate license is necessary for each process in respect of the same article: Ex. I. What is probably meant was that no separate fee is necessary for under S. 287 (3) a license is obligatory.

In these circumstances the present prosecution is difficult to understand. When confronted with Ex. I the Assistant Revenue Officer, P.W. 1, merely said that he was not aware of it, and the learned Presidency Magistrate ignores it altogether. The right fine would therefore seem to be Rs. 26. This is not a question of law, but a mere matter of municipal routine, and the resort to the Courts for what should be done in the office is strongly to be deprecated. When the matter does get to the Court however the Court should read the exhibits and not merely issue a summary ukase.

The fine is reduced by Rs. 50.

P.R.S./V.B. *Fine reduced.*

A. I. R. 1931 Madras 488 (2)

JACKSON, J.

Nanureddigari Lakshmireddy—Complainant—Petitioner.

v.

Urganapalle Muni Reddy—Accused—Respondent.

Criminal Misc. Petn. No. 660 of 1930, Decided on 30th September 1930.

Criminal P. C. (1898), S. 350—Sessions Judge directing further inquiry under S. 436—Change of Magistrates in trial Court—New Magistrate framing charge without re-examining witnesses already examined—Procedure held to be proper.

The Sessions Judge directed a further inquiry under S. 436, and returned the case to the original Court. Meanwhile there had been a change of Magistrates and the new Magistrate framed a charge without re-examining the witnesses already examined. Thereupon the accused petitioned the District Magistrate who

transferred the case holding that the procedure adopted was illegal.

Held: that, when an inquiry has been transferred to a new Magistrate, it was still the same inquiry and S. 350 was applicable. When there had been any error in District Magistrate's order it was better to restore the status quo ante and to follow the ordinary jurisdiction to prevail. Accordingly the District Magistrate's order was set aside and the procedure of the trial Magistrate was affirmed: 6 *All.* 367; 14 *I. C.* 607, *not Foll.*; 14 *Mad.* 334; *A. I. R.* 1923 *Mad.* 660, *Ref.*; 32 *Mad.* 218 and 35 *Cal.* 457, *Rel. on.* [P 490 C 1]

B. Somayya and *Vedantam Satyanarayana*—for Petitioner.

Ag. Public Prosecutor—for the Crown.

S. Subramania Ayyar—for Respondent.

Order.—On examining the record of C. C. 504 of 1929, the Sessions Judge of Chittoor, acting under S. 436, Criminal P. C., directed further inquiry and returned the case to the original Court, that of the Stationary Sub-Magistrate of Tirupathi. Meanwhile there had been a change of Magistrates and the new Magistrate, after posting the case for inquiry, framed a charge without re-examining the witnesses already examined. Thereupon the accused petitioned the District Magistrate of Chittoor who transferred the case, holding that the procedure adopted by the Sub-Magistrate was illegal and diametrically opposed to the authorities' and rulings. The learned Magistrate has not cited these rulings, but reserved them for a separate instruction to the Sub-Magistrate, a course that cannot be commended, because it leaves the parties and the revisional Court entirely in the dark. However the learned Public Prosecutor says that the rulings relied upon are *Queen-Empress* v. *Hasnu* (1) and *Ram Dial* v. *Emperor* (2).

In *Queen-Empress* v. *Hasnu* (1), a District Magistrate himself conducted a further enquiry into a case discharged by a Deputy Magistrate and framed a charge upon the evidence recorded by the Deputy Magistrate. This was held to be irregular. In *Ram Dial* v. *Emperor* (2), which is also an Allahabad case, it is ruled that further inquiry means that the evidence should be taken de novo, and does not contemplate a mere re-perusal of evidence already recorded. This latter case carries no authority in Madras for it is opposed to the Full Bench decision in *Queen-Emprees* v. *Balasinathambi* (3), where the matter is very clearly discussed by Shephard, J. The question is how far the matter is covered by S. 350, Criminal P. C. A Magistrate has recorded the evidence in an enquiry, ceases to exercise jurisdiction and is succeeded by another Magistrate who has jurisdiction; may the Magistrate so succeeding act on the evidence recorded by his predecessor? The learned Public Prosecutor would draw a distinction between cases where there has been a change of Magistrate in the course of the inquiry in the original Court, and where the inquiry has been closed by one Magistrate in the original Court by an order of discharge, and then reopened by the Sessions Judge when another Magistrate has succeeded. This circumstance does not seem to carry the case out of the purview of S. 350. It is the same inquiry until, on framing the charge, the proceedings become a trial, and the fact that there was an erroneous order of discharge, set aside by the Sessions Judge, is a mere incident in the course of that enquiry. When an enquiry was transferred from one Magistrate to another it was held to be the same enquiry, and S. 350, was applied: *Palaniandy Goundan* v. *Emperor* (4), following *Mohesh Chandra Saha* v. *Emperor* (5), and it is very doubtful whether, in the light of these rulings, *Queen-Empress* v. *Hasnu* (1), (where the District Magistrate in effect transferred the case to his own file) is still good law.

Mr. Somayya who appears for the petitioner has cited *Ramanathan Chettiar* v. *Emperor* (6), under the impression that the District Magistrate takes exception to the Sub-Magistrate's refusal to hold a de novo enquiry at the accused's request; but I do not gather that that point was ever in question. Of course the accused's right under S. 350, is confined to trials and does not extend to enquiries. Nor do I gather that literal stress is laid upon the word "immediate." It is not suggested that the

(1) [1884] 6 All. 367=(1884) A. W. N. 130.
(2) [1912] 14 I. C. 607=13 Cr. L. J. 255.
(3) [1891] 14 Mad. 334=2 Weir 557.
(4) [1909] 32 Mad. 218=9 Cr. L. J. 146=1 I. C. 54.
(5) [1908] 35 Cal. 457=12 C. W. N. 416=7 Cr. L. J. 220.
(6) A. I. R. 1923 Mad. 660=71 I. C. 608=24 Cr. L. J. 192=46 Mad. 719.

Sub-Magistrate framed the charge so immediately that he did not even peruse the record.

It is urged that the transfer ordered by the District Magistrate is no real hardship to any party and should be allowed to stand. The better rule, when there has been any error, is to restore the status quo ante and to allow the ordinary jurisdiction to prevail. Accordingly the order of the learned District Magistrate is set aside and the procedure of the Sub-Magistrate of Tirupathi is affirmed.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 490 (1)

JACKSON, J.

Arunachala Chetty —Accused —Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 947 of 1930, Criminal Revn. Petn. No. 875 of 1930, Decided on 19th February 1931, against judgment of Sub-divisional Magistrate, Tirukoilur, in Criminal Appeal No. 32 of 1930.

Madras Local Boards Act (1920), S. 194—S. 194 deals with inception and not user.

The offence of installing machinery without a license is not a continuing offence. The very word "install" shows that inception and not user is contemplated : *A. I. R.* 1927 *Mad.* 961 (*S. B.*), *Rel. on.* [P 490 C 2]

K. S. Champagesa Iyengar—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner has been fined Rs. 50 under S. 194, Madras Local Boards Act 1920 for installing machinery without a license. He applied for license on 4th September 1928 and his application never came before the Union Board, so by provision of sub-Cl. 4 in the 1920 Act he would be deemed to have obtained permission by 4th December 1928. A mahazar was sent to the Board asking it to grant him permission to " begin machine work " and this was permitted by the Board on 21st November 1928. The learned appellate Magistrate finds that this was only permission to use the premises under S. 193 and not permisssion to install the machinery under S. 194. This is to press the case against an accused. He had applied for leave to install, and leave to install was what the president refused on 24th October 1928. It was that refusal which inspired the mahazar on the same day, 24th October 1928, and obviously what the people wanted was the permission for what the accused had applied for, and what the president had refused.

There can be no doubt that at least by December 1928 accused had permission to install the machinery.

The permission was not cancelled till the following August by which time apparently the machinery was installed ; at any rate there is no evidence to the contrary.

Meanwhile accused was regularly paying license fees up to 31st March 1930. For the next period license was refused and accused was prosecuted. He might possibly have been prosecuted under S. 193, but the Union Board Clerk, P. W. 1, states in terms that he was being prosecuted under S. 194 and it is under that section that he has been convicted.

The learned Subdivisional Magistrate finds that the offence of installing machinery without a license is a continuing offence, but this view has no justification. The very word install shows that inception and not user is contemplated: cf. *Muthu Bala Chettiar* v. *Chairman, Madura Municipality* (1) at p. 125 (of 51 *Mad.*) :

" Section 250 (194 in Local Boards Act) does not deal with the user of such places, but only with their inception."

Once a factory is installed, its user cannot be said to be a continuous installation. In these circumstances the conviction under S. 194 cannot be upheld. Petitioner is acquitted, the fine is ordered to be refunded.

P.R.S /P.N. *Conviction set aside.*

(1) A. I. R, 1927 Mad. 961 =105 I. C. 686=28 Cr. L. J. 974=51 Mad. 122 (S. B.).

A. I. R. 1931 Madras 490 (2)

PANDALAI, J.

(*Lazar*) *Fernando* and *another*—Accused —Petitioners.

v.

Emperor

Criminal Revn. No. 1027 of 1929, Criminal Revn. Petn. No. 930 of 1929, Decided on 8th October 1930, against judgment of Sub-divisional Magistrate, Tuticorin, in Criminal Appeal No. 38 of 1929.

Opium Act (1878), S. 20—*A* and his wife convicted of illicit possession of opium—*A* attempting to prove that he was out of town on day of search but failing—*A's* conviction upheld while his wife was acquitted.

Possession implies both animus or knowledge and control. Where the facts proved leave it uncertain whether the accused or some one else was the person who had the knowledge and control necessary to constitute possession of the article seized, the prosecution has failed to prove its case and must fail: 42 *Cal.* 957, *Ref.*

A and his wife were convicted under the Opium Act of illicit possession of 17 tolas of opium found in the house in a search conducted by the Excise Assistant Inspector. *A's* attempt to prove that he was at Colombo on the day of the search failed.

Held: that it was not at all unreasonable to infer that he must have known of the presence of this large quantity of opium in his safe room, to which only his wife and children had access. If he knew of it, being the master of the house, he must be held to be the person in control and therefore in possession, and that the conviction was right.

Held further; that the wife cannot be held to be in joint possession with her husband of everything found in the house and that therefore the conviction of the wife should be set aside: 15 *All.* 129; 13 *C.W.N.* 861 and 40 *Cal.* 898, *Ref.* [P 492 C 1, 2]

K. S. Jayarama Ayyar and *G. Gopalaswami*—for Petitioners.

P. Govinda Menon—for the Crown.

Order.—The petitioners, husband and wife, were convicted under the Opium Act (1 of 1878), of illicit possession of 17 tolas of opium. The evidence against them was that at a search conducted by the Excise Assistant Inspector assisted by the local police a packet of 17 tolas of opium was seized from a gramaphone box placed on a safe in the western room in their house at Tuticorin on the night of 4th June 1929. Both the Courts have found that the search was properly conducted and that the opium was in fact seized as alleged by the prosecution.

Two lines of defence were adopted; one that petitioner 1 could not be said to be in possession of the opium, as he had left Tuticorin for Colombo on 29th May and was at Colombo on 4th June and therefore knew nothing of the opium; second, that the petitioner 2 who with her two children aged 18 and 20 was in the house at the time of the search was not in sole occupation of the house but that petitioner 1's elder brother and his family were also residing in the house and that there was nothing in the evidence to show that she could personally be charged with possession of the opium. It was found by the lower Courts that though petitioner 1 had left Tuticorin for Colombo on 29th May he left Colombo on 31st May so that he could have been in Tuticorin on 4th June, though he was not present in the house at the time it was searched. It was also found that petitioner 1's brother and his family were not living in the house at the time of the search though they occasionally lived there.

On these facts the Courts found both petitioners to have been in possession of the opium. As the appellate Magistrate put it:

"Accused 1 is the owner of the house and lives there. Accused 2 is his wife. Although it may be difficult to say which of them actually put it there it cannot possibly be said that it is not in their possession. They must therefore both have been in possession of the opium . . . . If they (the children) had been charged and had been convicted on the same evidence I should have found that they too were in possession of the opium."

When this petition came on for hearing it was again pressed that petitioner 1 was at Colombo on 4th June 1929. I have had the whole evidence translated and examined it. The evidence of Court witness 1 which there is nothing to discredit shows that petitioner 1 who was in Colombo on 31st May informed the witness who is the clerk in the Port Surgeon's office that he was returning to Tuticorin on which a reporting card Ex. X was issued to petitioner 1. This was necessary because he having arrived in Colombo on 30th May had according to the quarrantine rules bound himself by a bond Ex. Y, to present himself daily for 12 days for examination by the Port Surgeon. The object of the reporting card was to excuse further attendance as the person concerned was leaving Ceylon. The production of the card by the Port Surgeon's clerk shows that it was used after issue and that petitioner 1 left Colombo accordingly on 31st May. The other evidence produced by petitioner 1 to show that he was at Colombo on 4th June is worthless. I agree with the lower Courts that it is not shown that petitioner 1 was not at Tuticorin on 4th June and that in all probability he was there on that day though not present in the house at the time when the officers went to search it.

On the above facts I think the inference that petitioner 1 was in possession of the opium found in his house is justified. A large number of cases were cited to show that where property is found in a place to which several persons other than the accused have access, it is wrong to infer that the accused is the person in possession: *Jayaramulu Naidu* v. *Emperor*, *A.I.R.* 1923 *Mad.* 50; *Emperor* v. *Ram Autar* (1), *Khusiram Maharaj* v. *Emperor*, *A.I.R.* 1922 *Pat.* 387, *Jogjiban* v. *Emperor* (2). It was also argued that possession implies knowledge (*Shwe Kyo* v. *Emperor*, *A.I.R.* 1929 *Rang.* 121) and that in the circumstances the knowledge necessary to uphold a conviction cannot be imputed to petitioner 1. It is not necessary to examine the above decisions as they are all applications to particular facts of the rule that in such cases it is the duty of the prosecution to prove against the accused that he or they were in actual possession of the things recovered whether they be stolen property under the Penal Code or arms under the Arms Act or bombs under the Explosive Substances Act or opium under the Opium Act. Possession implies both animus or knowledge and control: *Amrit Lal Hazra* v. *Emperor* (3) at p. 1016. Where the facts proved leave it uncertain whether the accused or some one else was the person who had the knowledge and control necessary to constitute possession of the article seized, the prosecution has failed to prove its case and must fail. The inferences appropriate to facts arising in different cases are not necessarily valuable as guides in other cases.

In this case petitioner 1 was the master of the house. His attempt to prove that he was at Colombo not only failed but as the appellate Magistrate says throws suspicion on his conduct. If he was, as it is found he was, at Tuticorin on the day of the search, he could have left the house only for some temporary purpose a short time before the search and it is not at all unreasonable to infer that he must have known of the presence of this large quantity of opium in his safe room, to which only his wife and children had access. If he knew of it, being the master of the house, he must be held to be the person in control and therefore in possession: see *Queen Empress* v. *Sengan Lal* (4) at p. 131. It is not necessary to consider whether the same inference would have been justified if it had been proved that he had not returned after he left Tuticorin on 29th May.

But as against petitioner 2, the wife, there is no such inference available. The appellate Magistrate erred in thinking that a wife must be held to be in joint possession with her husband of everything found in the house. The error of this is apparent from the result to which it leads that if the children were charged they would according to the Magistrate have been equally liable to be convicted. This is opposed to common sense and to law: see *Queen-Empress* v. *Sangan Lal* (4), at p. 131 approved in *Jogjiban* v. *Emperor* (2), at p. 892 and *Weston* v. *Peary Mohan Dass* (5) at 922.

The petition of petitioner 1 is dismissed. The conviction of petitioner 2 is set aside and the fine if paid by her will be refunded.

P.R.S./K.N. *Order accordingly.*

(1) A.I.R. 1925 All. 478=87 I.C. 846=26 Cr. L.J. 1022.
(2) [1909] 10 Cr.L.J. 125=2 I.C. 681.
(3) [1915] 42 Cal. 957=16 Cr.L.J. 497=29 I.C. 513.
(4) [1893] 15 All. 129.
(5) [1913] 40 Cal. 898=23 I.C. 25.

A. I. R. 1931 Madras 492

PANDALAI, J.

Lakshmi Narayana Ayyar and *another* —Accused—Petitioners.

v.

Chinnappa Goundan—Complainant—Respondent.

Criminal Revn. No. 416 of 1930, and Criminal Revn. Petn. No. 389 of 1930, Decided on 2nd September 1930, against order of Joint Magistrate, Pollachi, D/- 22nd May 1930.

(a) Criminal P. C. (1898), S. 197—Member of village Panchayat Court in forwarding proceedings of election of Chairman, suppressed original, and fabricated and forwarded false document — Accused cannot take advantage of S. 197.

Members of a Village Panchayat Court are Judges within the meaning of S. 197 and the protection of the section is not confined merely to facts strictly within the authority of the Judge or public servant but extends to all official acts purporting to be done under colour of that authority : *A. I. R.* 1929 *Mad.* 172; 21 *Cr. L. J.* 293 and *A. I. R.* 1929 *Mad.* 659, *Ref.*

But where the accused, one a karnam and another village headman but both members of the Village Panchayat, in forwarding the pro-

ceedings of election of the Chairman of the Village Panchayat Court, suppressed the original and fabricated and forwarded a false document to the Revenue Divisional Officer for his confirmation and claimed the protection of S. 197 as Judges.

Held: that they were not performing any official duty cast on them as members of the Panchayat Court, but were acting as revenue subordinates to the Revenue Divisional Officer and therefore S. 197 did not give them any protection. [P 494 C 1, 2]

(b) Madras Village Courts Act, R. 21—"Court" explained.

The Revenue Divisional Officer enquiring into objections to the election of a President under R. 21, of the rules under the Village Courts Act is not a Court of any kind. [P 493 C 2]

George Joseph—for Petitioners.

P. Govinda Menon—for the Crown.

Order.—The question in this case is whether a complaint now pending against the petitioners before the Subdivisional Magistrate of Pollachi accusing them of offences under Ss. 193, 204 and 471, I. P. C., is incompetent for want of sanction of the Local Govenrment under S. 197, Criminal P. C.

The allegations in the complaint are as follows: The complainant, the two accused; petitioners (who are respectively the karnam and headman of the village) and two others mentioned as complainants' witnesses were elected as members of a Panchayat Court constituted under the Village Courts Act, for the village of Nanjundapuram. The five members were required by a notice given by the Revenue Divisional Officer to elect a President on 23rd September 1929. As the notices were given too late, the meeting for the election was in fact held on 27th September at which all the five members were present. The mode of election prescribed by the rules is by ballot by using slips of paper. Lots were however cast but the person whose name was drawn surrendered his right in favour of the complainant and by common consent complainant was elected. The complainant accordingly drew up the proceedings to that effect and got the signatures of all the five members present and entrusted it to the second petitioner, the headman, to forward the same to the Revenue Divisional Officer through the Tahsildar. The allegation is that instead of forwarding the true proceedings as above, the two accused together suppressed the genuine document and fabricated and forwarded a false report showing that the meeting had taken place on 23rd September and that accused 1 had been elected President and that for the purpose of supporting the fabrication had altered the dates in accused 2's tappal book showing the date of service of the notice of meeting from 27th to 23rd September. It appears that the Revenue Divisional Officer, on receipt of this proceeding and believing it to be true, approved the election of accused 1 on or about 19th October 1929; that on knowing this the complainant petitioned the Tahsildar; that the Tahsildar held an enquiry at which the accused put forward and relied on the false proceedings and tappal book in support of the alleged election of accused 1 and that the Revenue Divisional Officer on the Tahsildar's report set aside his previous order approving accused 1's election, and holding that the election of the complainant was itself irregular ordered a fresh election.

The petitioners (accused) took three preliminary objections to the maintainability of the complaint: (1) that the Revenue Divisional Officer and the Tahsildar in holding the enquiry were acting as a revenue Court and that therefore the offence under S. 193 could not be taken cognizance of without a complaint from that Court; (2) that the allegations amounted to a charge of conspiracy under S. 120-B for which the consent of the Local Government or District Magistrate is necessary; (3) that the petitioners purported to act as Judge within the meaning of S. 197, Criminal P. C., in the conduct attributed to them and that the sanction of the Local Government is necessary. The Subdivisional Magistrate overruled all these objections. Hence this petition.

The first two objections were not seriously pressed before me. The Revenue Divisional Officer enquiring into objections to the election of a President under R. 21 of the rules under the Village Courts Act, is not a Court of any kind. That objection was rightly disallowed. The second objection that an offence of conspiracy is disclosed, for trial of which the consent of the Local Government or the District Magistrate is necessary, is equally groundless. Even if there be any offence of conspiracy implied in the the allegations, it is not of the kind mentioned in S. 196-A. This objection also must be rejected.

But it was pressed that the accused petitioners were members of a Panchayat Court and therefore Judges; that they purported to act in the discharge of their official duty in what they did and are therefore protected by S. 197. It is now settled that members of a Village Panchayat Court are Judges within the meaning of this section: *Sivaramakrishna Ayyar* v. *Seshappa Naidu* (1), and that the protection of the section is not confined merely to acts strictly within the authority of the Judge or public servant, but extends to all official acts purporting to be done onder colour of that authority: *Subbiah Pillai* v. *Emperor* (2), *Gangaraju* v. *Venki* (3). The real point is whether the acts alleged against the petitioners are within that extended protection. To understand the character of the acts attributed to the petitioners some provisions of the Act and rules may be referred to. It is clear that the acts of the petitioners had no connexion with any case, real or imaginary, before them. It was in connexion with the election of the President.

As to elections, S. 9 (5), Village Courts Act, provides a Panchayat Court shall elect one of its members to be its President according to the rules prescribed. By S. 10 the "Village Munsif" (which term in this section means the President of a Panchayat Court, see S. 5), has to keep a register of suits and write the proceedings of the Court and it is the duty of the village karnam, if so required, to assist in keeping such register and in writing the proceedings of the Court. Rr. 19 and 22 prescribe the procedure for election of the President. The Revenue Divisional Officer is to convene the meeting. The meeting is to choose a Chairman. Candidates for the office of President have to be nominated and seconded; voting, if there is more than one candidate, is to be by ballot. The Chairman is to do the counting and if there is an equality of votes, the election is to be determined by casting lots. The name of the person elected is to be reported to the Revenue Divisional Officer. Objections to the election if any, are to be made in seven days and to be decided by the Revenue Divisional Officer whose decision is final. From the above it appears that the complaint is that the complainant having drawn up the proceedings of the election as he was required to do, had to forward it to the Revenue Divisional Officer and for that purpose handed it to accused 2, the village headman, who as such is the subordinate to the Revenue Divisional Officer and that the headman, instead of forwarding it suppressed it and fabricated and forwarded a false document in concert with the karnam. In forwarding the proceedings neither of the petitioners was performing any official duty cast on members of the Panchayat Court but acting as revenue subordinates of the Revenue Divisional Officer as is clear from the fact that they would have had to forward the document even if they had not been also members of the Panchayat Court. I hold therefore that the objection based on S. 197, is not valid.'

The petition is dismissed.

P.R.S./K.N. *Petition dismissed.*

(1) A. I. R. 1929 Mad. 172=115 I. C. 248=30 Cr. L. J. 396=52 Mad. 347.
(2) [1919] 21 Cr. L. J. 233=55 I. C. 105..
(3) A. I. R. 1929 Mad, 659=118 I, C, 102=30 Cr. L. J. 864=52 Mad. 602.

A. I. R. 1931 Madras 494

SUNDARAM CHETTY, J.

Picha Kudumban—Complainant—Petitioner.

v.

Servaikara Thevan and *others* — Accused—Respondents.

Criminal Revn. No. 1009 of 1929, and Criminal Revn. Petn. No. 912 of 1929, Decided on 24th April 1930, against order of Stationary Sub Magistrate, Tenkasi, D/- 26th August 1929.

(a) Criminal P. C. (1898), S. 430 — Accused charged with offence under S. 430, I. P. C.—Bench Magistrates trying them for lesser offence under S. 426, I. P. C.—Their proceedings are not void—Penal Code, Ss. 426 and 430.

Where the accused being charged with an offence under S. 430, I. P. C., and the Bench Magistrates (who had no jurisdiction to try the offence under S. 430) try the accused for a lesser offence under S. 426, I. P. C., for which they have jurisdiction, their proceedings are not void. [P 495 C 1]

(b) Criminal P. C. (1898), S. 439—Accused tried with lesser offence than that with which he is charged—Accused is not prejudiced—No interference in revision on conviction much less on acquittal.

Where the accused who is tried for a lesset offence than with which he is charged is no

prejudiced, there will be no interference in revision, though a case ends in conviction and a fortiori there will be no interference in the case of acquittal. [P 495 C 1]

(c) Criminal P. C. (1898), S. 439—Only three Magistrates of Bench hearing and trying case—Judgment signed by seven—It amounts to illegality as to vitiate conviction—Even in case of acquittal interference in revision is justified.

Where only three Magistrates of the Bench hear the evidence and try the case but the judgment is signed by seven, the case not being heard at all by four Magistrates, it amounts to illegality and in case of conviction the illegality vitiates it. Even in case of acquittal the illegality is such as would warrant interference in revision in the interests of the public : 53 *I. C.* 823, *Rel. on.* [P 495 C 1, 2]

T. L. Venkatarama Ayyar—for Petitioners.

K. Venkataraghavachariar — for the Crown.

S. Ramaswamy Ayyar — for Respondents.

Order.—This is a criminal revision petition filed by the complainant against the judgment of a Bench of Magistrates acquitting the accused.

There is no doubt that the offence complained of according to the allegations in the complaint is one coming within the purview of S. 430, I. P. C. The Bench Court has no jurisdiction to try such a case. But this case seems to have been sent to the Bench Court for trial, treating it to be a case regarding an offence under S. 426, I. P. C. The question is whether the Bench Court should be deemed to have clutched at jurisdiction. It would be so, if they tried the case for an offence under S. 430, I. P. C. By trying the accused for a lesser offence under S. 426, I. P. C., (for which they had jurisdiction) their proceedings would not be void *Emperor* v. *Ayyan* (1) and *In re, Mohideen Bacha Sahib* (2).

Where the accused is not prejudiced there will be no interference in revision, though the case ended in conviction, and a fortiori there will be no interference in the case of an acquittal.

In the present case there is a graver irregularity verging on illegality. Though only three Magistrates of the Bench heard the evidence and tried the case, the judgment is signed by seven. It is clear that four of the Magistrates who delivered this judgment, never heard the case at all. This is illegal and in case of conviction this illegality vitiates it. (*Re, Subramania Ayyar* (3) and *In re, Tantravahi Bapiraju* (4). Though in this case the result was an acquittal the nature of the illegality is such as would warrant interference in revision in the interests of the public.

I therefore set aside the order of the Bench Court, and direct a retrial of this case, by any Second Class Magistrate whom the District Magistrate chooses for trying it.

P.R.S./R.M. *Order set aside.*

(1) [1901] 24 Mad. 675=2 Weir 699.
(2) [1914] 14 Cr. L. J. 640=21 I. C. 688.
(3) [1915] 38 Mad. 304=16 Cr. L. J. 489=29 I. C. 329.
(4) [1919] 20 Cr. L. J. 823=53 I. C. 823.

A. I. R. 1931 Madras 495

JACKSON, J.

Vellayan Chetty and *others* — Petitioners.

v.

A. P. Balakrishna Nadar and *others*—Respondents.

Criminal Revn. Case No, 144 of 1931, Criminal Revn. Petn. No. 127 of 1931, Decided on 8th April 1931, against order of Joint Magistrate, Ramnad, in Misc. Case No. 59 of 1930.

(a) Criminal P. C. (1898), S. 147, Proviso—Interpretation.

There is nothing to warrant a gloss adding to "unless the right has been exercised on the last of such occasions" "or its exercise on such occasions has been prevented by circumstances beyond the control of the parties seeking to exercise the right": *A. I. R.* 1925 *Bom.* 536, *not Appr.* [496 C 1]

(b) Criminal P. C. (1898), S. 147, Proviso—"To exercise" explained.

"To exercise" means much less than "successfully and completely to assert." The root meaning of "to exercise" a right, is to take it out of its box, and a very small gesture on the part of the people obstructed might be counted as "exercise." [P 496 C 2]

(c) Evidence Act (1872), S. 114—Parties having right of user may be presumed to have used it.

If parties have a right of user of a thoroughfare it is a fair presumption, in the absence of clear evidence to the contrary that they have used it. [P 496 C 2]

K.S. Jayarama Ayyar and *M. Krishna Bharathi*—for Petitioners.

T. R. Venkatarama Sastri for *K. V. Sesha Ayyangar*—for Respondents.

Public Prosecutor—for the Crown.

Order.—Petitioners seek to review the order of the Subdivisional Magistrate, Ramnad in regard to rights of

thoroughfare claimed by the Nadars of Aruppukottai and denied by the Chettis of that place. The rights claimed are set forth in sub-paras, (a) to (f) of para. 3 of the lower Court judgment. About (b) and (e) there is no longer any dispute; the lower Court order stands.

As regards (a) and (c) as set forth in para. 12 of the lower Court order the Nadars were restrained from exercising these rights by magisterial order in 1928 and 1929, and therefore cannot be said to have exercised them during the last occasions before the institution of the inquiry in January 1931. This brings them within the mischief of the proviso to sub-Cl. 2, S. 147, Criminal P. C. The learned Magistrate has sought to get over the difficulty by importing into the proviso a gloss, and adding to "unless the right has been exercised on the last of such occasions," or its exercise on such occasions has been prevented by circumstances beyond the control' of the parties seeking to exercise the right. There is nothing in this section to warrant the gloss, and its only authority is an unreported case from Bombay *In re Basapppa Rachappa* (1). The learned Judges observe that by a strict interpretation of the statute, if those who assert the right have refrained from its exercise, on the last possible occasion they cannot claim relief under S. 147; but proceed to apply a looser interpretation. With all respect there appears to be no justification for any such judicial procedure. The proviso is perfectly plain, and the conception of circumstances beyond the parties control opens up a wide field of inquiry which was obviously never intended by the legislature. In these matters there is no room for judicial refinement. The statute arbitrarily lays down the circumstances in which a Magistrate can take summary action. Possibly the ambit of those circumstances may be advantageously enlarged. but that is a matter for the law maker and not for the Judge. The Judge's duty is to interpret, not to make the law. And here it may be added that the Magistrate has acted improperly in merely citing an unauthoritative ruling without himself examining the question when it was brought to his notice. If he had brought his mind to bear upon the point and had come to the same conclusion as that of the ruling, there would be no necessity to cite it and if his conclusion differed, the ruling was in no way binding upon him. Most of the errors of Subordinate Courts are traceable to the practice of reading the commentary instead of the statute.

When the Nadars were originally restrained from exercising the right it was open to them to plead that they had exercised it upon the previous occasion and to demand an inquiry; for presumably it was only upon apprehension of a breach of the peace that they were restrained. But if they preferred to desist from the exercise of their right, they eannot come a year or two afterwards and demand the same inquiry, for they are barred by this proviso. It must be found therefore as regards (a) and (c) that the lower Court acted without jurisdiction. Its order in regard to (a) and (c) is set aside.

It may be added that "to exercise" means much less than "successfully and completely to assert." The root meaning of 'to exercise a right', is to take it out of its box, and a very small gesture on the part of the people obstructed might be counted as "exercise." Possibly this view of the fact was a better solution of the Bombay dilemma.

As regards (d) there is the evidence of the priest, P. W. 2, that for the last eleven years a procession has gone to the garden east of the Siva temple, and has returned by the "same route." "Same route" clearly refers to the sentence just above:

> "The procession then comes back to the temple along the Virudunagar road, and after going through the four streets round the temple."

There is no reason to interfere with the order as regards (d).

As regards (f) it cannot be said that the finding at the end of the order is ill founded. If parties have a right of user of a thoroughfare it is a fair presumption, in the absence of clear evidence to the contrary, that they have used it. The order in regard to (f) stands.

P.R.S./S.N. *Order accordingly.*

(1) A. I. R. 1925 Bom. 536=89 I. C. 844=26 Cr. L. J. 1422.

A. I. R. 1931 Madras 497

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

Municipal Council, Kumbakonam—Defendant—Appellant.

v.

Ralli Brothers — Plaintiffs—Respondents.

Original Side Appeal No. 94 of 1929, Decided on 19th September 1930, against judgment and decree of Waller, J., D/-9th August 1929.

(a) Madras District Municipalities Act (5 of 1920), S. 354 (2)—Bar to suit—When action of Municipal Council in fixing license fee is ultra vires S. 354 does not apply.

When the action of the Municipal Council in fixing rates of license fees is ultra vires, it necessarily follows that the provisions of the Act have not in substance and in effect been complied with and the bar of suit provided for in S. 354 (2) cannot consequently avail them : 19 *Mad.* 10 ; 24 *Mad.* 205 and 27 *Mad.* 547, *Ref.* [P 500·C 1]

(b) Madras District Municipalities Act (5 of 1920), S. 354—License fee raised not with reference to expenses of collection or regulation—Enhancement resulting in unfair burden as compared with other tax payers—Raising of fee held ultra vires.

Whether a license fee is or is not unreasonable must be decided upon the circumstances of each particular case.

The license fee was not raised with reference to the expense of collection or regulation and the result of the enhancement was to impose on the plaintiffs who stored groundnut in the premises a very unfair burden as compared with other tax-payers of the city.

Held : that the levy of such fee by the Municipal Council was unreasonable and ultra vires, not being in substance and effect a compliance with the provisions of the Act : *A. I. R.* 1930 *Mad.* 55; *A.I.R.* 1927 *Rang.* 183 and *Kruse* v. *Johnson*, (1898) 2 *Q. B.* 91, *Ref.* [P 499 C 2]

K. Bhashyam Iyengar and *T. R. Srinivasan*—for Appellant.

R. N. Ayyangar—for Respondents.

Curgenven, J.—The appellant is the Municipal Council of Kumbakonam represented by its Chairman, and the appeal is against a decree granted by our learned brother Waller, J., to the respondents, Messrs. Ralli Brothers. This firm is engaged in the export of groundnut and possesses godowns within the Kumbakonam Municipality where after purchase and before shipment groundnut is stored. The plaint recites that for a period of 22 years godowns within the Municipality have been used for this purpose without any interference, but that in or about July 1926 a demand was made for a sum of Rs. 100 as license fee in respect of the premises for the year 1926-27. The plaintiffs paid the fee under protest and similarly paid the fee for the ensuing year 1927-28, upon a demand made on 12th April 1927. The suit was brought for a declaration that the plaintiff firm was not liable to pay such a charge because it was unreasonable and excessive and fixed in an arbitrary manner, and for a refund of the sums paid. The contention thus is that the levy was ultra vires, a contention accepted by the learned Judge in granting the decree appealed against. Since this question of the extent of the powers of a Municipality to levy license fees under the District Municipalities Act, Madras Act 5 of 1920, affects both the merits of the claim and the jurisdiction of the civil Court to entertain it, I propose to reverse the usual order and deal first with the merits.

Before discussing the facts, it will be of assistance to consider the circumstances of a closely similar case *Corporation of Madras* v. *Spencer & Co.* (1). It arose under the Madras City Municipal Act, Act 4 of 1919, but the same principles were involved as must apply here. Messrs. Spencer & Co. had a number of places within the city for storing spirits, and such places were required under the Act to be licensed. The license fee had been Rs. 25 up to December 1925 when a resolution was carried raising the license fee to Rs. 150 and again in March 1926 this fee was enhanced to Rs. 200 in respect of each and every place in which spirits were stored. Messrs. Spencer & Co. sued to recover the amounts paid by them under protest and obtained a decree. The learned Judges, Phillips and Reilly, JJ., who heard the appeal from that decree point out in the first place the difference between a tax and a license fee, which are severally provided for in different parts of the Act. They drew the inference that it was not the intention of the Act that fees for licenses should subserve the ordinary purposes of taxation. A corollary to that was that the Council had not the power to fix any arbitrary fee which it chose and accordingly a line must exist between what is a reasonable license fee and a license fee which is unreasonable and in substance, although not in form, a tax. Reference

(1) A.I.R. 1930 Mad. 55=121 I.C. 849=52 Mad. 764.

was made to *Kruse* v. *Johnson* (2) where the question arose as to the validity of a bye-law made by a county Council with regard to the playing of musical instruments. It was objected that the bye-law was ultra vires on the ground that it was unreasonable and therefore bad. Lord Russell, C. J., asking in what sense the word "unreasonable" as applied to bye-laws should be understood replies to his question thus :

"If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men,"

and he adds that in such circumstances the Court might well say :

"Parliament never intended to give authority to make such rules; they were unreasonable and ultra vires."

In the Madras City case the learned Judges go on to consider the circumstances in which the license fee was twice enhanced and find that this action originated in a refusal of the Government to allow the Corporation to utilize the abkari revenue arising within the city. The fee was not raised with reference to the expense of collection or regulation, and the result of the enhancement was to impose on persons who stored liquor a very unfair burden as compared with other tax payers in the city. Some comparison was instituted between the magnitude of this fee and fees charged in respect of licensing such places as stables, dairies and premises for storing skins and explosives, all of which were much lower.

Whether a fee is or is not unreasonable must of course be decided upon the special circumstances of each case, but I have dealt at some length with this other case because as will be seen it bears a close resemblance to the present one. Another case upon much the same lines is *Municipal Corporation of Rangoon* v. *Sooratee Bara Bazar Co., Ltd.* (3) where the question related to the reasonableness of a bye-law imposing a license fee of Rs. 10 for every 100 square feet of the floor area of private markets within the Rangoon Municipality. The question of the Corporation's powers, it was held, had to be decided by what must be deemed the intention of the legislature and the intention seemed to be merely to give power to charge a fee which would save the Corporation from being out of pocket by reason of the duties and liabilities imposed upon it by the Act in the supervision and regulation of private markets. Since the rate at which the fee was leviable did not conform to this test it was held to be unreasonable.

Turning now to the circumstances of the present case it will be found that whereas taxation is provided for in Part 3 of the Act, and is regulated there by a number of special provisions, licenses and fees form the subject of Part 4, entitled "Public Health Safety and Convenience." The power to impose a license fee is derived from sub-S. 2, S. 321 which runs as follows :

"For every such license or permission fees may be charged at such rates as may be fixed by the Council."

The wording undoubtedly suggested that the fee should be commensurate with the extra cost entailed by granting the license and exercising such supervision as is necessary to see that its terms are complied with. It may be that in order to promote the health, etc., of the public, with which this part of the Act specially deals, higher fees should be chargeable in the case of dangerous or offensive occupations. But it would, I think, be in conflict with the purpose for which such fees are leviable that they should be so assessed as substantially to contribute to the general revenues of the Municipality. The license fees now in question were imposed by a notification of 25th March 1926 and comprise a scale varying from Rs. 10 for premises of 500 square feet or less up to Rs. 100 for premises which exceed 5,000 square feet. Sch. 5 of the Act specifies the premises which may not be used without a license obtained under S. 219, and a scrutiny of the rates of license fees imposed under this schedule in respect of other premises will show how disproportionate is the maximum fee, which the plaintiffs had to pay in this case. The next highest fee is Rs. 30, payable in respect of premises for storing manure, offal, blood, bones, rags, hides, fish, horns or skins. It is fairly evident that in fixing this fee the offensive nature of such stores as

(2) [1898] 2 Q. B. 91=67 L. J. Q. B. 782=78 L.T. 647=46 W.R. 630=14 T.L.R. 476=62 J.P. 469.

(3) A. I. R. 1927 Rang. 183=102 I.C. 878=5 Rang. 212.

these was taken into consideration ; and yet for the far less offensive storage of groundnut the plaintiffs have to pay more than three times as much. The fee for a place used for making fish oil is Rs. 20 ; for a dyeing yard is Rs. 3 if the area does not exceed 100 square feet and Rs. 12 for anything in excess of that area; for an oil mill or press the fee is Rs. 4-8-0. There is a graduated fee of Rs. 5, Rs. 10, Rs. 15, according to the area, for burning bricks or tiles, certainly a very objectionable process within a town. The fee is no more than Rs. 7-8-0 for a place used for storage of explosive or combustible materials or for the manufacture of anything from which offensive or unwholesome smell arises. These examples, I think, are enough to impose on the Municipal Council the duty of explaining why so high a fee as Rs. 100 was fixed in respect of groundnut premises. The only officer examined on the appellant's side was a Sanitary Inspector, and it cannot be said that the Municipal Council has attempted by his evidence to justify the dimensions of the fee by reference to the special expense entailed in granting the license and inspecting the premises. Moreover, it is evident that if a fee on this scale were justified by such expenses, all the other license fees must be inadequate for that purpose. One is compelled therefore to enquire whether the fee was not imposed from some other motive.

It is asserted in the plaint that up to March 1925, the Council was collecting profession tax from the respondent and that this levy had to be discontinued in view of certain decisions of this Court. It is no doubt true, as the written statement points out, that the judgment in the particular suit brought by Messrs. Ralli Brothers regarding this claim to profession tax was not delivered until 1st March 1927, but it appears that the same question arose and was decided in the same manner in some earlier suits in one of which (C. S. No. 551 of 1924) judgment was delivered on 20th April 1925. It is certainly somewhat difficult not to connect the loss of this profession tax of Rs. 100 with the imposition of a so-called license fee of precisely the same amount in respect of premises allowed to go unlicensed for so many years, and it is much to be regretted that a body in the position of a Municipal Council should lay itself open to such an imputation. But, however this may be, it is unnecessary to discover what was the precise motive in fixing the rates of fee. I am clearly of opinion that the levy of so disproportionate a fee can only be accounted for as pursuant to some policy of unfair discrimination and that it is not justified either by the letter or by the spirit of S. 321 (2) of the Act. I hold therefore that it was ultra vires.

Turning now to the question of jurisdiction, sub-S. 2, S. 354, runs as follows:

> "No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment, or collection of money made under the said authority: provided that the provisions of this Act have been, in substance and effect, complied with."

Now having found that the action of the Municipal Council in fixing these rates of license fees was ultra vires, it necessarily follows that the provisions of the Act have not in substance and in effect been complied with; and it seems to me quite unnecessary to cite authority for so self-evident a proposition. It is no doubt true that a line must be drawn between cases which the section excludes from the Court's jurisdiction and cases which by virtue of the proviso, are not so excluded. The difficulty of drawing such a line by the formulation of general principles will, I think, be apparent by a comparison of two Madras cases, *Municipal Council, Nellore* v. *Rangayya* (4) and *Municipal Council, Cocanada* v. *Standard Life Assurance Co.* (5). As has been observed in the latter of these cases, the question, whether there has been substantial compliance with the Act is one of fact which has to be determined with reference to the particular circumstances of the case. The particular circumstances there were that a company had been wrongly assessed to profession tax, and to assess to profession tax a company not liable is not to comply with the provisions of the Act in substance and effect. Another case in which the Court interfered was *Municipal Council of Mangalore* v. *Codialbail*

(4) [1896] 19 Mad. 10.
(5) [1901] 24 Mad. 205=10 M. L. J. 401.

Press (6), where the Municipal Council had adopted gross instead of net income as the basis of assessment. But, as I have said, once it is found that the action of the Council was ultra vires, all question of the power of the Court to interfere disappears. Had the purpose of S. 354 (2) been to bar any suit so long as the provisions of the Act had been formally complied with, which is virtually the argument of the learned advocate for the appellant, the proviso relating to substance and effect would not have been added.

Since my learned brother concurs in these views, the appeal is dismissed with costs.

Bhashyam Ayyangar, J.—I concur. It is undisputed that the respondent firm were bound to take out a license in the years in question for storing groundnut on their premises and the appellant Council were entitled to charge a fee for such license. If the Council had charged a mere fee, the respondent would have had no right of suit. The respondent's contention is that what they were charged with was really a tax under the guise or cloak of a license fee. The fee charged is Rs. 100 per year, and it is certainly out of proportion to the cost of the work involved in issuing the license and supervising the premises. The evidence shows that a higher fee than Rs. 30 is not charged for any other license, although many other cases can be easily pointed out from the schedule relating to licenses, in connexion with which the work of supervision must be far more strict and onerous for the Council. The inference therefore appears reasonable that although the Council purported to levy the sum of Rs. 100 in this case as license fee it was really not that but a tax in disguise. In this view, their action was not in substance or effect a compliance with the provisions of the Act but ultra vires, and the bar of suit provided for in S. 354 (2), cannot consequently avail them. I agree that the appeal should be dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

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(6) [1904] 27 Mad. 547.

A. I. R. 1931 Madras 500

VENKATASUBBA RAO, J.

P. V. S. Kabalamurthi Pillai—Plaintiff.

v.

P. V. Subramania Pillai and *others*—Defendants.

Civil Suit No. 794 of 1921 and Applns. Nos. 3435 of 1929, 3155 of 1929, and 1319 of 1930, in Civil Suit No. 794 of 1921, Decided on 8th October 1930.

Civil P. C. (1908), O. 40, R. 2—Receivers ordered to retain 5 per cent of gross sales are not entitled to commission on sum shown as "trade discount."

Where in a certain condiment business the receivers have been ordered by the Court to retain 5 per cent of the gross sale proceeds in their hands they are not entitled to that commission on the sum shown as "trade discount because "proceeds" mean produce, outcome or profit and an amount never received, viz., the so called "trade discount" cannot be a part of proceeds. [P 501 C 1]

V. V. Srinivasa Iyengar and *S. G. Satagopa Mudaliar*—for Plaintiff.

K. S. Krishnaswami Iyengar for *Ramaswami Iyengar & Srinivasavaradachari, G. Krishnaswami Iyer, R. Ramchandra Chetty* and *K. S. Rajagopala Iyengar*—for Defendants.

Judgment.—This summons is taken out by defendant 5. He applies that the receivers may either be removed or in the alternative suitable directions be given to them. After hearing the application very fully I have come to the conclusion that they should be continued but that in the interests of the estate their duties should be more precisely defined than in the orders under which they were appointed. (His Lordship stated the facts and after dealing with the charges made against the receivers proceeded.) By far the most important question that has been argued is what is the amount of remuneration to which the receivers are entitled? The point really turns on the meaning of the expression "gross sales" in the order of Court dated 2nd June 1925. Para. 13 of the order reads thus:

"With regard to the condiments business the said receivers do retain 5 per cent on the gross sales in their hands as and for their remuneration for the said condiment business."

It was by the consent and at the request of the parties that this order was made. It must be read in the light of the affidavit filed then by the receivers. In that affidavit they ask for a commis-

sion at 5 per cent on the "gross sale proceeds." It is not disputed that the two expressions "gross sales" and "gross sale proceeds" are identical in their meaning and effect. Messrs: Fraser and Ross in their report point out that the commission retained by the receivers in respect of the business from 18th August 1924 to 31st March 1930 is Rs. 43,991-12-0. They have drawn this commission on the footing that they are entitled to 5 per cent on what is shown as the amount of the "gross sales" namely 9 lakhs odd. This concern had dealings mainly with two firms Messrs. Sharwood & Co., England, and Messrs. Fisher & Co., Australia. The goods were supplied to them on a large scale from time to time under subsisting contracts. The invoices made out against them mention certain figures as the price of the goods supplied and from those figures is deducted what is described in the report as "trade discount." This latter term comprises various items such as commission, bonus and discount. It is the aggregate of the total prices that reaches the figure nine lakhs odd, to which I have referred. The "trade discount" amounts to about two lakhs and the actual proceeds received by the receivers is about seven lakhs. The question is: Are they entitled to commission on the nine lakhs odd or only on the sum of about seven lakhs? In my opinion the receivers are clearly not entitled to commission on the sum shown as "trade discount." "Proceeds" mean produce outcome, profit: (see the Concise Oxford Dictionary. An amount never received cannot be part of the proceeds. Whether from the point of view of the buyers or the sellers, the only figure that matters is the amount actually paid and received. As Messrs. Fraser & Ross point out:

"it is usual in business concerns to quote list or catalogue prices and allow percentage off such prices to trade customers as trade discounts. Such discounts are deducted in the invoices themselves and are not brought into account in the financial books."

To seem to make a concession while in point of fact no concession is made or intended is a devise which tradesmen usually employ. To take an instance, if you want to charge for an article Rs. 75 you may quote its price as Rs. 100 and allow a discount of 25 per cent or you may quote Rs. 125 as its price with a discount of 40 per cent. In either case, the buyer pays and the seller receives only Rs. 75. So long as the buyer parts only with Rs. 75, it little signifies to him whether the price quoted is Rs. 100 or Rs. 125. The receivers' commission must not be made to depend upon the fictitious figure that they may choose to show as the original price of the article.

Moreover, the receiver's commission is in truth the price of the work done by them. It must have some relation to the labour involved and the time taken. Why should they receive remuneration in respect of an amount which is added in the first instance and then straightway deducted? So long as the buyer knows that he is paying only seven lakhs, what matters to him whether the original price is shown as nine lakhs, as in this case, or, say, 15 lakhs?

It has been suggested for the receivers that the very phrase "gross proceeds" involves that it is something distinct from net proceeds. Perfectly true; but you cannot for sustaining this distinction import a fiction and call a sum never received as a part of the proceeds. Having regard to the nature of this business the expression "gross sale proceeds" is extremely inapt and wholly unrelated to the facts of the case. The parties have used the words loosely without pausing to think what they mean. The difference between the gross and the net sale proceeds is recognized in some of our enactments. For instance, in the Original Side Rules, O. 16, R. 4, makes the commission depend on what may be described as "gross sale proceeds". It says that the receiver may take his commission at 5 per cent on sales calculated on the total value realized by him. On the other hand O. 18, R. 6, provides that the master may fix as the auctioneer's remuneration a percentage on the sale proceeds. The same expression "net sale proceeds" occurs also in O. 34, R. 6, also R. 8-A, Civil P. C. Let us take O. 34, R. 6. Where after the sale of a mortgaged property there is still a balance due to the mortgagee, this rule says that the Court may pass a personal decree for the balance. It is on the basis of net sale proceeds the rule provides that the balance is to be computed. In these several instances the "net proceeds" are something different from "gross proceeds". The mortga-

gee in the rule quoted above has no concern with the "gross sale proceeds." The expenses of the sale must be first deducted and thus the net sale proceeds are arrived at. But in the present case there are generally speaking no expenses attending a sale at all. So, as I have said the phrase "gross sale proceeds" is inappropriate and in any event cannot include an amount never received. Whether the phrase is suitable or not the question really is: Did the parties at the time they used it intend that the commission should be paid on a fictitious sum, an amount that was never to come? In my opinion the answer must clearly be in the negative.

The report points out that the receivers have charged commission also on packing charges and freight which are treated as part of the price. I can give effect if necessary to the phrase "gross sales" by holding that they are entitled to remuneration on these two items. Strictly in my opinion they cannot charge commission on freight; it is paid at one end and recovered at the other. But still the term used being "gross proceeds" as the freight is a part of the sum they received, I am prepared to allow them commission on this head. In the result they may retain commission on freight and packing charges but not on "trade discount."

I have discussed this point at some length as the sum involved is upwards of Rs. 10,000. On my finding the receivers are accountable for this sum being the excess received by them. I do not propose to direct them to bring back this sum but it will be treated as a debt due by them to the estate to be adjusted against any future commission they may earn.

In the result I have decided not to remove the receivers but to give them the following directions. (His Lordship gave the necessary directions and also passed orders regarding costs.)

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 502

MADHAVAN NAIR, J.

Sarraju Venkataraghaviah—Defendant—Appellant.

v.

Sarraju Chenchu Subbiah—Plaintiff—Respondent.

Second Appeal No. 1388 of 1927, Decided on 24th October 1930, against decree of Dist. Judge, Nellore, in A. S. No. 131 of 1926.

(a) Madras Hereditary Village Offices Act (1895), Ss. 13 and 21—Plaintiff appointed karnam by proprietor and holding that office and discharging its duties—Revenue officer cancelling this appointment and appointing defendant to the post—Plaintiff's suit for declaration that revenue officer's order is ultra vires—Such suit does not fall within S. 13, and S. 21 is no bar to it.

Where the plaintiff has been validly appointed to the post of a karnam by the proprietor and discharges his duties as such, and where such appointment has been cancelled by the revenue officer on the defendant's application that he was the nearest heir of the last office holder, and after which the defendant is appointed to that office, whereon the plaintiff files a suit for declaration that the order of the revenue officer is ultra vires and hence null and void, then S. 13 does not apply to the case, because the plaintiff does not ask for a declaration that he is the heir to the office in question, or for restoration of his appointment as karnam but asks only to set aside the order of the revenue Officer. Therefore S. 21 is no bar to the maintainability of such a suit: 50 *I. C.* 185; 33 *Mad.* 208 and 60 *I. C.* 650, *Ref.* [P 504 C 1]

(b) Specific Relief Act (1877), S. 42—Suit by plaintiff for declaration that revenue officer's order cancelling his appointment by proprietor as karnam is ultra vires—Suit is not barred by S. 42.

A suit by the plaintiff for a declaration that the revenue officer's order cancelling his appointment to the post of a karnam and made by the proprietor is ultra vires is not barred by S. 42 of the Act, because the suit is one to have the true construction of the statute declared and to have the act done in contravention of the statute (Act 3 of 1895) rightly understood, pronounced void and of no effect: 22 *Mad.* 270 (*P.C.*), *Rel. on.* [P 504 C 1]

(c) Madras Proprietary Village Service Act (1894), S. 11 (1)—Revenue officer's right of appointment does not extend to cases where proprietor's nominee is not in fact nearest heir of last officeholder.

Where action is taken by the revenue officer under sub-S. (1), S. 11, it appears that the right of appointment is conferred on the revenue divisional officer only in respect of cases where the nominee of the proprietor is disqualified under sub-S. (1), S. 10, but does not extend to cases where the nominee is not in fact the nearer heir to the last holder of the office, that is, the cases where the proprietor's appointment contravenes the provisions of sub-S. (2), S. 10: 50 *I. C.* 185, *Ref.* [P 505 C 1]

(d) Madras Proprietary Village Service Act (1894), S. 11 (1)—Right of appeal when given,

Where the divisional officer makes an appointment after taking action under sub-S. 1, S. 11, this sub-section should be understood as confining the right of appeal to cases where the proprietor's appointment is disallowed by the revenue divisional officer on the ground that the proprietor has contravened the provisions of sub-S. (1), S. 10. [P 505 C 2]

B. Somayya—for Appellant.

M. Patanjali Sastri—for Respondent.

Judgment.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff for a declaration that the order of the Revenue Divisional Officer of Kavali dated 18th May 1925, appointing the defendant as karnam of Somavarappadu, is ultra vires and does not bind him.

On a vacancy arising in the office of karnam in the proprietary village of Somavarappadu, the proprietor appointed the plaintiff to the office by his order dated 9th December 1924 and sent notice of the appointment as required by the Act (Act 2 of 1894) to the revenue divisional officer, Kavali. On the ground that he is a nearer heir the defendant, a minor by his guardian, applied to the revenue divisional officer praying that he should be appointed as the karnam. On 18th May 1925 the revenue divisional officer disallowed the appointment of the plaintiff as karnam holding that the defendant was the next heir to the office and directed the registration of his name as heir to the last holder of the office.

The plaintiff's case is that the order of the revenue divisional officer is illegal and ultra vires, and he prays for its cancellation.

The defendant's case is : (1) that the civil Court has no jurisdiction to entertain this suit by reason of the provisions of S. 21, Madras Hereditary Village Offices Act, Act 3 of 1895, and the Madras Proprietary Village Service Act, Act 2 of 1894 ; (2) that a suit of this nature is barred by S. 42, Specific Relief Act ; (3) that even according to the pedigree sent by the proprietor to the revenue divisional officer he, the defendant, is the next heir to the office in question and not the plaintiff ; and that the revenue divisional officer has on this ground jurisdiction to set aside the proprietor's order appointing the plaintiff who is not the next heir to the office ; and (4) that the plaintiff's only right is to prefer an appeal under S. 11 (3), Act 2 of 1894 against the order of the revenue divisional officer.

The Madras Act of 1894 admittedly applies to the office of the karnam in question and the provisions of the Madras Act 3 of 1895 also apply to it by reason of S. 3 (1) of that Act. S. 21, Act 3 of 1895 provides that

"no civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in section . . . ."

The office in question being an office specified in S. 3, the question is whether the Court has no jurisdiction to entertain the suit. S. 13 (1) of the same Act provides that

"any person may sue before the Collector for any of the village offices specified in S. 3 . . . "

on the ground that he is entitled under sub-S. 2 or sub-S. 3, S. 10, Madras Proprietary Estates Village Service Act, Act 2 of 1894, to hold such office subject to certain provisions. S. 10, Madras Proprietary Estates Village Service Act, Act 2 of 1894, lays down certain rules to be observed by the proprietor in making the appointment. It contains three subsections ; sub-S. 1 sets out the qualifications to be possessed by the person to be appointed; sub-S. 2, the rule of succession to be followed; and sub-S. 3, the rule to be followed in case the next heir is not qualified, or in case there is no heir at all. It has been held in a series of decisions in this Court: *Krishnaswami Naidu* v. *Akkulammal* (1), *Muvvula Seetharam Naidu* v. *Doddi Rami Naidu* (2) and *Kodandaramayya* v. *Ramalingayya* (3), that S. 21, Act 3 of 1895, takes away the jurisdiction of the civil Court only in cases in which the jurisdiction is conferred on the revenue Courts by S. 13 of the Act. The correctness of this proposition of law is not challenged by the learned advocate for the appellant. What he argues is that the plaintiff's present suit, though the plaint is cleverly worded to take it out of the scope of S. 13, is substantially a suit for the village office specified in S. 3 on the ground that he is entitled to it under sub-S. 2, S. 10, Madras Proprietary Estates Village Service Act, and so the civil Court has no jurisdiction to deter-

(1) [1919] 50 I. C. 185.
(2) [1910] 33 Mad. 208=5 I. C. 137.
(3) [1920] 60 I. C. 650.

mine it. I have read the plaint carefully, and I cannot agree with this contention. The plaintiff does not bring his suit for the office on the ground that he is entitled under sub-S. 2 or sub S. 3, S. 10 of Act 2 of 1894 to the office in question. His case is that he has been validly appointed as karnam by the proprietor, that he is holding the office and discharging its duties, and that the appointment of the defendant by the Revenue Divisional Officer in cancellation of his own appointment is null and void. He does not ask for a declaration that he is the heir to the office in question or for restoration to his appointment as karnam. "His position apparently is," as pointed out by the learned District Munsif

"that if the order of the Revenue Divisional Officer is held to be illegal and ultra vires and set aside, his appointment as karnam by the proprietor will stand good."

In my opinion a suit of this nature does not obviously fall within S. 13, Act 3 of 1895 and therefore it appears to me that S. 21 of that Act is not a bar to the maintainability of the suit.

The second question is whether a suit for a declaration that the order of the Revenue Divisional Officer is ultra vires and does not bind the plaintiff, is barred by S. 42, Specific Relief Act. It is argued that, as according to the genealogical tree furnished by the proprietor himself the defendant and not the plaintiff is the next heir to the last holder of the office of karnam, the plaintiff is not entitled to the office under sub-S. 2, S. 10 and therefore the plaintiff has no legal character sufficient to sustain the action and the suit for the declaration therefore should have been dismissed by both the lower Courts. The argument was not put in this form in the lower Courts. What was argued there was that a suit of this nature for a declaration that the order of the Revenue Divisional Officer appointing the defendant karnam is ultra vires, is not maintainable and the lower Courts rightly overruled the objection pointing out that according to the decision of the Privy Council in *Robert Fischer* v. *Secretary of State* (4) the suit is :

"in substance one to have the true construction of a statute declared and to have an act done in contravention of a statute rightly understood pronounced void and of no effect."

It was not argued in the lower Courts that he has no title to maintain the suit. It is now argued that the decision in *Robert Fischer* v. *Secretary of State* (4) is inapplicable as the plaintiff in that case had obviously title to institute the suit which the plaintiff in this case does not have. Whether the plaintiff is the next heir in the order of succession or not, it is clear that he is now in possession of the office and is discharging its duties. This by itself will give him sufficient title to sustain the action. But apart from it, if the Revenue Divisional Officer had no jurisdiction to pass the order cancelling the plaintiff's appointment then his present title to the office, as nominee of the proprietor, cannot be questioned. The substantial question is therefore whether the order of the Revenue Divisional Officer which is called into question is ultra vires and not binding on the plaintiff and this is the third point for decision.

When the office of karnam falls vacant in a village in a proprietary estate, S. 9, Act 2 of 1894, makes it obligatory on the proprietor of the village to appoint a person to the vacant office and send notice of the appointment in writing to the Divisional Officer in charge of the division. S. 10, as I have already pointed out, lays down certain rules to be observed by the proprietor in making appointments. Sub-S. 1 of that section enumerates the several disqualifications to the office. It states that

"(1) no person shall be eligible for appointment to any village office who: (a) is not of the male sex; (b) has not attained the age of majority; (c) is not physically and not mentally capable of discharging the duties of the office; (d) has not qualified according to the educational test prescribed for the office in question by the Board of Revenue by rules made under S. 32 and (e) has been convicted by a criminal Court of any offence which, in the opinion of the Revenue Officer in charge of the division or of the District Collector, disqualifies him for holding the office."

Sub-section 2 says :

"The succession to all hereditary village offices shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible zamindaris in Southern India."

In the present case it will be remembered that the Revenue Divisional Officer set aside the appointment of the plaintiff by the proprietor on the ground that the appointment contravened the rule of succession mentioned in sub-S. 2, S. 10. This was done under S. 11. Sub-S. 1,

(4) [1899] 22 Mad. 270=26 I. A. 16=7 Sar. 459 (P.C.).

S. 11 confers powers on the Revenue Divisional Officer to record his objections to the appointment made by the proprietor and call on him to appoint another person. This subsection is as follows :

"If the Revenue Officer to whom notice of appointment is sent under S. 9 considers the person appointed to be qualified under sub-S. 1 of the preceding section, he may, at any time within three months from the date of the receipt by him of the said notice of appointment, and, in cases falling under Cls. (c) and (e) in sub-S. 1, S. 10, after giving notice to the parties concerned and making enquiry, record his objections and call upon the proprietor to appoint another person, and the proprietor shall thereupon do so and send notice of such new appointment to the said Revenue Officer within six weeks after such requisition. . . . . ."

(It may be observed in passing that the word "qualified" appearing in sub-S. 1, S. 11 in the Government publication of the Act is apparently a mistake for the word "disqualified.") Sub-S. 2 states in certain cases the Divisional Officer may himself make the appointment. Stated generally, this subsection confers powers on the Divisional Officer to appoint another individual to the office in cases where a proprietor who has the right to appoint omits to do so within the statutory period or, if the person again appointed by the proprietor is also disqualified under sub-S. 1, S. 10. Where action is taken by the Revenue Officer under sub-S. 1, S. 11, it appears that the right of appointment is conferred on the Revenue Divisional Officer only in respect of cases where the nominee of the proprietor is disqualified under sub-S. 1, S. 10, but does not extend to cases where the nominee is not in fact the nearer heir to the last holder of the office, that is the cases where the proprietor's appointment contravenes the provisions of sub-S. 2, S. 10. This appears to be clear from the language of the subsection. It is admitted on all heads of disqualifications referred to in sub-S. 1, S. 10. In my opinion the Divisional Officer therefore had no jurisdiction to set aside the order of the proprietor and his order is not warranted by the powers conferred on him by the statute. The observations of Sadasiva Ayyar, J., in *Krishnaswami Naidu* v. *Akkulammal* (1), lend support to this view of the jurisdiction of the Divisional Officer to set aside the appointment by a proprietor in a case like the present one.

The last question is whether the plaintiff is precluded from instituting the suit as he is given the right under sub-S. 3, S. 11, of appeal to the District Collector against the Divisional Officer's order. This subsection runs as follows :

"Whenever an appointment is disallowed under this section, an appeal shall lie to the District Collector within one month, or, if the officer disallowing the appointment is the District Collector, an appeal shall lie to the Board of Revenue within three months"

Where the Divisional Officer makes an appointment after taking action under sub- S. 1, S. 11, I think this subsection should be understood as confining the right of appeal to cases where the proprietor's appointment is disallowed by the Revenue Divisional Officer on the ground that the proprietor has contravened the provisions of sub-S. 1, S. 10. If so understood, it is clear that the plaintiff has no right of appeal in the present case. Even if the subsection is to be understood as giving the plaintiff a right of appeal in all cases against the Divisional Officer's order it does not say that the aggrieved party has no right of suit.

For the above reasons this second appeal fails and is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

A. I. R. 1931 Madras 505

MADHAVAN NAIR, J.

Muthukumaraswamia Pillai and *others* —Plaintiffs—Appellants.

v.

R. S. Subbaraya Pillai and *others*—Defendants—Respondents.

Second Appeals Nos. 1405 to 1408 of 1925, Decided on 9th September 1930, against decrees of Sub-Judge, Ramnad.

(a) Hindu Law—Surrender by reversioner is valid if it is to person next in succession.

A reversioner can release or surrender his rights but the surrender or release to be valid must have been executed to the next in succession. [P 507 C 2]

(b) Hindu Law—Religious endowment—Alienation—Sale of office of trustee is invalid if made to others except sole immediate heir.

Sale of the office of trustee for the pecuniary advantage of the trustee is not valid in law and in the absence of special usage the alienation of a religious office would not be valid if made in favour of any person other than the sole immediate heir: 1 *Mad.* 235 and 15 *Mad.* 183, *Foll.*; 6 *Bom.* 298 and 51 *I. C.* 979, *Ref.* [P 508 C 2]

(c) Civil P. C. (1908), O. 6, R. 17—New plea—Plaintiff cannot rely on title not alle-

ged in plaint but acquired during pendency of suit—Practice, subsequent events.

In certain cases permission can be given to parties to cure formal defects in title and even to put forward new grounds of title, but whether such permission should be granted or not would depend on the special circumstances of each case. Plaintiffs cannot be allowed to rely on title not alleged in the plaint but subsequently acquired during the pendency of the suit, [P 509 C 1]

(d) Specific Relief Act (1877), S. 42—Declaratory suit—Plaintiff alleging title to office — Trustees preventing plaintiff from discharging duties — Actual possession in addition to injunction need not be asked.

Where trustees or their nominee are preventing the plaintiffs, who say that they are entitled to the office, from discharging their duties it is not necessary that actual possession should be asked for as a further relief in addition to the relief of injunction or in the place of it, for maintaining the suit under S. 42: 28 *Bom.* 567, *Foll.*; *A. I. R.* 1926 *Mad.* 164, *Ref.*; 42 *Cal.* 244, *not Foll.* [P 509 C 2]

(e) Specific Relief Act (1877), S. 42—Unsettled condition among landlords and tenant is good ground for declaratory decree.

Where the parties to the suit are scrambling for possession and the tenants are taking sides, some ryots recognizing one claimant as their landlord and some the other the case is eminently one in which a declaratory decree is desirable to avoid multiplicity of suits and to obtain a decision once and for all which will secure peaceful possession of the properties, and there is nothing in the language of ths proviso to S. 42 to prevent the Court from passing a declaratory decree in the case: 15 *Mad.* 307; 25 *Mad.* 736; 12 *I. C.* 548; 26 *Cal.* 11; *A. I. R.* 1922 *Cal.* 8; 24 *I. C.* 678 and 55 *I. C.* 32, *Ref.*; 15 *Mad.* 255, *Dist.* [P 510 C 1)

(f) Limitation Act (1908), Art. 124—Suit claiming hereditary office—Article applicable is 124 and not Lim. Act (1908), Art. 120.

In the case of a claim to a hereditary office, the article applicable is 124 and not 120. When a claim falls within the provisions of a special article there is no room for the application of the general article which is designed to meet cases for which no period is fixed by the Act. [P 511 C 2]

(g) Limitation Act (1908), Art. 124—Suit barred against holder of office—Successors in office also lose their rights.

Where the predecessor has allowed his rights to the hereditary office to get barred by limitation, those who are next in succession to him should also be deemed to have lost their rights: *A.I.R.* 1922 *P.C.* 123, *Dist.*; 23 *Mad.* 271. *Foll.*; 24 *Mad.* 219 and 49 *I. C.* 393, *Ref.* [P 511 C 1]

A. C. Sampath Aiyangar and *T.R. Srinivasa Ayyar*—for Appellants.

K. Krishnaswami Iyengar and *Somasundaram*—for Respondents.

Judgment.—*S. A. No.* 1405 *of* 1925. This second appeal is directed against the decree and judgment of the Subordinate Judge of Ramnad at Madura in A. S. No. 2 of 1922 which affirmed the decree of the District Munsif of Srivilliputtur dismissing the plaintiff's suit.

The suit related to the office of Sri Pandaram in Vaidyanathasawmi temple, Srivilliputtur. The plaintiffs alleged that the office was held by one Veerappa Pillai's family as a hereditary office, that they as members of that family are at present entitled to hold that office, that defendants 1 and 2 are trustees of the temple and that defendants 3 to 6 are obstructing them from holding office and receiving its emoluments. The suit was for a declaration of their right to hold the office and for an injunction directing the defendants not to prevent the plaintiffs from entering into the temple and performing the duties attached to it. Various issues were raised in the case; but in this second appeal we are concerned only with the questions formulated by the Subordinate Judge as points 3, 4 and 5 which are as follows:

Point 3.—Whether a suit for a mere declaration and injunction without a prayer for possession cannot be maintained.

Point 4.—Whether the plaintiffs have got title to the office claimed.

Point 5.—Whether the plaintiffs' rights, if any, are barred by limitation.

The lower appellate Court found that the office of Sri Pandaram was held by Veerappa's family as a hereditary office and that a suit for a mere declaration and injunction without a prayer for possession could be maintained; but it held that the plaintiffs have no present title to the office claimed and that their rights, if any, are barred by limitation. The appellants call into question the correctness of the decision on points 4 and 5, while the respondents try to sustain the judgment also on the ground that a suit for a mere declaration and injunction would not lie on which point the learned Subordinate Judge, as stated before, has found against him. A decision on any of these points, if it is adverse to the plaintiffs, will entail a dismissal of this second appeal.

I shall first consider the question raised as point 4 by the Subordinate Judge that is, whether the plaintiffs have got title to the office claimed.

The following facts are not disputed: Ex. R, the genealogical tree will explain the relationship of the various members of the family. The present plaintiffs are the sons of Vaidyalingam Pillai marked as defendant 7 in that table. Veerappa

Pillai, the last holder of the office died in 1884, leaving his widow as his only heir. She carried on the duties with the help of one Audinarayana Pillai, her sister's daughter's husband. She died in 1895. As the trustees were not satisfied with Audinarayana Pillai, he was dismissed from the office in 1889 and when he attempted to re-enter on his duties by force, the then trustee instituted a suit to recover possession of the suit properties from him. In that suit O. S. No. 77 of 1897 the Sub-Court of Tinnevelly gave a decree that:

"Upon the plaintiff's satisfying the Court in execution that a proper person with hereditary right has been appointed by the trustee of the plaint temple, with the sanction of the Siva temple committee, to perform the duties of Sri Pandaram and to have possession of the lands etc., the plaintiff as trustee of the temple be put, with the assent of such a person, in possession of the plaint lands. . . . . ."

This decree was subsequently modified by the High Court by expunging the words "with hereditary right" and by substituting the words "on behalf of such a person" in the place of the words "with the assent of such a person." The trustees by this decree acquired the right of appointing the Sri Pandaram office holder. In accordance with the decree of the High Court, the trustees appointed one Muthukumara Gurukkal to the office of Sri Pandaram on 5th January 1900. He continued in office for over 18 years and was dismissed by the trustees on 19th November 1918. When Muthukumara Gurukkal was discharging the duties of the office the plaintiff's paternal uncle, Umaiorupagam Pillai filed O. S. No. 32 of 1905 for possession of the Sri Pandaram office and its emoluments; but that suit was ultimately dismissed by the Subordinate Judge on remand from the High Court, on the ground that Umaiorupagam Pillai could not maintain the suit inasmuch as one Arunachalam Pillai belonging to the family was living and he was the preferential heir. This decree was confirmed by the High Court.

The plaintiffs instituted the present suit alleging that Arunachalam Pillai orally released his rights to the Sri Pandaram office in their favour and that Muthukumara Gurkkual gave them possession of the keys of the office and of the properties attached to it. This oral release has been found against the plaintiffs by both the lower Courts. In the course of the trial in the first Court, the plaintiffs succeeded in obtaining from Arunachalam Pillai a registered release deed dated 5th March 1919. This was not admitted in evidence by the first Court but was admitted by the appellate Court and marked as Ex. YY. Reliance is placed on this document to show that the plaintiffs have a present title to institute this suit. The question is: (a) whether Ex. YY validly conveys Arunachala's rights in favour of the plaintiffs and (b) if it does, how far this new title can be relied on by them in support of their claim, having regard to the fact that the title, i. e, the oral release, alleged in the plaint has been found against by the lower Courts. Though the plaintiffs belong to Veerappa's family, admittedly Arunachala has superior right to the office as the preferential heir. Ex. YY after mentioning the previous history of the office recites that, as Arunachalam Pillai has received Rs. 1,000 for his "superior right" in the office and as the plaintiffs are the heirs next to him in the order of succession and as they have obtained possession from Muthukumara Gurukkal, Arunachalam relinquishes his rights and that the plaintiffs may enjoy them. The document is called a release deed. The law is well settled that a reversioner can surrender or release his rights but the surrender or release to be valid must have been executed to the next in succession.

In the present case, it is clear that during the lifetime of Umaiorupagam Pillai (plaintiff in O. S. No. 32 of 1905 aleady referred to) the plaintiffs are not the next in succession to Arunachalam Pillai. This is conceded, Umaiorupagam Pillai was living at the time of Ex. YY as he died only on 24th November 1922. If so, the plaintiffs, not being the next reversioners to Arunachalam Pillai, can derive no title to institute the present suit under Ex. YY; but it is argued that Ex. YY, though it is called a "release deed," must be deemed to be a conveyance and as such effect should be given to it. I cannot agree with the contention that it is not a release deed, relinquishing the rights of Arunachalam Pillai. Ordinarily a release deed is executed in favour of the next reversioner. In Ex. YY, Arunachalam says one of the reasons for exe-

outing Ex. YY in favour of the plaintiffs is that they are the heirs next to him in the order of succession. Of course here he is obviously wrong because Umaiorupagam Pillai was living at that time and he was the next heir in succession. But the statement that he is executing the document in favour of the plaintiffs as they are the heirs next in succession to him shows what his intention was when he executed the document. There can be no doubt that he must have thought that he was executing a release deed.

Otherwise there was no reason for him to have alleged that he was executing the document as the plaintiffs are his next reversioners. In my opinion Ex. YY cannot be considered as anything else than an ordinary "release deed." However I shall deal with the argument that effect should be given to Ex. YY treating it as a conveyance. In my opinion this cannot be done. In the first place there is nothing to show that the consideration mentioned in it was paid by the plaintiffs to Arunachalam, and further, if it is treated as a conveyance, it will be invalid as it will amount to a conveyance or sale of the office of a trustee for consideration. It is argued that as the duties of the office are merely secular as found by the lower Courts, such as keeping of the jewels, possession of the room containing vahanam and vyanjana arai, lighting, temple watch, gate watch, etc., the office, though attached to the deity in the temple, has nothing religious about it and therefore there is nothing illegal in conveying it for consideration. The duties attached to the office may not, strictly speaking, be religious duties; but there can be no doubt that the office holder of Sri Pandaram is a trustee. The office involves duties to be performed in the temple of Vaidyanathaswami with the right of enjoying the emoluments and properties attached to that office. The properties are described as devadayam properties endowed for the support of the temple. The grant was made by the Nawab of the Carnatic. The fact that the properties were granted to the officeholder does not show that the properties are not trust properties. The officeholder who has to perform the duties attached to the office and who has the right of enjoying the properties after meeting the expenses, etc., is clearly a trustee and the office of Sri Pandaram is the office of a trustee. The question is whether the sale of the office of a trustee for consideration is valid under the law. It has been held by the Judicial Committee in *Baja Varmah Valia* v. *Ravi Varmah Kunhi Kutti* (1) that the sale of the office of trustee for the pecuniary advantage of the trustee is not valid in law ; but it is argued that if the alienation is in favour of a member of the alienor's family to which the office belongs hereditarily, then there can be no objection to the transfer. But the decisions of the Madras High Court do not support this general proposition. In *Narayana* v. *Ranga* (2) the view was expressed that in the absence of special usage the alienation of a religious office would not be valid if made in favour of any person other than the sole immediate heir. In that case as it was found that the alienee was not the sole next heir of the alienor because he had three brothers, the alienation of the office was held invalid.

The decision in *Mancharam* v. *Pranshankar* (3) relied on by the appellants in support of the general proposition is accepted by this Court as authority only for the view that a transfer to one next in the line of succession may be held to be valid : see *Rajam Bhattar* v. *Singarammal* (4). As the plaintiffs in this case are not the immediate heirs next in the line of succession to Arunachala the alienation in their favour cannot in any event be supported. In discussing the validity of the transfer, I have thus far assumed that Arunachala, the alienor, had at that time an existing right to release or transfer the rights of the office ; but if it is held, as has been done by the lower Courts, that his rights were barred at that time, that would be an additional ground to hold that Ex. YY could not convey any rights to the plaintiffs as Arunachala had no rights at all to convey since his claim was barred by limitation at that time. This question will be considered as the last point in this judgment. Apart from this ground my conclusion is, for the reasons given

(1) [1876] 1 Mad. 235=4 I. A. 76=3 Sar. 637 (P.C.).
(2) [1892] 15 Mad. 183=2 M. L. J. 19.
(3) [1881] 6 Bom. 298.
(4) [1919] 51 I. C. 979.

above, that Ex. YY cannot have legal effect either as a release or as a conveyance.

The next question is, assuming that Ex. YY confers a valid title on the plaintiffs to the office of Sri Pandaram, how far it can be relied on in support of their title having regard to the fact that it was not relied on by them in the plaint and that it was obtained and filed only in the course of the suit. The title alleged by the plaintiffs in the plaint is an oral release in their favour, of his rights by Arunachalam. Since this has not been found to be true by both the lower Courts it follows that they had no title at all to institute the suit. Can this initial defect of the want of title in the plaintiffs be cured by the fact that they secured in their favour Ex. YY after the suit was filed ? In certain cases Courts have given permission to parties to cure formal defects in their alleged title and even to put forward new grounds of title ; but whether such permission should be granted or not would depend upon the special circumstances of each case. In the present case the contention was raised by the defendants in para. 21 of the written statement that the plaintiffs even if the office is hereditary in the family, have no title to institute the suit. It was pointed out in that paragraph that

"the plaintiffs could have no right to maintain the suit while Umaiorupagam Pillai, Muthukaruppa Pillai, and Arunachalam Pillai, referred to in O. S. 32 of 1905, Tuticorin Sub-Court, are alive."

As pointed out by the learned Subordinate Judge the point was explicitly raised in the written statement, and the plaintiffs after obtaining the release deed from Arunachalam Pillai could have put in an additional statement meeting these pleas and "set themselves right". This they have not done. Arunachalam and Umaiorupagam are now dead ; but this does not mean that the plaintiffs are the next heirs ; Muthukaruppa is alive and all of them, Arunachala, Umaiorupagam and Muthukaruppa have left sons. This appears from the evidence. It will be a difficult question to decide who, amongst these persons including the plaintiffs, have present title to claim the office. Having regard to these facts I agree with the Subordinate Judge that even if Ex. YY may be said to confer rights on the plaintiffs which would entitle them to institute the suit it cannot be relied on by them in support of their title as it was obtained after the suit was filed. As in my view Ex. YY is a deed of release and at that time the plaintiffs were not the next in succession to Arunachala, it does not confer any title on them and hence they have no present title to institute this suit and the suit must therefore be dismissed. In this view the question just discussed does not really arise for consideration.

The next question is whether a suit for a mere declaration and injunction without a prayer for possession of the office and of the properties attached to it can be maintained. The Subordinate Judge answered the question in the affirmative in favour of the plaintiffs The respondents take objection to the decision of the Subordinate Judge on this point. In the plaint the plaintiffs allege that they are in possession of the office as they have obtained the keys from Muthukumara Gurukkal and that they are also in possession of the lands attached to the office. These were denied by the defendants. As regards the office it is clear that they are not discharging its duties. As a matter of fact they are not allowed to go to the office nor are they permitted to attend to its duties. The evidence in the case shows that they were asking permission from the trustees even as late as four days before the suit. If doing the duties of the office is the test of possession of the office : see *Jalandhar Thakur* v. *Jharule Das* (5), it is clear that the plaintiffs in this case are not in possession of the office ; but in a case like this where the trustees and their nominee are preventing the plaintiffs, who say that they are entitled to the office, from discharging their duties, is it necessary that actual possession should be asked for as a further relief in addition to the relief of injunction or in the place of it, for maintaining the suit under S. 42, Specific Relief Act ? The plaintiffs have asked for injunction against the trustees and the other defendants. In *Kunj Bihari* v. *Keshavlal Hiralal* (6) it was held that, in the case of an office with reference to the title of which a declaration is asked for, a prayer for possession is unnecessary and a prayer for injunction will give all that

(5) [1915] 42 Cal. 244=24 I. C. 501.
(6) [1904] 28 Bom. 567=6 Bom. L.R. 475.

can also be obtained by a prayer for possession. This case has been approvingly referred to in *Govindaswami Pillai* v. *Ramanathan Chettiar*, *A. I. R.* 1926 *Madras* 164. I think I must hold that the present case, having regard to the contentions raised, should be governed by the principle of the decision in *Kunj Bihari* v. *Keshavlal Hiralal* (6). If the plaintiffs succeed in getting the declaration of their title which they seek, then, it is clear that the relief by way of injunction preventing the defendants from interfering with the proper discharge of their duties will give them all that they want and a separate prayer for possession of the office thus becomes unnecessary. As regards possession of the lands it is true that the plaintiffs have not secured actual possession of any of the lands attached to the office ; but, as pointed out by the Subordinate Judge, many of the tenants have attorned to them while some of the tenants have attorned to the trustees. Both the plaintiffs and the trustees have been trying to get lease deeds executed by the defendants in their favour. Where the parties to the suit are scrambling for possession and the tenants are taking sides, some ryots recognizing one claimant as their landlord and some the other, it has been held in this Court that the

> "case is eminently one in which a declaratory decree is desirable to avoid multiplicity of suits and to obtain a decision once and for all which will secure peaceful possession of the properties",

and that

> "there is nothing in the language of the proviso to S. 42, Specific Relief Act to prevent the Court from passing a declaratory decree in the case : see *Chinnammal* v. *Varadrajulu* (7)".

This case has been followed in this Court in *Dampanaboyina Gangi* v. *Addala Ramaswami* (8) and *Boyanapalli Venugopal Row* v. *Venkata Narasimha Raw* (9). In this connexion attention may be drawn to the decisions in *Nirmal Chunder Banerjee* v. *Mahomed Siddik* (10) *Joyanarain* v. *Srikant Roy* (11), *Mahommad Umar* v. *Nwab Din* (12) and *Labhu* v. *Nathu* (13). The decision in *Narayana* v. *Shankunni* (14), relied on by the respondents is distinguishable as that was not a case of a scramble for possession at all. I think the Subordinate Judge is right in holding that having regard to the circumstances of the present case a suit for a mere declaration and injunction without a prayer for possession can be maintained.

The last question for decision is whether the plaintiffs' suit is barred by limitation. The answer to this question is not free from doubt; but after giving my best consideration to it I am inclined to agree with the views of the Courts below that the claim of the plaintiffs is barred by limitation. The article of the Limitation Act applicable to the case is Art. 124. Under this article, for possession of an hereditary office, time runs against the plaintiff from the time when the defendant takes possession of the office adversely to the plaintiff. In this case Arunachala, the predecessor of the plaintiffs, never claimed the office or exercised its rights. Audinarayana, who was doing the duties, was clearly a trespasser and the trustees brought against him, as already noticed, O. S. No. 77 of 1897, as a result of which they obtained the power to appoint a person to hold the office of Sri Pandaram. Such a power to appoint became an incident of the trusteeship by virtue of the decree of the High Court. In the exercise of this power the then trustee appointed Muthu Gurukkal to the office. That he held the office adversely to the true claimant is clear from the fact that he pleaded adverse possession in the suit instituted by Umaiorupagam Pillai, O. S. No. 32 of 1905, though the plea did not succeed as the office had not been then held for 12 years. Now 18 years have passed since Muthukumara had taken possession of the office and his title to hold the office as the nominee of the trustee has become perfected by adverse possession or in other words the trustees, though they themselves cannot hold the office, through the exercise of the power of appointment vested in them by the decree adversely to the claimant, for the statutory period deprived the plaintiffs of their right to the office through their nominee Muthukumara Pillai. I can find nothing in *Annaswami Pillai* v. *Rama-*

(7) [1892] 15 Mad. 307.
(8) [1902] 25 Mad. 736=12 M.L.J. 103.
(9) [1911] 12 I. C. 548.
(10) [1899] 26 Cal. 11=25 I.A. 225=7 Sar. 383 (P C.).
(11) A. I. R. 1922 Cal. 8=65 I. C. 8.
(12) [1914] 24 I. C. 678.
(13) [1920] 55 I. C. 32.
(14) [1892] 15 Mad. 255=2 M. L. J. 29.

krishna Mudaliar (15) inconsistent with this position of the trustees. The right of holding the office being perfected by Muthukumara's adverse possession for over 12 years, the next nominee, defendant 6, who though appointed temporarily, still continues to discharge the office, cannot be disturbed by the plaintiffs. The decision of our High Court reported in *K. Thathachariar* v. *Veeraswami Mudali* (16), which is a case very much like the present one, supports the above conclusion. In that case the question was whether the plaintiffs who according to the finding were at that time hereditary archakas of the suit temple, but who had been out of possession and enjoyment of that office for about 60 years, were barred under Art. 124, Lim. Act, when they brought the suit against defendant 6 the archakas in possession and defendants 1 and 4, the trustees of the temple by whom this archaka and the preceding archakas for many years had been appointed. Archakas like the holders of the Sri Pandaram office in the present case, held their office by virtue of the power of appointment vested in the trustees. The High Court answered the question in the affirmative.

It may be noticed that the archaka then in office had been in possession of the office for less than 12 years but the High Court held that periods of possession of the previous archakas would enure to the advantage of the then archaka as it may be said that each successive holder of the office claims from or through each other as in the case of successive holders of a stanom. This legal position may no longer be tenable having regard to the decision of the Privy Council reported in *Vidya Varuthi* v. *Baluswami Ayyar* (17), which says that in cases like these one holder does not claim through the other; but in our present case this difficulty does not arise as Muthukaruppa himself held the office adversely for over 12 years and so to make up the necessary 12 years there is no need to add the periods of the office of successive holders. Arunachala, the predecessor of the present plaintiffs, having allowed his rights to the office to get barred by limitation those who are next in succession to him should also be deemed to have lost their rights. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (18) is an authority in support of this position. I hold therefore that the plaintiffs' suit is barred by limitation. Before I conclude I may mention that it was argued by Mr. Sampath Ayyangar that the article of the Limitation Act applicable to the case is the general Art. 120 and not Art. 124. This is a new argument urged for the first time here. Having regard to the relief claimed, i. e. the claim to a hereditary office, the article applicable is clearly Art. 124. When a case falls within the provisions of a special article of the Limitation Act there is no room for the application of the general article which is designed to meet cases for which no period of limitation is fixed by the Act.

In the result the second appeal is dismissed with costs. S. A. Nos. 1406 to 1408 are also dismissed.

P.R.S./K.N. *Appeals dismissed.*

(15) [1901] 24 Mad. 219=11 M. L. J. 1.
(16) [1919] 49 I. C. 393.
(17) A. I. R. 1922 P. C. 123=65 I. C. 161=48 I. A. 302=44 Mad. 831 (P. C.).
(18) [1900] 23 Mad. 271=27 I. A. 69=7 Sar. 671 (P. C.).

A. I. R. 1931 Madras 511

REILLY AND ANANTAKRISHNA AYYAR, JJ.

(*Inuganti*) *Venkata Madhava Rao*—Appellant.

v.

Garapati Narayanamurty and *others*—Respondents.

Appeal No. 238 of 1930, Decided on 17th December 1930, against order of Sub-Judge, Ellore, D/- 19th September 1929.

Civil P. C. (1908), S. 60 and O. 21, R. 94—Auction sale not confirmed — Judgment-debtor retains interest and it can be attached or sold.

Even after auction sale of property but before the confirmation of the sale, judgment-debtor retains interest in the property which can be attached or sold : 55 *I. C.* 626, *Dist.*; *A. I. R.* 1921 *Mad.* 498; *A. I. R.* 1921 *Mad.* 157; 52 *I. C.* 569, *Ref.* [P 512 C 1]

Ch. Raghava Rao with *S. Raja Ram*—for Appellant.

V. Suryanarayana—for Respondents.

Judgment.—One Sobhanadri Rao obtained a mortgage decree for sale against Ramayya (respondent 3 here), brought the mortgaged property to sale and became auction-purchaser. After the auction but before confirmation of the sale respondents 1 and 2 here brought a suit for money, O. S. 89 of 1928, against

Ramayya in the District Munsif's Court and obtained an attachment before judgment of the same property in this suit on 5th February 1928. On 6th February 1928 Ramayya sold the property to Madhava Rao (appellant here) and on 13th February 1928, having paid into Court what was necessary under O. 21, R. 89, Civil P. C., got the auction sale to Sobhanadri Rao cancelled. Madhava Rao then applied to the District Munsif for the raising of the attachment obtained by respondents 1 and 2, who by that time had got a decree in their suit but had not applied for execution. The District Munsif held that their attachment was invalid and formally raised it. They then appealed to the Subordinate Judge, who remanded the petition to the District Munsif. Madhava Rao now appeals against that order of remand.

It is contended for Madhava Rao that no appeal lay to the Subordinate Judge against the District Munsif's order. Assuming, without deciding, that to be so, this appears to us to be a matter in which we ought to interfere in revision by setting the District Munsif's order aside on the principle of *Sree Krishna Doss* v. *Chandook Chand* (1) in order to prevent multiplicity of proceedings. If after the auction sale to Sobhanadri Rao and before its cancellation Ramayya had any saleable interest in the property, then the attachment obtained by respondents 1 and 2, if properly made, was valid, and Ramayya's subsequent sale to Madhava Rao could have no effect against it. It is contended for Madhava Rao that Ramayya had no interest in the property at the date of his sale or at the date of the attachment, but that by virtue of S. 43, T. P. Act, after cancellation of the auction sale, Ramayya's title having revived, Madhava Rao gets the full benefit of that. But the contention that Ramayya had no interest whatever in the property after the auction sale until its cancellation appears to us unsound. Oldfield, J., in *Narasingerji Gyanagerji* v. *P. Parthasaradhi*, *A.I.R.* 1921 *Mad.* 498 and *Sundaram* v. *Mansa Mavuthar* (2) went so far as to regard the judgment-debtor as preserving his full ownership in such circumstances until the confirmation of the auction sale. In the latter case Kumaraswami Sastri, J., appears to have regarded the judgment-debtor as retaining an interest which could be conveyed. However Rr. 86 and 87, O.21, Civil P. C., appear to indicate the meaning of the Code in this matter. If the auction-purchaser makes default in paying full purchase money, the property has to be sold again at his risk without re-attachment. In those circumstances it is the judgment-debtor's interest which is sold, and that must be subsisting after the auction, and still subject to the attachment in cases in which attachment before sale is necessary, though under S. 65, Civil P.C., if the auction sale is confirmed, the auction-purchaser's title relates retrospectively to the date of the auction. In *Venkataswami Naidu* v. *Guruswami Ayyar* (3), it was remarked that after the auction sale the judgment-debtor retained no interest which could be attached or sold, but we have ascertained from the records of that case that the sale had been confirmed.

As in this case it is clear in our opinion that Madhava Rao's purchase from Ramayya on 6th February 1928 gives him no ground for objecting to the attachment obtained by respondents 1 and 2 on 5th February 1928, if the attachment was properly effected, we set the District Munsif's order in C. M. P. 961 of 1928 on his file aside and direct him to hear the petition on the remaining questions raised in accordance with the order of the learned Subordinate Judge. We may remark that we are now adopting a course similar to that taken by Sadasiva Ayyar, J., in *Chengalroya Chetti* v. *Raghava Ramanuja Doss* (4).

The costs in the District Munsif's Court will abide and follow the result. There will be no order as to costs here or in the Subordinate Judge's Court.

P.R.S./S.N. *Order accordingly.*

(1) [1909] 32 Mad. 334=4 I. C. 509.
(2) A. I. R. 1921 Mad. 157=63 I. C. 937=44 Mad. 554 (F.B.).
(3) [1920] 55 I. C. 626.
(4) [1919] 52 I. C. 569.

A. I. R. 1931 Madras 512

JACKSON, J.

S. Vijiaraghavalu Naidu—Petitioner.

v.

M. Rajamani Ayyar—Respondent.

Civil Revn. Petn. No. 1505 of 1930, Decided on 11th February 1931, against order of Dist. Munsif, Poonamallee, D/- 23rd September 1930.

Civil P. C. (1908), O. 13, Rr. 1 and 2—Refusal to receive documents six months late—No satisfactory explanation for delay—Refusal is proper.

The rule is peremptory that a document on which a party intends to rely must be produced at the first hearing and R. 62 of the Civil Rules of Practice does not relieve a party of that obligation. Therefore a refusal to receive documents that were six months late, a delay for which there was no satisfactory explanation is proper : *A. I. R.* 1928 *Mad.* 516, *Ref.* [P 513 C 1]

G. Lakshmanna and *T. V. Srinivasan* —for Petitioners.

M. S. Venkatarama Ayyar —for Respondent.

Judgment.—This petition seems to have been admitted to see whether the learned District Munsif when he refused to receive documents that were six months late, a delay for which there was no satisfactory explanation infringed the precept of *Ramaswami Chettiar* v. *Tyagaraja Pillai* (1). It does not seem that *Ramaswami Ckettiar* v. *Tyagaraja Pillai* (1) in any way modifies the law as laid down in O. 13, Rr. 1 and 2, Civil P. C. The rule is peremptory that documents on which a party intends to rely must be produced at the first hearing and R. 62 of the Civil Rules of Practice does not relieve the party of that obligation.

I am not prepared to hold that the learned District Munsif has erred. The petition is dismissed with costs.

P.R.S./P.N. *Revision dismissed.*

(1) A. I. R. 1928 Mad. 516=110 I. C. 16=51 Mad. 472.

A. I. R. 1931 Madras 513

MADHAVAN NAIR, J.

Gangama Naik — Defendant—Appellant.

v.

N. L. V. R. Veerappa Chetti —Plaintiff —Respondent.

Second Appeals Nos. 1657 and 536 of 1927, Decided on 21st November 1930, against decree of District Judge, Madura, in Appeal Suit No. 91 of 1923.

(a) Civil P. C. (1908), O. 41, R. 22—Scope of.

It is not open to respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the trial Court and in respect of which he has filed no appeal or memorandum of objections: *A. I. R.* 1927 *Mad.* 801 ; *A. I. R.* 1925 *Cal.* 94, *Foll*; 45 *I. C.* 232, *not Foll.* [P 517 C 1]

(b) Civil P.C. (1908), O. 41, R. 33—In proper case respondent who has not filed appeal or objection can be allowed to argue that plaintiff's suit should be dismissed.

The appellate Court in a proper case can allow the respondent, who has not filed an appeal or a memorandum of objections to argue that the plaintiff's suit should be dismissed. Obviously this power will not be exercised by Courts except on sufficient grounds. [P 518 C 2]

(c) Transfer of Property Act (1882), S. 53—Transfer set aside on ground of fraud—Transferee gets mortgage-money only and not money debts of transferor discharged by him.

When a transfer of immovable property is set aside, on the ground that it was intended to defeat and delay the creditors, the transferee is entitled to get credit only for the mortgage debt binding on the property that he may have discharged as part of the consideration for the document and not for the money debts of the transferor discharged by him : *A. I. R.* 1927 *Mad.* 278 and 43 *I. C.* 956, *Foll.* [P 519 C 1]

(d) Civil P.C. (1908), S. 2 (12)—Interest on mesne profits.

No doubt ordinarily interest on mesne profits is to be allowed, but such interest may be disallowed on special grounds. [P 520 C 2]

K. V. Krishnaswami Ayyar and *K. Sankara Subba Ayyar*—for Appellant.

Watrap S. Subramania Ayyar and *T. D. Gopala Krishna Ayyar* — for Respondent.

Judgment.—(*S. A. No.* 1657 *of* 1927.) Defendant 1 is the appellant. This second appeal arises out of a suit to establish his title instituted by a defeated claimant in execution proceedings.

The plaintiff obtained an ex parte decree against one Ramakrishna Naicken in O. S. No. 34 of 1915 on the file of the Periakulam Munsif's Court in respect of a promissory note dated 15th October 1912 for Rs. 600. In execution of the decree the plaint properties were attached on 16th August 1915 and sold in Court auction and were purchased by the plaintiff on 31st August 1917. When he tried to take possession of the properties, he was obstructed by the defendants and hence the present suit was filed by him to establish his title.

The judgment-debtor, Ramakrishna Naicken, had various dealings with different persons. He had executed a mortgage on 18th August 1909 for Rs. 5,000 in favour of defendant 1's wife Subbammal. In 1914 various decrees were obtained against him and he was put in jail. At that time defendants 1 and 5 agreed to help him to discharge his debts and in consequence, by June 1915 almost all his debts were discharged. In recompense for his services Ramakrishna

Naicken executed a sale deed of all his properties in favour of defendant 1 on 14th December 1914 (see Ex. 1). Defendant 1 resists the plaintiff's suit on the strength of this document. Generally stated, the other defendants derive their right to the properties from defendant 1.

By April 1917 defendant 1 and Ramakrishna Naicken had quarrelled and so, on 12th April 1917 Ramakrishna Naicken instituted O. S. 52 of 1917 to set aside Ex. I, the sale deed in favour of defendant 1, referred to above. The written statement in this suit was filed on 23rd August 1917. I may here mention that the Court sale of the suit properties in favour of the plaintiff was held on 31st August 1917, i. e. after the filing of the written statement in O.S. 52 of 1917. This fact is important in connexion with the plea of lis pendens urged by defendant 1 to which reference will be made later. On 30th January 1918 the present plaintiff, who had by that time purchased the plaint properties, desired to become a party plaintiff in O. S. 52 of 1917 filed by Ramakrishna Naicken. That application was opposed by Ramakrishna Naicken on the ground that the exparte decree obtained by the plaintiff was not a valid one and that he was intending to take proceedings to set aside that decree. While the application was pending on 10th January 1919 Ramakrishna Naicken filed an application to withdraw the suit, O. S. 52 of 1917 with liberty to bring a fresh suit. On Ramakrishna agreeing to pay the costs ordered by the Court within a prescribed time, he was given permission to withdraw the suit. But as he failed to comply with the Court's order regarding costs, the suit was dismissed; and with it the plaintiff's petition to be made a party was also dismissed.

In the present suit the plaintiff stated at first that Ex. I, the sale deed to defendant 1, is a nominal and sham transaction. By I. A. 291 of 1921 he sought an amendment of the plaint to raise the question that the document, Ex. I, was bad under S. 53, T. P. Act, and this was allowed on 8th November 1921 and an additional issue was raised on 2nd February 1922.

Various issues were raised in the case. Three of the important issues were :

Issue 1.—"Whether the sale in favour of defendant 1 is sham and colourable ?"

Issue 8.—"Whether the execution sale in favour of plaintiff is true and even if true, is affected by lis pendens ?"

Issue 12.—"Whether the sale deed to defendant was executed to defeat, delay or defraud the creditors of Ramakrishna Naicken ?"

On issue 1 the Subordinate Judge found in favour of defendant 1. On issues 8 and 12 he found in favour of the plaintiff. In the result, the plaintiff obtained a decree and was granted possession of the suit properties but subject to the condition that he should take possession only after paying Rs. 17,644-12-0 which the learned Judge found to have been the consideration paid under Ex. I and independently, for the discharge of certain decrees against Ramakrishna Naicken.

No appeal was filed by defendant 1, the present appellant, against the above decree, nor did he call into question the finding that Ex. I is a transaction to be avoided as coming under S. 53, T. P. Act; but the plaintiff-respondent filed an appeal stating that as Ex. I is found to fall within the scope of S. 53, T. P. Act, he should not have been asked to pay any part of the consideration said to have been paid under that document and towards the decrees obtained against its executant, Ramakrishna Naicken. In appeal the learned District Judge modified the decree of the Subordinate Judge to the extent indicated in his decree.

Against this decree of the District Judge the plaintiff has filed S. A. 536 of 1927 urging that the decision of the lower appellate Court in so far as it is against the appellant is contrary to law.

Against the same decree defendant 1 has filed S. A. 1657 of 1927 urging that the lower appellate Court should not have interfered with the original Court's decree, for the reason that the plaintiff's suit should have been dismissed on the ground that his purchase was affected by lis pendens and for other reasons and stating that, though he had not filed an appeal against the original Court's decree, he is entitled under O. 41, R. 22, Civil P. C., to support it before the appellate Court by urging the aforesaid contention; and that the lower appellate Court was wrong in not having allowed him to raise that plea.

I shall first take up S. A. 1657 of 1927 filed by defendant 1 inasmuch as if he succeeds in his second appeal the result will be that the plaintiff will have to be

content with the first Court's decree in which case, it will be unnecessary to proceed with his second appeal 536 of 1927. But before discussing the main question raised in the second appeal I shall first deal with the question whether the memo of cross objections filed by the appellant impugning the validity of the decree passed by the first Court was rightly disallowed by the lower Court and whether the plaintiff's suit should have been dismissed on the ground of lis pendens.

I have no doubt that the memo of objections was rightly dismissed by the lower Court. As already stated the appellant did not prefer any appeal against the decree of the first Court nor did he file any memo.of objections to the appeal filed by the respondent. In the affidavit filed in support of the petition for permission to file the memo. of objections, the appellant's vakil stated that

"he was allowed to argue that some of the findings in favour of the appellant could not be supported."

but this statement was contradicted in the affidavit filed by the pleader who appeared for the respondent. No reference to these points appears in the judgment of the appellate Judge, Mr. Bardswell, which distinctly states that no appeal was filed by the present appellant against the decree of the lower Court. It appears to me that the appellant discovered his mistake only after the appeal was after full hearing remitted to the lower Court for findings on the question of mesne profits and then he filed his application for permission to file a memo of objections under S. 151, Civil P. C., on 26th March 1924, that is after the hearing of the appeal on 29th January 1924 and the order calling for findings on 21st February 1924. The finding was due by 1st July 1924. This petition was posted for hearing after notice to the other side along with the appeal which had been posted to 3rd July 1924. After various adjournments the petition was dismissed on 23rd October 1925 by the then District Judge (now Reilly, J.) by the following order:

"This memo. of objections was presented long out of time and cannot be accepted. The petition is dismissed."

After this the defendant-appellant sought to raise the points covered by his memo. before Mr. Burn, the District Judge who finally disposed of the appeal but was again dsallowed from doing so. I am of opinion that the memo. of objections sought to be filed was rightly disallowed by the lower Court as being long out of time.

The next question is whether the plaintiff's suit should have been dismissed by the learned Subordinate Judge on the ground of lis pendens, i. e. on the ground that his purchase of the suit properties was made on 31st August 1917 after the institution of O. S. 52 of 1917 Ramakrishna Naicken in which the written statement was filed by the present defendant 1 on 23rd August 1917. It will be remembered that that suit was ultimately dismissed owing to the failure on the part of Ramakrishna to pay the costs ordered by the Court. The learned Subordinate Judge held that the doctrine of lis pendens does not apply as the suit properties had been already attached by the respondent; and that though he no doubt "is a person who derived the right, title and interest of Ramakrishna" his right to question the alienation and to avoid it is an independent right. This reasoning is contested by Mr. Krishnaswami Ayyar on various grounds. Having regard to the decision in *Motilal* v. *Karrabuldin* (1) and the fact that the respondent is not entitled to get possession except through his right by the purchase of the properties at the Court auction the decision of the learned Subordinate Judge seem to be open to question, but in the view that I am prepared to take on the main question

"whether the appellant is entitled to argue this question at all under O. 41, R. 22."

I do not think it is necessary to deal with in detail the arguments and the counter-arguments addressed to me on this point. For the purpose of this second appeal, I am prepared to assume that the execution sale in favour of the respondent is affected by lis pendens and that the learned Subordinate Judge should have dismissed his suit on that ground; but the question is—and this is the main question in this second appeal—whether the appellant who has not filed any appeal against the decree passed against him by the first Court and has also not filed any memo of objections in the

(1) [1898] 25 Cal. 179=24 I. A. 170=7 Sar. 222 (P.C.).

appeal filed by the respondent, can be allowed to support the decree and insist that it should not be interfered with by the appellate Court urging the contention that the first Court was wrong in passing the decree against him.

It is clear that if the appellant's contention that the execution sale is vitiated by lis pendens is upheld, the learned Subordinate Judge was wrong in passing any decree at all against the appellant; he should have dismissed the suit in toto. The appellant by preferring an appeal against the decree of the Subordinate Judge urging this contention would have succeeded and got the decree set aside; but he did not file any appeal nor did he file any memorandum of objections, as already stated, impugning the validity of the adjudication made against him on those various points decided against him by the first Court. It is urged that he did not want to get the decree set aside by preferring an appeal as he was quite content to accept the decree that was passed against him and that he was entitled to urge the present plea at the time of the hearing of the appeal preferred by the respondent in the lower appellate Court. "Can he do so?" is the question which I have to decide. Reliance is placed on O. 41, R. 22, Civil P.C., in support of the appellant's contention. That order states that

"any respondent though he may not have appealed from any part of the decree, may not only *support the decree on any of the grounds decided against him in the Court below* but take any cross-objection to the decree which he could have taken by way of appeal. . . . . (The italics are mine)."

In this case we are not concerned with any cross-objections by the appellants, whether he is entitled to file any cross-objections or not, he did not file any such objections in time and when he asked for permission to file them at a late stage in the appeal the permission was rightly refused. In my opinion the words of O. 41, R. 22, Civil P. C., do not support the appellant's contention. Though a respondent may not have appealed from any part of the decree he is given permission under the provisions of this order to urge the points decided against him in the Court below in supporting the decree of the lower Court. The words used are "support the decree" and not "attack the decree." A contention that a ground on which the lower Court has decided against the respondent should have been decided in his favour and therefore the lower Court should not have passed the decree under appeal is in my opinion not a ground which supports the decree but is one which attacks the decree and therefore cannot be urged by the respondent under this order. In support of the lower Court's decree the only grounds decided against him by the lower Court which can be urged by a respondent without filing an appeal against the lower Court's decree are those which will support the decree of the lower Court and not render that decree invalid. If the contention of the respondent is accepted, then it means that though he has not filed an appeal or a memo of objections, he is to be allowed to have the benefit of the same indirectly which I think is not permissible under the provisions of O. 41, R. 22, Civil P. C. If the Court disagrees with the opinion of the lower Court on the point in question, how can the Court doing so allow the lower Court's decree to stand without setting it aside? The result will be as pointed out in *Kishan Kishore* v. *Din Muhammad*, *A. I. R.* 1929 *Lah.* 684, to which I shall presently refer that

"without any appeal or cross-objections we will have to set aside a decree which has been passed in the plaintiffs' favour which is not permissible."

The appellant's contention is supported by a decision of the Punjab Chief Court reported in *Mahammad Ali* v. *Parama Nand* (2). The argument that the respondent who has not filed any appeal against the lower Court's decree or, lodged a memorandum of objections should not be allowed to urge a contention impugning the validity of the decree was thus met by the learned Juges of the Punjab Chief Court in *Muhammad Ali* v. *Parama Nand* (2):

"But we fail to see why a party who is content to accept the lower Court's decision should not resist an appeal from that decision on the ground that the decree errs in favour of the appellant. The respondent not having appealed nor filed any cross-objections, cannot ask that the decree should be altered in his favour but surely he is entitled to urge that, if he can show that the decree errs in favour of the appellant, it should not be disturbed."

With all deference to the learned Judges I may observe that the words of O. 41, R. 22, Civil P. C., have not been considered by them in this judgment and I am not inclined to accept their view.

(2) [1918] 45 I. C. 232.

This decision has not been followed in this Court and has been dissented from in the Lahore High Court in *A.I.R.* 1929 *Lah.* 684 at p. 686. With respect to a similar contention urged before them relying strongly on the decision of the Punjab Chief Court, the learned Judges of the Lahore High Court made the following observations.

"We should have thought that the matter was so obvious that no elaborate discussion thereof was necessary. But the learned counsel relies particularly on *Muhammad Ali* v. *Parama* (2), a judgment of a Division Bench of the Chief Court of the Punjab. That judgment might afford some support to the respondent's contention but it was dissented from in *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar* (3)."

Then stating that perhaps the facts of the Punjab case are distinguishable from the facts of the case before them they stated,

"In any case, we are not prepared to hold that the case is a clear authority in favour of tne respondent's contention."

In *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar* (3), this Court, after referring to *Muhammad Ali* v. *Parama* (2) expressed the opinion that under the rule (O. 41, R. 22)

"it is not open to respondent to have adjudicated by the appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections."

In this connexion attention may also be drawn to the decision in *Pichai Konar* v. *Narasimha Rama Iyer* (4), which also supports the principle contended for by the respondent though it is not a decision under O. 41, R. 22. An argument similar to the present one was considered and overruled by the Calcutta High Court in *Shailesh Chandra* v. *Bechai* (5). That was an appeal by the plaintiff and arose out of a suit for the enforcement of a mortgage by sale of the mortgaged properties. The mortgage was executed by defendant 1 in favour of the assignor of the plaintiff. Defendants 2 to 28 were impleaded as having acquired some interest in different portions of the mortgaged property subsequent to the mortgage. The Subordinate Judge passed a decree in favour of the plaintiff for Rs. 381-0-6 calculating the interest on the principal at the rate of 14 annas per cent. against all the defendants. The plaintiff preferred the appeal against this decree raising various grounds to which it is not necessary to refer in this connexion. The defendants did not prefer any appeal nor did they file any memorandum of cross-objections but in support of the decree they argued that the frame of the suit was in contravention of O. 34, R. 1, Civil P. C., and that the suit should have been on that ground dismissed by the first Court. This argument was based on the allegation in the written statement that defendant 8 has cosharers who have not been made parties. This question was raised in issue 3 in the Court below and decided against the defendants. Though they did not file any appeal against the decree of the lower Court or lodge any cross-objections, they sought to argue the point under O. 41, R. 22, by way of supporting the decree of the lower Court. The learned Judges answered the argumet thus:

"No cross-objection was filed by the respondents in this Court under O. 41, R. 22 of the Code, and it is not therefore open to them to take that ground as it is not one in support of the decree made, but which, if sustained, would render the decree invalid."

Then they stated that as defendant 8 represented the interest of his cosharers "the decree cannot therefore be reversed on that ground" meaning thereby that the argument that the suit should have been dismissed on the ground urged was untenable even if the defendants were permitted to raise it. I do not think Mr. Krishnaswami Ayyar's contention that the sentence in the judgment "the decree cannot therefore be reversed on that ground" should be interpreted as meaning that the learned Judges refused to allow the defendants to raise the contention based on O. 34, R. 1, Civil P. C., because the defendants actually wanted to get a reversal of the appeal in their favour urging that ground, can be accepted. The learned Judges have clearly explained the reason for disallowing the defendants to raise the contention on the extract quoted above. In further support of his argument Mr. Krishnaswami Iyer invited my attention to O. 58, R. 6, of the English Rules of Practice which he says corresponds to O. 41, R. 22, but the language of the statute is totally different from the language of the rule referred to; and further, the respondent's learned advocate contends that, even according to the English statute

(3) A.I.R. 1927 Mad. 801=104 I.C. 472=50 Mad. 866.
(4) A.I.R. 1930 Mad. 471=125 I.C. 247.
(5) A.I.R. 1925 Cal. 94=84 I.C. 124.

and the decisions thereunder he would be able to show that the appellant would be clearly precluded from raising his contention. As the terms of O. 41, R. 22, are clear, and as the decisions of this and other Courts interpret those terms in the way I have indicated, I do not think any useful purpose will be served by a consideration of O. 58, R. 6 of the English Rules of Practice in relation to the present argument.

The appellant's argument has no authority to support it except the decision in *Muhammad Ali* v. *Parama* (2) which, as I have pointed out, has not been followed by this Court and other Courts and is clearly not warranted by the terms of O. 41, R. 22, Civil P. C.

In the result, I must disallow this argument of the appellant. The second appeal will be posted for argument with respect to ground No. 10 raised in the memo of second appeal.

[The said Second Appeal No. 1657 of 1927 and Second Appeal No. 586 of 1927 again coming on for hearing on Tuesday, the 18th day of November 1930 and having stood over for consideration till this day, the Court delivered the following:]

Judgment.—Before arguing the point raised in ground No. 10 Mr. Krishnaswami Iyer argues that, as it was open to the lower appellate Court under O. 41, R. 33: see *Ramaswami Ayyangar* v. *Official Receiver* (6), to allow the respondent before it to argue that the plaintiff's suit should be dismissed though he may not have filed an appeal against the decree of the first Court or a memorandum of objections in the appeal filed by the plaintiff, I should now remand the entire case to the lower appellate Court for consideration as to whether it would exercise the discretion vested in it by O. 41, R. 33, in favour of the present appellant (respondent) before it. The records of the case clearly show—and this is not very seriously disputed—that this point was not raised before the District Judge either at the time of the argument before the remand order made by him or in the memorandum of objections which was filed long out of time. No doubt it was stated in the memorandum of objections that the plaintiff's suit should have been dismissed. This was with reference to the argument under O. 41, R. 22, which I have already dealt with in my judgment dated 22nd October 1930. It is now stated that, as the memorandum of objections has been put in under S. 151, Civil P. C., it must be deemed that this aspect of the argument also comes under it. This is clearly an afterthought. However the point was not raised before me on the last occasion. It comes for consideration for the first time only now. This by itself is a sufficient ground for refusing the appellant permission to raise the point at this stage of the case. However I shall consider the argument on its merits.

It is true, as held in *Ramaswami Ayyangar* v. *Official Receiver* (6), that the appellate Court, in a proper case, can allow the respondent who has not filed an appeal or a memorandum of objections to argue that the plaintiff's suit should be dismissed. Obviously this power will not be exercised by Courts except on sufficient grounds. In *Ramaswami Ayyangar* v. *Official Receiver* (6) the appellate Court exercised its discretion in favour of the respondent because the decision, in which reliance was placed to show that the decision on which the first Court based its judgment was overruled, was passed by the High Court only after the appeal was filed. It was therefore thought by the appellate Court that the case was a proper one in which the discretion vested in it under O. 41, R. 33 should be exercised in favour of the respondent. But no such consideration arises in the present case. The Full Bench judgment, *Ramaswami Ayyangar* v. *Official Receiver* (6) reported recently did not in any way alter the law. It interpreted the scope of the power vested in the appellate Court under O. 41, R. 33. There was no prior decision in this Court saying that the appellate Court has no such power. The appellant had therefore no justification for not raising the point before the learned Judge. Apart from this, I do not think the circumstances of the case are such as would justify the exercise of the Court's discretion in the appellant's favour. He is a party to the document Ex. 1 which was intended to defeat or delay the creditors. It has been found that various false receipts some of them ante-dated have been filed to prove the payments made by the appellant. If he wanted to attack the lower Court's decree which clearly held

(6) A.I.R. 1926 Mad. 672=94 I.C. 535.

that Ex. 1 is a document intended to defeat and delay the creditors, he should have filed an appeal against it. This he failed to do and no adequate reason is assigned for this omission. The assertion that the appellant was content to allow the first Court's decree to stand as it was, though the plaintiff's suit ought to have been dismissed is not, having regard to the circumstances of the case, a sufficient explanation for not filing an appeal against the first Court's judgment. For these reasons I must reject the plea urged on behalf of the appellant with reference to O. 41, R. 33.

Now coming to ground No. 10 the District Judge has held that it is obligatory on the part of the respondent, that is the plaintiff, to pay the appellant only the amount including interest which was due to the mortgagee under Ex. 2 and that it is not necessary that he should pay the various other payments that have been made by the appellant on behalf of Ramakrishna Naicken. Mr. Krishnaswami Iyer argued that the learned District Judge should have held that the respondent should pay him the other amounts also or at least the amount of Rs. 3,250 paid by him to release the property purchased by the respondent from attachment in execution of O. S. No. 449 of 1913 and O. S. No. 201 of 1914. He also argues that the calculation of the District Judge with respect to the amount due on the mortgage is wrong. This latter objection is not covered by ground No. 10 and further, I find from the memoranda filed in the lower Court by the respondent's pleader that the calculation is correct. The only question therefore is whether the District Judge should have allowed in his favour payments amounting to Rs. 6,470 made by the appellant in discharge of Ramakrishna Naicken's various debts.

It has been held in a series of decisions in this Court : see *Viswanatha Reddi* v. *Raja Venkata Reddi* (7), *S. A. .No* 979 and 1449 *of* 1925 and *Subroya Goundan* v. *Perumal Chettiar* (8), that when a transfer of immovable property is set aside, on the ground that it was intended to defeat and delay the creditors, the transferee is entitled to get credit only for the mortgage debt binding on the property that he may have discharged as part of the consideration for the document and not for the money debts of the transferor discharged by him. In this case, as already observed, the mortgage amount due under Ex. 2 has been allowed in favour of the appellant. Following the decisions which I have just referred to, I hold that the learned District Judge was right in disallowing the various other amounts claimed by him. With respect to the sum of Rs. 3,250 a special argument has been advanced. It was argued that this amount should be treated separately because it was paid to release the suit property from the existing attachment. An attachment does not create any charge on the property and therefore there is no justification in according to this amount the same consideration that was given to the amount under Ex. 3, and further, the payment of this amount is not described as one of the considerations in Ex. 1.

It is next argued that the learned District Judge should have allowed interest on the mortgage amount, Rs. 6,113-8-0 found due to the appellant from 14th December 1914, the date of Ex. 1 up to 30th December 1917, the date of the symbolical delivery of possession to the plaintiff, and reliance is placed in support of this contention on *Pichaikonar* v. *Narasimha Rama Iyer* (4) I do not think that the general principle laid down in this decision can be applied to the present case having regard to the terms of Ex. 1. Under it, it is assumed that the mortgage debt under Ex. 2 has been discharged by that time. The appellant is therefore entitled to get only the amount of the mortgage and the interest up to that date. If he is allowed interest up to 30th December 1917 it will involve the assumption that the mortgage remained undischarged up till that date which will be contrary to the terms of Ex. 1. I think it is on this basis that the lower Courts have proceeded in finding what is the amount due to the appellant with respect to the discharge of Ex. 2. Having regard to the facts of this case, I would hold that the lower Court was not wrong in not awarding interest in favour of the appellant on the amount found due to him under the mortgage Ex. 2.

No other points were argued before me in connexion with this second appeal. For the reasons given above, this second appeal is dismissed with costs.

(7) A.I.R. 1927 Mad. 278=99 I.C. 709.
(8) [1918] 43 I.C. 956.

S. A. No. 536 *of* 1927.—The plaintiff is the appellant. This second appeal is connected with the other second appeal just disposed of, both arising out of the same original suit filed by the plaintiff, i. e. O. S. No. 27 of 1920. The facts of the case have been mentioned in the judgment in the other S. A. No. 1657 of 1927.

The questions for decision in this second appeal are simple ones and relate to "costs" "interest" and "mesne profits" awarded by the lower Court. The lower appellate Court awarded proportionate costs to the appellant since he was only "part successful" in the appeal. It is argued that he should have been awarded a sum of Rs. 444-11-0 by way of additional costs. This sum is calculated apparently with reference to the amount of the mortgage Ex. 2 discharged by defendant 1. It must be noticed that this sum was also included in the appeal filed by the plaintiff, the present appellant, to the lower appellate Court. It is argued that if an endorsement by the mortgagee regarding the discharge of the mortgage had been filed in the first Court, this sum would not have been included in the appeal. I have no doubt that all these considerations must have been present in the mind of the learned District Judge when he passed his order relating to costs. Courts have a very wide discretion in making orders as to costs. In this case the learned Judge has given his reason for ordering only proportionate costs for the appellant. I cannot find any ground for interfering with the order as to costs made by him. In the first Court the learned Judge did not make any order as to costs "considering the circumstances of the case." It is argued that the plaintiff should have been awarded his costs in the first Court. What I have said already regarding the order of costs made by the District Judge applies in this case also.

The next argument relates to the award of interest at 15 per cent for the amount due under the mortgage. It is argued that the appellate Court should have decreed interest only at the primary rate, of 14 annas per mensem and not at the rate of 15 per cent. Under the document, Ex. 2, the interest at 15 per cent becomes payable if the principal is not paid in five years. When the amount was not paid within the stipulated time the condition for the enforcement of the 15 per cent interest came into existence and I think the lower Court was right in awarding interest at that rate. I do not consider the rate to be penal.

It is then argued that interest should have been calculated not on Rs. 6,113-8-0 found due under the mortgage together with interest, but only on the principal sum of Rs. 5,000. Having regard to the fact that interest was not paid at the end of each year, I think on a proper construction of the terms of the document the decision of the learned Judge that interest should be calculated on Rs.6,113-8-0 cannot be said to be wrong.

The next question to be dealt with relates to the rate of the mesne profits allowed by the lower Court. Both the Courts have come to the same conclusion regarding the rate. This is a pure question of fact. It is argued that interest on mesne profits should have been allowed in favour of the appellant and that the lower Court was wrong in not allowing it having regard to S. 2 (12), Civil P. C. No doubt, ordinarily the appellant would be entitled to interest on mesne profits but such interest may be disallowed on special grounds. In this case (see para. 6 of his judgment) the learned Judge has given sufficient reasons to show why the appellant should not be given such interest and I cannot therefore interfere with his order.

No other points were argued before me in this second appeal. In the result, this second appeal fails and is dismissed with costs.

P.R.S./V.S. *Appeals dismissed.*

A. I. R. 1931 Madras 520

MADHAVAN NAIR, J.

(*Appu L. Rm.*) *Lakshmanan Chetti* and *another*—Appellants.

v.

Union Board of Devakottai—Respondent.

Civil Revn. Petn. No. 1207 of 1927, and Second Appeal No. 2009 of 1927, Decided on 4th February 1931, against decree of Sub-Judge, Devakottai, in Appeal Suit No. 36 of 1926.

Madras Local Boards Act (1920), S. 225—S. 225 applies only to suits for compensation and damages.

Section 225 applies only to suits for compensation and for damages.

A suit for a refund of a professional tax that was illegally levied cannot be described as a suit

for compensation and for damages and it cannot therefore be said that it is not maintainable for want of notice prescribed under S. 225: *A. I. R* 1930 *All* 365, *not Foll.*; 16 *Mad.* 296; 16 *Mad.* 317; 16 *Mad.* 474; 32 *Mad.* 371, *Rel. on.*; *A. I. R.* 1926 *Mad.* 235; 28 *I. C.* 45; *A.I.R.* 1926 *Mad.* 152, *Ref.*; *A. I. R.* 1929 *Mad.* 409, *Expl.*; *A. I. R.* 1927 *P. C.* 176, *Expl.* and *Dist.*

[P 523 C 1]

M. S. Vaidyanatha Iyer — for Petitioner.

K. Bhashyam Iyengar — for Respondent.

Judgment.—The plaintiff is the petitioner. This civil revision petition arises out of a suit instituted by the plaintiff against the defendant, the Union Board of Devakottai, .for a declaration that the Board is not entitled to levy professional tax from him for the year 1924-1925, that the assessment and the collection thereof are illegal and for the recovery of Rs. 100 paid by him with interest from the date of collection. The defendant amongst other things contended that the suit is not maintainable as no notice as required under S. 225, Local Boards Act, 14 of 1920 was given by the plaintiff before the suit. The petitioner's contention with reference to this objection regarding the maintainability of the suit was twofold: (1) that the present suit does not fall within the scope of the section inasmuch as the section contemplates only suits for compensation and damages; and (2) that even if notice is required he has complied with this requirement as he had sent Ex. A to the President of the Union Board. Ex. A is described as an appeal petition to the President relating to profession tax. In the cover the sender is described as the petitioner in respect of the provision tax. The petition ends with the sentence.

"I shall wait for one month and on the strength of this very registered petition I shall file a suit in the Local District Munsif's Court.',

Exhibit A was taken by the Union Board as an appeal preferred against the assessment made by the President.

The two points for decision arising from these contentions are: (1) whether a notice under S. 225, Madras Act 14 of 1920 is necessary in this case and (2) if it is necessary, whether Ex. A would constitute a proper and valid notice under the section. On both these points both the lower Courts decided against the petitioner. In the present civil revision petition the validity of the decisions of the lower Courts on both the points is questioned by the appellant.

Section 225 sub Cl. 1. Madras Local Boards Act 14 of 1920, enacts that "no action shall be brought against any Local Board, or against any member or servant of such Board, or against any person acting under the directions of such Board or of a member of such Board, on account of any act done or purporting to be done in pursuance or execution or intended execution of this Act, in respect of any alleged neglect or default in the execution of this Act, until the expiration of two months next after notice in writing shall have been delivered or left either at the office of the Local Board or at the place of abode of such member or servant or of such person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place and abode of the intended plaintiff; and unless such notice be proved to have been so delivered or left, the Court shall find for the defendant."

It is contended on behalf of the appellant that this section contemplates only suits for compensation and for damages against the Local Board and as the appellant's suit which is one for refund of profession tax illegally levied is not a suit for compensation and damages at all, that S. 225 does not apply to this case, and that therefore the notice required under the section is not necessary. In support of this argument reliance is placed mainly on three decisions of this Court in *Syed Ameer Sahib* v. *Venkatarama* (1), *President of Taluk Board, Sivaganga* v. *Narayan* (2), *Srinivasa* v. *Rathna Sabhapathi* (3) and *Govinda Pillai* v. *Taluk Board, Kumbakonam* (4). These decisions are no doubt under the old Local Boards Act and the old Madras District Municipalities Act; but a comparative study of the scope of the corresponding sections of the old and the present Local Boards Act and of the old District Municipalities Act, i. e., S. 156, Act 5 of 1884, S. 225, Act 14 of 1920 and S. 261, Act 4 of 1884 will show that the appellant's contention is well founded. S. 156, Local Boards Act 5 of 1884 (corresponding to S. 225 of the present Local Boards Act) on which were based the two decisions in *Syed Ameer Sahib* v. *Venkatarama* (1) and *President of Taluk Board, Sivaganga* v. *Narayan* (2) so far as it is irrelevant for the present purpose is as follows:

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(1) [1893] 16 Mad. 296.
(2) [1893] 16 Mad. 317=3 M. L. J. 12.
(3) [1893] 16 Mad. 474=3 M. L. J. 124.
(4) [1909] 32 Mad. 371=4 I. C. 32.

"No action shall be brought against any Local Board or panchayat or against any member or servant of such Board or panchayat or against any person acting under the directions of such Local Board or panchayat or of a member or servant of such Board or panchayat, on account of any act done, or purporting to be done, in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act, until the expiration of one month next after notice in writing shall have been delivered or left either at the office of the Local Board or panchayat or at the place of abode of such member or servant or of such person, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed and the name and place of abode of the intended plaintiff; and unless such notice be proved to have been so delivered or left, the Court shall find for the defendant. . . . ."

In *Syed Ameer Sahib* v. *Venkatarama*(7) it was held that this section is only applicable to suits for compensation claimed for wrongful acts committed under the colour of the Act and was therefore not applicable to the suit in question which was one for ejectment brought on the ground that the land upon which the defendant had entered belonged to the plaintiff. In *President of Taluk Board, Sivaganga* v. *Narayan* (2) it was held that the cases contemplated in S. 156 are suits for compensation and for damages and the principle is to allow public bodies time for tender of amends to the parties to avoid litigation. The latter observation regarding the tender of amends related to a provision embodied in the last sentence of that section which enacted that

"if the person to whom such notice of action is given shall before action brought tender sufficient amends to the plaintiff such plaintiff shall not recover more than the amount so tendered."

A similar provision is enacted also in Cl. 2, S. 225 of the present Act. In the case in question the learned Judges held that the principle of S. 156 cannot apply:

"When the object of the suit is to obtain a declaration of title to immovable property and for an injunction to restrain interference with immovable property."

The decision in *Srinivasa* v. *Rathna Sabapathi* (3) was under S. 261, District Municipalities Act (4 of 1884) which corresponded generally with the necessary modifications to S. 156, Local Boards Act (5 of 1884) in essential particulars. In this case it was held that

"the cases contemplated under S. 261 are suits for compensation and for damages, and the principle is to allow public bodies time for tender of amends to the parties so as to avoid litigation."

And reference was made to *President, Taluk Board, Sivaganga* v. *Narayan* (2) already noticed and the cases quoted therein. These decisions would show that according to the law as it then stood, S. 156, Local Boards Act, and the similar provision contained in S. 261, District Municipalities Act contemplated only suits for compensation and for damages. This position was made clear by the subsequent amendments introduced into the two Acts. The Local Boards Act (5 of 1884) was amended by Act 6 of 1900 which split up the section into four sub clauses and added after the words "explicitly stating the cause of action" in the first clause the words "the nature and relief sought, the amount of compensation claimed." The other amendments need not be noticed. S. 261, District Municipalities Act (4 of 1884), had also by this time been amended in a similar way. The decision in *Govinda Pillai* v. *Taluk Baord, Kumbakonam* (4), which is that of a Full Bench, is under the amended S. 156 (1), Madras Local Boards Act of 1884.

Under that decision it was held that the amended section does not apply to suits for an injunction and the notice described therein is not necessary in the case of such suits. In support of their decision the learned Judges relied on the three decisions in 16 *Madras* already referred to and the amendment of S. 156, which introduced in it the words "the nature of the relief sought, the amount of compensation claimed." It is clear that in amending the Acts by introducing these words, the legislature acted upon the decisions in 16 *Madras* which even without the amendment, held that Ss. 156 and 261 would apply only to suits for compensation and for damages. S. 225, Local Boards Act (14 of 1920), the section which applies to the present suit, so far as the present point is concerned corresponds to the amended S. 156, of the old Local Boards Act, and enacts in similar language the same provisions which are contained in that section. It may well be said therefore as contended for by the petitioner's learned advocate that the Full Bench decision in *Govinda Pillai* v. *Taluk Baord, Kumbakonam* (4), may be used as an authority for interpreting the scope of S. 225. S. 261, of the old District Municipalities Act is also similar to S. 225 of the pre-

sent Local Boards Act, though that section has been thoroughly recast in the present District Municipalities Act. It appears to me that S. 225 of the present Local Boards Act, interpreted in the light of these decisions of which one is a Full Bench decision under the Local Boards Act, shows clearly that that, section would apply only to suits for compensation and for damages. These decisions were followed by Phillips, J., in *Municipal Council, Cochin* v. *Bavu Devussi, A. I. R.* 1926 *Mad.* 235. The petitioner has also relied on the decisions in *Municipal Council of Kumbakonam* v. *Veeraperuma Padayachi* (5), and *Krishna Jute and Cotton Mills Co. Ltd.* v. *Municipal Council, Vizianagaram* (6), in support of his contention. I do not think it is necessary to discuss these cases as in my opinion the cases already discussed afford abundant authority in support of his contention. It is clear that the present suit which is for refund of profession tax that was illegally levied cannot be described as a suit for compensation and for damages, and therefore it cannot be held on the authorities mentioned that it is not maintainable for want of notice prescribed under S. 225.

On behalf of the respondent Mr. Bhashyam Ayyangar, argued that having regard to the decisions of this Court in *Municipal Council, Dindigul* v. *Bombay Co. Ltd.* (7) and of the Privy Council, *Bhaghchand Dagadusa* v. *Secy. of State* (8) it can no longer be maintained that the proposition of law laid down in the cases examined above to the effect that Ss. 156 and 156 (1) of the old Local Boards Act would apply only to suits for compensation and for damages is correct and that having regard to the comprehensive nature of the words used in S. 225 it should be held that the section is applicable to all kinds of suits instituted against the Local Board whatever be their nature. I think this contention cannot be accepted. In *Municipal Council, Dindigul* v. *Bombay Co. Ltd.* (7), to which I was a party it was held that:

"a suit by a company for the recovery of a sum wrongfully collected by a Municipality under S. 92 is essentially an equitable section for "money had and received" and not a suit for "damages and compensation", and the bar of limitation prescribed by S. 350, Cl. 2 of the Act, will not apply to such an action."

This decision turned upon the scope of S. 350, District Municipalities Act, which in Cl, 1 stated:

"No suit for damages or compensation shall be instituted against the Municipal Council. . . . ."

And we had to consider whether the suit in that case could be described as a suit for damages or compensation. The words of Cl. 1, S. 350, are totally different from the words of S. 225, which we have to consider here, and I fail to see how the decision in that case is in any way inconsistent with the decisions I have examined above. In the course of my judgment I contrasted the wording of S. 261 of the old District Municipalities Act 4 of 1884, with the wording of S. 350, and pointed out that "all descriptions of actions as under the English law" would be included within the scope of S. 261 of the old Act. This observation is relied on to show that according to this view, the opinion in the earlier decision that that section is confined only to suits for compensation and damages should be held to be incorrect. I do not think that this conclusion follows from my observation. In making this observation I was only pointing out that S. 350 of the new District Municipalities Act (5 of 1920), having regard to its wording was not so comprehensive in its scope as S. 261 of the old Act, which I think is perfectly correct; and that was all. I was not considering the question as to what kinds of suits will be included within the words "No action shall be brought, etc." used in S. 261 of the old Act. In fact, none of the cases now brought to my notice on behalf of the appellant was cited before us. In my opinion, the decision in *Municipal Council, Dindigul* v. *Bombay Co. Ltd.* (7) which as I have already observed, is a decision under S. 350 of the present District Municipalities Act has hardly anything to do with the point which I have to decide in this case. The decision in *Bhagchand Dagdusa* v. *Secy. of State* (8) deals with S. 80, Civil P. C., which states that:

"no suit shall be instituted against the Secretary of State for India in Council or against any officer for any act purporting to be done by such officer in his official capacity until

(5) [1915] 28 I. C. 45.
(6) A. I. R. 1926 Mad. 152=91 I. C. 297.
(7) A. I. R. 1929 Mad. 409=120 I. C. 867=52 Mad. 207.
(8) A. I. R. 1927 P. C. 176=104 I. C. 257=54 I. A. 338=51 Bom. 725 (P. C.).

the expiration of two months next after notice in writing given in the manner provided by the section."

Their Lordships held that the section applies to all forms of suits and whatever the relief sought including a suit for injunction. Though it may be said that there is a general simliarity between the wording of S. 80, Civil P. C., and that of Cl. 1, S. 225, it has to be observed—and this is a very important circumstance—that the words "the nature of the relief sought, the amount of compensation, etc.," which were introduced by the amendment in S. 156, Act 4 of 1884, after the words "explicitly stating the cause of action" do not find a place in S. 80, Civil P. C. Even without these new words the learned Judges in *Syed Ameer Sahib* v. *Vinkatarama* (1) and *President Taluk Board, Sivaganga* v. *Narayan* (2), were prepared te hold that S. 156, Act 5 of 1884, as it then stood was applicable only to suits for compensation and for damages. Apparently, as already observed this view of the learned Judges was adopted by the legislature and the amendment was introduced so that there may not be any doubt whatsoever about the scope of the section. It may also be pointed out that the provision regarding the tender of amends in S. 156, which finds a place also in S. 225, on which the learned Judges of this Court relied in support of their interpretation of S. 156 [see *President, Taluk Board, Sivaganga* v. *Narayan* (2)] is absent in S. 80, Civil P. C. Having regard to these important considerations which make S. 225, Act 14 of 1920 materially different in its scope from S. 80, Civil P. C. I do not think it is right to rely on the decision in *Bhagchand Dagdusa* v. *Secy. of State* (8), in considering what classes of suits are included within the scope of S. 225. My attention was drawn by Mr. Bhashyam Ayyangar to the fact that in *Bhagchand Dagdusa* v. *Secy. of State* (8) it is pointed out by their Lordships of the Privy Council that the authority of the decisions in *Flower* v. *Local Board of Low Leyton* (9) and *Attorney-General* v. *Hackney Local Board* (10) is no longer binding, having regard to the subsequent development of the law in England, and so it was argued that these being decisions on which the learned Judges relied in support of their interpretation of the scope of S. 156, [see *Govinda Pillai* v. *Taluk Board, Kumbakonam* (4),] it should be held that that decision and the other earlier decisions are no lcnger good law.

If our legislature in understanding S. 156 accepted the view of the law enunciated in those two cases and in order, to make the position clear, amended the section by introducing suitable words, then there can be no force in the argument now urged, since obviously we have to give effect to the enactment of our legislature so long as it remains unamended with respect to this point. The two English cases referred to may have lost their authority having regard to the subsequent amendments in the wording of the relevant English Acts; but on the point under consideration S. 225 remains the same as S. 156 of the old Act, and in tbis view the observations of their Lordships of the Privy Council in *Bhagchand Dagdusa* v. *Secy. of State* (8) regarding the decisions in *Flower* v. *Local Board of Low Leyton* (9) and *Attorney-General* v. *Hackney Local Board* (10) do not in any way affect the present question. In my opinion neither the decision in *Municipal Council, Dindigul* v. *Bombay Co. Ltd.* (7) nor the decision in *Bhanchand Dagdusa* v. *Secy. of State* (8) can be understood as throwing doubts on the correctness of the prior decisions of this Court in *Syed Ameer Sahib* v. *Venkatarama* (1), *President, Taluk Board, Sivaganga* v. *Narayan* (2), *Srinivasa* v. *Rathnasabhapati* (3) and *Govinda Pillai* v. *Taluk Board Kumbakonam* (4).

Another branch of the learned advocate's argument was that the words of S. 225 are of sufficient amplitude to cover cases of the present description and that the words "the amount of compensation claimed" do not in any way narrow down the meaning of the words the "cause of action" or "the nature of the relief sought" appearing in the section. This argument is supported by a decision of the Allahabad High Court in *Munir Khan* v. *Municipal Board, Allahabad* (11) about the scope of S. 326, U. P. Municipalities Act, (Act 2 of 1916), which, except as regards Cl. (4), in sub-

(9) [1877] 5 Ch. D. 347=46 L. J. Ch. 621=36 L. T. 760=25 W. R. 545.

(10) [1876] 20 Eq. 626=44 L. J. Ch. 545=33 L. T. 244.

(11) A. I. R. 1930 All. 365=122 I. C. 742.

stantial particulars agrees in its wording with S. 225, Madras Local Boards Act. The wording of Cls. 1 and 2 of the two sections are similar in all material particulars: (see the United Provinces Act 2 of 1916.) It was held in the Allahabad case

"that the words "the cause of action" occurring in Cls. 1 and 2, are of sufficient amplitude to cover cases involving the infraction of an absolute right or of a right arising out of a contract and also of a right to compensation flowing from tort and that the words "the amount of compensation claimed" do not narrow down the denotation of either "the cause of action" or "the nature of the relief sought," to mere suits for damages founded upon tort and evidently mean no more than this: that where the plaintiff sues he must specify the amount of compensation."

This decision no doubt supports the respondent's argument, but none of the cases of this Court or the English cases relied on in the decision of this Court is referred to in the judgment; and further, what is more important we know nothing as regards the history of that enactment. Having regard to the decisions of our Court, which are all one way, I cannot follow the decision of the Allahabad High Court.

For the above reasons, I must hold that the decision of the lower Court that the suit is not maintainable for want of notice under S. 225 cannot be upheld.

Having regard to my view, that no notice is necessary in this case, the further question whether, if notice is necessary, Ex. A would be a sufficient notice does not arise for consideration though I am inclined to hold that it amounts to a sufficient notice within the meaning of the section.

In the result the civil revision petition is allowed with costs throughout and the case is remanded to the lower Court for disposal on the other issues. The Court-fee in the lower appellate Court will be refunded.

S. A. 2009 *of* 1927. No second appeal lies in this case. The second appeal is dismissed. No costs.

P.R.S./B.V. *Revision allowed.*

S. A. 2009 *of* 1927 *dismissed.*

A. I. R. 1931 Madras 525

SUNDARAM CHETTY, J.

M. S. Gopalaswami Chettiar—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

Second Appeals Nos. 1189 to 1191 of 1927, Decided on 4th November 1930, against decrees of Dist. Judge, Salem.

(a) Madras Proprietary Estates Village Service Act (1894), S. 27—S. 27 is not ultra vires of local legislature — Levy of village service cess is not enhancement of peishkush fixed at time of Permanent Settlement.

The levy of the village cess under S. 27, Cl. 2 of the Act is virtually a demand of the amount deducted in his favour when the purpose for which that deduction was made no longer exists. The mere fact that this cess is made payable along with the present permanent assessment cannot amount to an enhancement of the amount of peishkush arrived at as the assessment properly due from the estate. It was by reason of the proprietor bearing the cost of the village establishments that an amount less than the peishkush fixed as otherwise due from the estate came to be payable by him and it stands to reason that when he is relieved of the obligation he can no longer have the benefit of that deduction. The withdrawal of that deduction made in the amount fixed as the proper peishkush due on the estate when the consideration for such deduction has ceased to exist cannot amount to an enhancement of the peishkush contrary to the contract or the statutory provision referred to above. Therefore S. 27 of the Act is not utra vires of the local legislature: *A. I. R.* 1929 *Mad.* 746; 28 *Cal.* 487; 34 *Cal.* 740, *Ref.*

[P 527 C 1]

(b) Madras Proprietary Estates Village Service Act (1894), Ss. 17 and 27— Date of enfranchisement under S. 17 may coincide with date contemplated in S. 27.

Under S. 17 the Government may enfranchise village service inam by imposition of quit rent and such enfrachisement will take effect from such date as the Government may notify. It may be that the date notified by the Government as the date from which the enfranchisement shall take effect under S. 17 is the date contemplated in S. 27, on or after which it shall be lawful for the Government to require the proprietor to pay the village service cess.

[P 528 C 2]

K. V. Sesha Ayyangar—for Appellant.

Government Pleader—for Respondent.

Judgment. — These are connected appeals preferred by the plaintiff and arise out of three suits filed by him against the Secretary of State for India in Council for a declaration that the collection of certain amounts from him by the defendant under S. 27, Cl. 2, Madras Proprietary Estates Village Service Act 2

of 1894 was ultra vires of the Madras legislature and for a refund of those amounts to him.

The plaintiff is the owner of three mittas in Salem District namely Karamanur Pavitram and Avatwadi. His contention is that the levy of the village service cess from him in respect of these mittas tantamounts to a breach of the contract concluded between the proprietors of permanently settled estates and the East India Company and contravenes the statutory provisions in the Permanent Settlement Regulation 25 of 1802, because the imposition of this tax or cess amounts to an enhancement of the peishkush already fixed. Another contention put forward by him is that the levy of the cess in question is illegal because the aforesaid Act 2 of 1884 had not been properly extended to his mittas before the collection of the amounts in question. A third objection raised is to the effect that the plaintiff's estates do not come within the purview of S. 27, Cl. 2 of the Act. He obtained a decree in his favour in each of these suits in the first Court. But on appeal, all the contentions raised by him have been negatived and his suits were dismissed with costs. In these second appeals the same contentions have been pressed for acceptance.

The first contention is whether the levy of the village service cess under S. 27, Cl. 2, Madras Act 2 of 1894 is really an enhancement of the peishkush fixed at the time of the Permanent Settlement so as to amount to a breach of the engagement entered into between the Government and the proprietor at the time of the Permanent Settlement, and if so whether S. 27 of the Act would be ultra vires of the local legislature. This question has been considered at some length by the learned District Judge in his able and well-reasoned judgment. The aforesaid Act was passed by the local legislature in order to make better provision for the appointment of the village officers in permanently settled estates and for their remuneration and for securing better supervision and control over them as the preamble would show. S. 27, Cl. 2 is to the effect that if in any estate the cost of village establishments was provided for by a deduction from the assets of an estate before its permanent assessment was fixed, it shall be lawful for the Government to require the proprietor to pay along with the present permanent assessment a sum equal to that by which it would have been increased had no such deduction been made on account of the remuneration of the classes of village officers brought within the scope of this Act, and the proprietor shall no longer be liable for the payment of such classes of village officers. The question for consideration is whether the village service cess levied under the aforesaid clause really amounts to an enhancement of the peishkush amounting to a breach of contract or violation of the provision contained in S. 1, Regn. 25 of 1802.

That section no doubt contains a declaration that the amount of the peishkush so fixed shall never be liable to be increased under any circumstances. In the case of estates coming within the purview of S. 27. Cl. 2, what was done at the time of the Permanent Settlement is this: on a due calculation of the assets of an estate according to the recognized principles, the permanent jamda payable by the proprietor of that estate as assessment due to the Government was fixed. One of the obligations of the proprietor was the maintenance of the village establishments in his estate the cost of which he had to meet. In consideration of his fulfilling that obligation a deduction was made from the assets of the estate on which the peishkush was fixed, with the result that a proportionate reduction in the peishkush payable by him was made and the balance was taken to be the permanent assessment due from him. If that obligation had not been undertaken by him the amount of peishkush fixed as the legitimate permanent assessment for his estate would have become payable by him without any reduction whatever. If by means of this Act the proprietor is made to pay that portion of the peishkush which was so deducted, without being relieved of the obligation of maintaining and paying for the village establishments, it can very well be contended that an enhancement in the permanent assessment has been made resulting in a breach of the contract and violation of the declaration made in S. 1, Regn. 25 of 1802.

Such is not the case at all here. If what was deducted from the amount fixed as the proper peishkush due from the estate may be considered to be money left in the hands of the proprietor for the purpose of meeting the cost of the village establishments, the levy of the village service cess under S. 27, Cl. 2 of the Act, is virtually a demand of the amount deducted in his favour when the purpose for which that deduction was made no longer exists. The mere fact that this cess is made payable along with the present permanent assessment cannot amount to an enhancement of the amount of peishkush arrived at as the assessment properly due from the estate. It was by reason of the proprietor bearing the cost of the village establishments that an amount less than the peishkush fixed as otherwise due from the estate came to be payable by him and it stands to reason that, when he is relieved of the obligation, he can no longer have the benefit of that deduction. The withdrawal of that deduction made in the amount fixed as the proper peishkush due on the estate, when the consideration for such deduction has ceased to exist, cannot amount to an enhancement of the peishkush contrary to the contract or the statutory provision referred to above. No attempt has been made on the part of the Government Pleader to justify the village service cess in question as a new tax which the Government may impose in exercise of its sovereign powers. His contention is that this is not an enhancement of the peishkush amounting to a breach of contarct or violation of any statutory provision. It is rightly observed by the learned District Judge that the proprietor could have been made liable for an amount of peishkush higher than the present assessment at the time of the Permanent Settlement, had he not accepted the obligation of maintaining and paying the village establishment himself. I am therefore clearly of opinion that S. 27, Madras Act 2 of 1894 is not ultra vires of the local legislature.

The next contention is, that the necessary prerequisites for the levy of the cess in question have not been complied with and therefore the levy is illegal. The principle enunciated in the decisions relied on by the learned advocate for the appellant, namely, *Municipal Council, Cuddapah* v. *M. S. M. Ry. Co. Ltd.* (1), *Secy. of State* v. *Neitya Gopal Adhikary* (2) and *Rameswar Singh* v. *Secy. of State* (3), is to the effect that taxing enactments should be strictly construed and the imposition of any tax would not be legal unless the conditions precedent to the imposition of that tax are strictly complied with. There is no question of this principle applying to the present case. It has to be seen whether the prerequisites or conditions precedent, if any, have been sufficiently fulfilled or not. The learned District Judge has found that the requirements of the statute have been fully complied with. That finding is now challenged in these second appeals.

For this purpose, a reference to some of the sections in the Act, and also to the notifications exhibited in these suits, is necessary. S. 2 of the Act states that the Government may by notification extend this Act or any portion thereof to any estate within the Presidency of Madras, and to the office of any classes of village officers in such states, namely, (1) village accountants ; (2) heads of villages ; (3) village watchman or police officers. Thus it is clear that, before the levy of the village service cess under S. 27, Cl. 2 of the Act, the Government should have extended this Act to the estates in question by notification. Ex. 1 is the notification in the Ft. St. George Gazette dated 25th March 1919 which runs as follows :

"Under S. 2, Madras Proprietary Estates Village Service Act, 1894, His Excellency the Governor-in-Council hereby directs that Chs. 1, 2 and 5 of the said Act shall come into force from and after 1st October 1897 in the proprietary estates mentioned in the schedule hereto annexed in respect of ; (1) karnams; (2) monegars and shroffs and (3) thottis and tindekars who are hereby declared to come under the class of (1) village accountants ; (2) village headman and (3) village watchman or police officers respectively."

The plaintiff's three estates now in question have been included in the schedule attached to this notification. It is admitted that even the earlier notification dated 20th September 1897 for which this notification was substituted directed the extension of Chaps. 1, 2 and 5 of the Act to certain estates including

(1) A. I. R. 1929 Mad. 746=121 I. C. 839=52 Mad. 779.
(2) [1901] 28 Cal. 487.
(3) [1907] 34 Cal. 470=11 C. W. N. 356=5 C. L. J. 669.

the plaintiff's three estates now in question. But it is contended that, by reason of the partial extension of the Act by applying Chaps. 1, 2 and 5 alone to these estates, no levy of the cess contemplated in S. 27, Cl. 2 contained in Chap. 3 of the Act could be legally made. In answer to this, reliance is placed by the learned Government Pleader upon the notification filed as Ex. 11. It is G. O. No. 339 dated 10th August 1909 and runs as follows :

"Under S. 2, Madras Proprietary Estates Village Service Act 2 of 1894, His Excellency the Governor-General in Council is hereby pleased to direct that the said Act shall come into force from and after 1st October 1909 in all the proprietary estates of the Presidency as defined in S. 4 of the Act to which the Act in its entirety has not hitherto been extended in respect of the village officers appointed under the said Act."

To my mind, it should be deemed that the entire Act has been extended to the plaintiff's estates now in question from 1st October 1909 by reason of this general and comprehensive notification. When the whole Act has been so extended, Chaps 3 and 4 also should be deemed to have been applied to these estates. In this view the contention raised on the appellant's side must be discountenanced. However a strenuous attempt was made by the learned advocate for the appellant to show that the extension of the entire Act to all the estates in the Presidency by means of this notification should be considered to have been made only in respect of officers appointed under the said Act. If this construction be sound, the result would be rather a startling one. If the extension of the Act is only in respect of those officers who have been appointed under the Act, then a necessity will arise for a further extension of the Act by means of fresh notifications from time to time as vacancies arise in the estates on account of death, resignation or dismissal of those officers in respect of whom along the notification Ex. 11 was extended. Further comment is unnecessary to demonstrate the untenability of the construction sought to be put upon the notification by the appellant's advocate. What the notification states is that to all the estates in the Presidency to which the Act has not been hitherto fully extended in respect of officers appointed under the Act, the whole of this Act is now extended by means of this notification. It is argued that, if the Notification Ex. 11 should be understood in this sense, there would be no need for issuing the subsequent notification dated 19th March 1919 (Ex. 1). But it must be remembered that the notification Ex. 1 had to be issued for quite a different purpose. S. 2 of the Act has specified three classes of village officers. It provides that, in case of doubt whether a village officer in any estate falls under any of those classes, the Government shall have power to decide whether such village officer comes under any of the above classes and if so, under which of them. In exercise of that power the Government issued a notification Ex. 1 in 1919 declaring that karnams, monegars, shroffs thottis and tindekars in certain estates come under the classes of village officers specified in S. 2 of the Act. The issue of the Notification, Ex. 1, does not in any way militate against the construction placed by me as to the meaning and scope of Ex. 11.

Another argument put forward by the learned advocate for the appellant is that the requisition for payment of the village service cess should be made by the Government under S. 27 of the Act on or after the date notified under the provision of Ch. 3, and therefore the levy of the cess in question would be illegal in the absence of the issue of such a notification. As Ch. 3 now stands it consists only of two sections, namley 17 and 27, the other sections having been repealed by the Amending Act 3 of 1914. Under S. 17 the Government may enfranchise village service inams by imposition of quit rent and such enfranchisement will take effect from such date as the Government may notify. It may be that the date notified by the Government at the date from which the enfranchisement shall take effect under S. 17 is the date contemplated in S. 27, on or after which it shall be lawful for the Government to require the proprietor to pay the village service cess. A perusal of Exs. A, B and 13 would show that in respect of Karamanur and Avatvadi the enfranchisement of the service inams was notified under S. 17 and the date on which the revised system of remunerating the village establishments was introduced into each of them was also notified in 1915. Similarly in respect of Pavitram there were

notifications to the same effect as would appear from Ex. 12 and Ex. 1-A. There is no doubt that, before the levy of the village service cess from the plaintiff which is now the subject matter of these suits, there had been an extension of the entire Act to these estates and also the publication of the notification as required by Ss. 17 and 27 of the Act. I find that the conditions precedent or the necessary pre-requisites have been fulfilled by the Government and the second contention put forward by the appellant should also be overruled.

Lastly, it is contended that the estates in question should be proved to have come within the purview of S. 27, Cl. 2 of the Act. As to this there is ample proof supplied by the documentary evidence which has been carefully considered by the learned District Judge in para. 5 of his judgment. It is unnecessary for me to refer to those documents again, and suffice it to say that I am in complete agreement with the view taken by the District Judge that the plaintiff's estate do come within the purview of S. 27, Cl. 2. The extract made by the District Judge from the Salem District Manual by Mr. Le Fanu and quoted in para. 5 of his judgment clearly shows that the peishkush or permanent assessment in respect of these estates was the balance struck after making a deduction on account of the pay of the village servants which the proprietor had to meet. The figures appearing in Ex. 5-A, Ex. 6-A and Ex. 8-A appear to have been adopted by the Special Deputy Collector for assessing the amount of the village service cess to which the plaintiff would be liable. There is therefore no reason to hold that the plaintiff is now made to pay more than what was deducted from the peishkush on account of the obligation of maintaining and paying the village officers. For the foregoing reasons, I must hold that the levy of the vlllage service cess in question is legal and the plaintiff cannot therefore claim a refund of the same.

As the plaintiff's claim fails on the merits, it is unnecessary to consider the plea of limitation with respect to the amounts levied for Faslis 1328 and 1329. It seems to me that in view of the allegations made in the plaint, those payments can reasonably be deemed to have been made by the plaintiff under protest. If so the proper article applicable to the present suits would be Art. 16, Lim. Act which provides a period of one year. The claim as regards the refund of those amounts would therefore be barred.

In the result these second appeals fail and are dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

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* A. I. R. 1931 Madras 529

MADHAVAN NAIR, J.

Sundara Nadan—Defendant —Appellant.

v.

Annammal and *others* —Plaintiffs—Respondents.

Second Appeal No. 180 of 1927, Decided on 21st January 1931, against decree of Sub-Judge, Tiruvarur, in A. S. No. 62 of 1925.

*** Minor — Alienation by guardian—Property of Christian minor by de facto guardian—Alienation is void.**

Where the property belonging to *P*, a Christian, and *P's* sister, is sold during the minority of *P* by one *S*, the husband of another sister of *P*, the alienation by such a de facto guardian is a void transaction and is not binding on *P*: 34 *All.* 213 (*P. C.*) ; *A. I. R.* 1918 *P. C.* 11 and *A. I. R.* 1928 *Mad.* 226, *Ref.* [P 531 C 1]

A. Ramaswami Iyengar—for Appellant.

E. Vinayak Rao—for Respondents.

Judgment.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff for partition and possession of the plaint property. The property belonged to the plaintiff and her sister, and during the minority of the plaintiff it was sold by one Sanjeevi Nadan, the husband of another sister of the plaintiff. The plaintiff's case is that the sale is not binding on her as Sanjeevi Nadan was not her guardian in law and that she is therefore entitled to recover possession of the property. The defendant, the purchaser of the property, contended that the sale is binding, that it was for a necessary and proper purpose, that the property was sold and that the plaintiff's suit is barred by limitation. The lower Court found that Sanjeevi Nadan, though a de facto guardian, was not the proper guardian of the plaintiff, that it was not proved that the plaintiff was benefited in any way by the sale of the property and that the suit was not barred by limitation. The finding of the learned Subordinate Judge that the plaintiff was not benefited by any portion of the money

paid by the defendant is a finding of fact and is binding on me in second appeal. So the only two questions remaining for consideration are whether the sale by the de facto guardian in this case is binding on the plaintiff and whether the suit is barred by limitation. The question of limitation would depend upon whether Sanjeevi Nadan for the purposes of the sale is to be considered as a proper guardian of the plaintiff or as only an unauthorized person interfering with the plaintiff's property ; for, if he can be considered to be a person entitled to deal with the minor's property, then Art. 44 would apply.

The plaintiff is an Indian Christian. It is argued on her behalf that under the personal law of the parties Sanjeevi Nadan is not her proper guardian and therefore the sale by him should be considered to be a sale by an unauthorized person. The argument is that for that reason the sale is an absolutely void transaction. Under the Hindu law it has been held in a series of cases that a sale by a de facto guardian on behalf of a minor is a voidable transaction and that Art. 44, Limitation Act would apply. That was also the position under the Mahomedan law till the Privy Council finally decided that sales by de facto guardians under the Mahomedan law are void transactions in *Mata Din* v. *Ahmad Ali* (1). It has now been finally held in the case of persons governed by the Mahomedan Law following this decision: see *Imambandi* v. *Mutsadi* (2), that sales by de facto guardians under the Mahomedan law are void transactions. There does not appear to be any decided case with reference to the point as to who the guardians of an Indian Christian would be. In Trevelyan on Minors Edn. 6, at p. 60, it is stated :

"Failing the father and mother, and their appointees, no person, however nearly related, is of right entitled to the custody of minors, who are neither Hindus nor Mahomedans, or the guardianship of their property."

Again at p. 167 it is stated :

"The law applicable to persons other than Hindus and Muhomedans does not permit guardians, other than those appointed by the Court, or having power given to them by the instrument appointing them, to sell or charge the immovable property of their wards."

If these extracts represent the correct state of the law applicable to communities other than Hindus and Mahomedans it must follow that in this case, the plaintiff being a Christian, the transaction in question should be held to be void.

Mr. Vinayaka Rao, on behalf of the respondent has drawn my attention to *Mata Din* v. *Ahmad Ali* (1) to show that even though it is a decision under the Mahomedan law, the observations of their Lordships are general and may well be relied upon in support of the contention that an alienation by a de facto guardian of an Indian Christian is also void like the alienation of a Mahomedan de facto guardian. The paragraph referred to is this:

"It is urged on behalf of the appellant that the elder brothers were de facto guardians of the respondent and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a "de facto" guardian. He may, by his de facto guardianship, assume important responsibilities in relation to the minor's property but he cannot thereby clothe himself with legal power to sell it."

The observations seem to be general, but they were made in connexion with a case in which the parties were Mahomedans. It may be doubtful whether, having regard to the facts of the case, those observations can be given an extended application. However, it must be noticed that Kumaraswami Sastri, J., in his Court in *Ramaswami* v. *Kasinatha*, *A. I. R.* 1928 *Mad.* 226, was inclined to apply these observations generally ; and he stated relying on the two Privy Council decisions in *Mata Din* v. *Ahmad Ali* (1) and *Imambandi's case* (2) that if the matter was res integra he would, on the observations of Lord Robson, be prepared to hold that even under the Hindu law alienations by de facto guardians are absolutely void ; but having regard to the trend of decisions under the Hindu law on the principle of stare decisis the learned Judge was not inclined to give an extended application to the observations of the Privy Council. If the observations of the learned Judges of the Privy Council can be understood as applicable to the case of alienations by de facto guardians, irrespective of the question whether the parties are Maho-

(1) [1912] 34 All. 218=15 C. C. 49 = 39 I. C. 49=13 I. C. 976 (P. C.).
(2) A. I. R. 1918 P. C. 11 =47 I. C. 513 = 45 I. A. 73=45 Cal. 878 (P. C.).

medans, Hindus or Christians, then, certainly these observations support the contention of the respondent. Having regard to the authorities I have referred to, I must uphold the decision of the lower Court that the alienation in this case is a void transaction and not binding on the plaintiff. If it is a void alienation, then, it is clear that Art. 44, Limitation Act, has no application, and as the plaintiff's suit has been brought within 12 years after the alienation, it is not barred by limitation. In the result the decision of the lower Court is right and this second appeal is dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

A. I. R. 1931 Madras 531

ANANTAKRISHNA AIYAR, J.

Municipal Council, Calicut—Defendant—Appellant.

v.

Palakkal Velayudha Menon—Plaintiff—Respondent.

Second Appeal No. 2462 of 1927, Decided on 2nd February 1931, against decree of Sub-Judge, South Malabar, in Appeal Suit No. 201 of 1927.

Civil P. C. (1908), O. 18, R. 18—Judges are entitled to make local inspection to understand evidence—But they cannot base findings of fact solely upon its result.

Judges, both of Courts of first instance and Courts of appeal, who have to appreciate evidence and understand its bearing properly, are entitled, in proper cases, to make local inspections with a view not only to save time with reference to the arguments in the case but also to enable them to follow intelligently and understand the evidence in the case. But at the same time it is not open to a Court either of first instance or of appeal to base the Court's findings of fact solely on the result of its local inspection, nor without giving opportunities to the parties to let in counter evidence and explain what is recorded as the result of the inspection. [P 532 C 1, 2]

K. Kuthi Krishna Menon—for Appellant.

D. A. Krishna Variar—for Respondent.

Judgment.—The plaintiff instituted the original suit for a perpetual injunction restraining the Municipal Council of Calicut from interfering with the thodu (channel) on the western side of the plaintiff's property.

The case of the plaintiff was that the channel was his and that he was entitled to do what he liked with the same, and that for the convenient enjoyment of his land which is on the east of the channel he (the plaintiff) constructed what has been described as a "gate" across the channel. The Municipal Council having by its proceedings dated 12th January 1924 passed a resolution prejudicial to the rights of the plaintiff in the lawful exercise of his legal ownership of the property, he instituted the original suit for the relief of injunction claimed by him. The case of the municipal council in para 3 of the written statement was that the footpath running north to south just to the west of the channel in question as well as the channel were public properties and as such under the control of the Municipality. The learned District Munsif who tried the suit framed two issues in the case; (1) whether the water channel in question belonged to the plaintiff and (2) whether the plaintiff is entitled to the injunction claimed. He held that the site of the channel B belonged to the plaintiff and, whether the path just to the west of the channel be regarded as a public street or a private street, he was of opinion that the channel in question should be taken to be the property of the municipality as part of the street. He accordingly dismissed the plaintiff's suit. On appeal preferred by the plaintiff the learned Subordinate Judge concurred with the finding arrived at by the trial Court on ths question of the ownership of the site covered by the channel BB. He however, was of opinion that the lane or the path just to the west of BB could not be held to be either a public or a private street. He reversed the decision of the trial Court and granted the injunction prayed for in the plaint. The defendant has accordingly preferred the present second appeal.

On behalf of the appellant the learned advocate argued that the lower appellate Court was not justified, in the circumstances, in recording any finding on the question whether the lane or the path to the west of BB was a public street or a private street within the definitions contained in the District Municipalities Act and that the way in which the lower appellate Court disposed of this part of the case was not satisfactory. On the other hand, the learned advocate for the plaintiff-respondent sought to support the decision of the lower appellate Court by drawing my attention to various

passages in its judgment where it is mentioned that the channel was really not a definite one and that the same was used by the plaintiff for his convenience only. As I propose to ask the lower appellate Court to frame a fresh issue on the question whether the lane or the path called A in the proceedings is a public street or a private street within the definition contained in the District Municipalities Act, I am anxious not to say anything which might in any way cause any embarrassment to the lower appellate Court in the ultimate discussion and decision of that question.

I think that, having regard to the pleadings in the case, the trial Court ought to have framed an issue on the questlon whether the path A is a public street or a private street. The lower appellate Court has, in my view, discussed that question without having an issue on that point raised specifically and without giving a proper opportunity to the parties to let in evidence on the question. As I said, I am anxious not to say anything on the merits of that question, and therefore I do not propose to go through the various passages, to which my attention was drawn by the learned advocates for the parties, in the judgment of the lower appellate Court. But I must make one observation. In the memorandum of grounds of second appeal, ground 9 reads as follows. "The learned Judge erred in making a local inspection". If it is intended to negative the jurisdiction of an appellate Court to make local inspection, then it is clearly untenable. Judges both of Courts of first instance and Courts of appeal, who have to appreciate evidence and understand its bearing properly, are entitled, in proper cases, to make local inspection with a view not only to save time with reference to the arguments in the case but also to enable them to follow intelligently, and understand the evidence in the case. vide O. 18, R. 18, Civil P. C. On the other hand, as I understood the argument of the learned advocate for the respondent, he laid great emphasis on certain observations occurring in the judgment of the lower appellate Court which seem to be based solely (it was said for the appellant) on the result of that Court's inspection of the locality in question. I must say that, though it is open to Courts who have to record findings on questions of fact, and though it may also be proper for the Court in proper cases to make local inspection with a view to understand and follow the evidence in the case and to appreciate it properly, I am clear that it is not open to a Court either of first instance or of appeal to base the Court's findings of fact solely on the result of its local inspection nor without giving opportunities to the parties to let in counter evidence and explain what is recorded as the result of the inspection. I am anxious to say that I do not understand the judgment of the lower appellate Court in the present case to be in any way solely based on the result of its inspection; but as both the learned advocates who argued the case before me made remarks on the subject of local inspection by Courts, I thought I should mention my opinion on the matter.

As I said, having regard to the pleadings in the case, I think the lower appellate Court should now be called upon to frame a distinct issue on the question whether the path A lying to the west of the channel in dispute BB is a public street or a private street within the definitions contained in the District Municipalities Act. The lower appellate Court will with reference to its decision on that issue, also consider whether the channel in question appertains to any such street and vests in the municipality, before finally deciding the rights of the parties. I allow the parties liberty to adduce fresh evidence on the above questions. It must be distinctly understood that the finding arrived at by both the lower Courts, viz., that the site of the channel BB belongs to the plaintiff, has been accepted by me, and that question is no longer available for discussion in the further hearing of this case. I reverse the decision of the lower appellate Court and remand the appeal for disposal, in the light of the observations contained in this judgment. Costs of this second appeal will abide and follow the result.

P.R.S./V.S. *Case remanded.*

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A. I. R. 1931 Madras 533

JACKSON, J.

Pethu Reddiar— Defendant — Petitioner.

v.

Chidambara Reddiar— Plaintiff—Respondent.

Civil Revn. Petn. No. 787 of 1930, Decided on 24th November 1930, against order of Dist. Munsif, Turaiyur, D/- 15th January 1930.

(a) Court-fees Act (1870), S. 17—Fresh court-fees must be paid for fresh cause of action.

If it is the law that for different causes of action different suits must be brought, that law must be upheld. If plaintiff wants the privilege of a fresh cause of action, he must pay a fresh court-fee. [P 534 C 1]

(b) Civil P. C., O. 6, R. 17—Cause of action foreign to original one cannot be tacked to suit.

A plaintiff cannot be allowed to amend the plaint by tacking on to a suit a cause of action which is foreign to the cause of action on which that suit is brought.

If the new cause of action is barred by limitation, to escape that bar by tacking is to offend a principle which the Courts have invariably maintained. If the new cause of action is not time barred, such tacking is a fraud on the revenue, since the only apparent reason for not bringing a second suit is to save the court-fee : 43 *I. C.* 560, *not Foll.* [P 533 C 2]

T. V. Muthu Krishna Ayyar—for Petitioner.

M. S. Vaidayanatha Ayyar—for Respondent.

Judgment.—Petitioner seeks to revise the order of the District Munsif of Turaiyur allowing plaintiff to amend the plaint in O. S. 627 of 1929.

Plaintiff sued as endorsee of a promissory note the note was alleged by defendant to be void as infringing the Paper Currency Act. Plaintiff then obtained an assignment of the original obligation, and applied to add that cause of action to his plaint. This was allowed, and hence the petition.

It is conceded by petitioner that if plaintiff were payee there would be no objection to his suing on the original obligation : cf. *Mian Baksh* v. *Bodhiya* (1). But it is contended that the endorsee has not the same privilege. On the other hand it is maintained that the endorsee is an assignee of the actionable claim, who can sue on the debt evidenced by the note. There is no absolutely direct authority; but in the light of *Muhammad Khumarali* v. *Ranga Rao* (2) and *Nataraja Naicken* v. *Ayyasami Pillai* (3) this plea is at least arguable; and if it is arguable there is no reason for this Court in revision excluding it from the plaint.

Therefore if the plaintiff were only seeking to amplify his original cause of action, no exception could be taken to the lower Court's order. The difficulty has arisen because he wishes to add a fresh cause of action which will only be useful to him, if it is found to be extraneous to the original cause of action. That is to say, if the original cause of action is found to include the right to sue on the debt itself, as though the endorsee ranks as payee, then the fresh cause of action is otiose and useless. If on the other hand, the original cause of action is found to be strictly confined to the note, and not in the case of an endorsee capable of extension so as to include the debt then the fresh cause of action is something entirely new. The question will then arise. can a plaintiff tack on to a suit, a cause of action which is foreign to the cause of action on which that suit is brought. I think it must be held that he cannot. If the new cause of action is barred by limitation, to escape that bar by tacking is to offend a principle which the Courts have invariably maintained. If the new cause of action is not time barred, such tacking is a fraud on the revenue, since the only apparent reason for not bringing a second suit is to save the court-fee. The present case is of the latter kind unaffected by limitation. In a similar case *Doraiswami Pillai* v. *Chinnia Goundan* (4), Sir John Wallis has observed :

" To say that a plaintiff must be driven to a fresh suit appears to me to impose an undue hardship on litigants in India having regard to the state of the law as to court-fees and cost of litigation."

With the greatest respect I do not think it incumbent upon the Judge to relieve against what he privately may consider to be too onerous provisions in the Court-fees Act; and it must be remembered that some one has to pay for the up-keep of the judiciary. If the litigant is relieved, the burden is merely shifted to the general tax-paper. If it is

(1) A. I. R. 1928 All. 371=50 All. 839 (S.B.).

(2) [1901] 24 Mad. 654.
(3) [1917] 38 I. C. 339.
(4) [1918] 43 I. C. 560.

the law that for different causes of action different suits must be brought, that law must be upheld. So, in this case, if the counter-petitioner wants the privilege of a fresh cause of action, he must pay a fresh court-fee. If on the other hand he had preferred to rely upon his original cause of action, he could have saved the expense. This is now admitted on behalf of the counter-petitioner and he is prepared to pay the additional court-fee as though he had brought a suit upon the assigned debt. I order accordingly.

I do not see, then that the petitioner has any further grievance. If the Munsif had refused amendment, it would only have resulted in petitioner having a second suit to defend, and the course adopted by plaintiff has probably saved him expense, and would certainly have saved him time, but for the present proceedings.

This petition will stand dismissed upon plaintiff paying into the lower Court the requisite court-fee within one month from this date.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1931 Madras 534

RAMESAM, J.

Tallapragada Appa Rao — Petitioner.

v.

Kasangi Venkappa and *others* — Respondents.

Civil Revn. Petns. Nos. 1648 to 1653 of 1929, Decided on 17th March 1930, against orders of Sub-Judge, Ellore, D/- 24th September 1929.

(a) Civil P. C. (1908), O. 21, Rr. 98 and 100 — Tenants of judgment-debtor unless occupancy tenants are bound by decree.

Tenants or servants of a judgment-debtor unless they are occupancy tenants are bound by the decree against the judgment-debtor : *A.I.R.* 1922 *Bom.* 273 ; *A. I. R.* 1922 *Bom.* 449, *Ref.* 47 *Cal.* 907, *Dist.* [P 535 C 2]

(b) Civil P. C. (1908), O. 21, R. 100—Application under R. 100—Decree-holder asked to begin—After his examination witnesses of claimant examined—It amounts to irregularity.

Where in an application under O. 21, R. 100, the decree-holder is first asked to begin the case, and after he finishes his examination, the witnesses of the claimants are examined it amounts to an irregularity.

(c) Civil P. C. (1908), S. 115 — Court finding entirely different case than that set up by party—Irregularity justifies interference.

When the lower Court finds an entirely different case than that set up by a party, it is an irregularity which justifies interference in revision.

When certain person claims occupancy tenancy on the ground that the village is an estate, and the Court does not find whether there was occupancy tenancy but finds a different case than that set up by the parties, it amounts to an irregularity. [P 536 C 2]

(d) Civil P. C. (1908), O. 21, R. 100—Certain person not parties to suit set up by judgment-debtor to put forward case of tenancy and prevent decree-holder from executing decree — High Court can interfere and set aside order allowing such claims.

Where certain persons taking advantage of their not being parties to a suit are set up by the judgment-debtor somehow after the execution proceedings to put forward a case of tenancy, and prevent the decree-holder from reaping the benefit of his decree, the High Court can in revision interfere and set aside the order of the lower Court allowing the claims of such persons. [P 538 C 1]

S. V. Venugopalachariar — for Petitioner.

V. Govindarajachari and *B. V. Ramanarasu* — for Respondents.

Judgment. —These petitions are filed against the order of the Subordinate Judge of Ellore on applications filed under O. 21, R. 100, Sch. 1, Civil P. C. (E. A. Nos. 199 and 201 to 206) in O. S. No. 98 of 1926. E. A. No. 206 and a portion of E. A. No. 205 were dismissed and the rest of the petitions were allowed.

The opposite party namely the decree-holder in the main suit files these revision petitions.

The facts out of which these petitions arise may now be stated. The main suit is a dispute between two persons who are half-brothers. The plaintiff is the younger brother and the defendant is the elder.

The plaintiff's case was that during the lifetime of the father in 1924 there was a division of the father's property by the father himself according to which two-thirds share was allotted to the plaintiff and one-third to the defendant, and each was enjoying his separate share, the plaintiff's enjoyment being through his father as he was a minor.

After the father's death the elder brother refused to recognize the younger

brother's right to more than half a share and contended that the division was in two shares, with the result that a suit had to be filed on behalf of the plaintiff by his maternal uncle in 1926. The suit was tried and the plaintiff's case was found to be true and it was decreed. I am informed that the defendant has appealed to the High Court and that the appeal is pending. It appears that in the main suit itself the defendant made no suggestion that there were any tenants on the suit land and that they should be made parties in the suit. Incidentally I may observe that the suit is not one for partition but for possession of separate and definite items on the ground that they fell to the plaintiff's share and were trespassed upon by the defendant.

In 1928 execution was taken out of the decree and an amin was deputed to deliver possession to the plaintiff's next friend. He and the amin went to the lands on 23rd November. The decree-holder and the amin were resisted.

Ex. A is the application of the amin to the Station House Officer of Pentapadu for police help. This is a very important document in the case. So I will set forth a portion of this application.

"Accordingly, when I went to deliver the properties, defendant and men belonging to the defendant obstructed me with a bad intention of putting the minor's guardian out of possession of the properties and stealing away the crops raised on the scheduled lands. If I deliver them against the defendant's will they are ready to commit danger to lives with brute force. The Court has passed orders in E. A. No. 1484 of 1927 to remove such obstruction and deliver, if the defendant should obstruct unlawfully in this way. The above warrants have to be executed in accordance with the above orders and without breach of peace. So I pray that your honour may kindly be pleased to render such help so that the warrants may be executed."

The Subordinate Judge had previously ordered on 18th November that police help may be taken. This is the order referred to in Ex. A. After such order, there is nothing high-handed in the acts of the amin and the decree-holder. Thereupon the Station House Officer deputed a head constable and two police constables to help the amin to preserve peace.

At this stage it is important to observe that the obstructors were described in Ex. A as "the defendant and men belonging to the defendant." Who are these men belonging to the defendant?

They must be either farm servants of the defendant or tenants of the defendant. In either case unless they are occupancy tenants they are bound by the decree : see *Jafirji Ibrahimji* v. *Miyandi Mangal* (1), and *Jairam Jadowji* v. *Nouroji Jamsedji* (2), which I prefer to *Erra* v. *Gubbay* (3) which is also distinguishable. Otherwise they would not be described as men belonging to the defendant. On 24th November the amin effected delivery of possession and reported delivery to the Court. The Court recorded delivery without objection.

Some time later about 1st December some or all of the present claimants attempted to cut the crops on the land and one of the head constables gave a notice to one of these claimants (one of the two claimants in E. A. No. 203) not to cut the crops. This is Ex. C dated 1st December 1927. The head constable also sent a report to the Sub-Inspector of Police which is Ex. D. The Sub-Inspector was requested to come and prevent a breach of the peace. Afterwards these claimants or some of them were charged in a criminal case No. 90 of 1927. The present petitions were filed under O. 21, R. 100, of the Code on 21st December 1927, i. e. after and not before the incident of 2nd December 1927. Para. 4 begins by saying that on 1st December 1927 and 2nd December 1927 the decree-holder and his brother-in-law came to their fields and attempted to forcibly cut the crops raised by the petitioners. Para. 5 says :

"With the assistance of the police respondent 1 threatened the petitioners and has dispossessed the petitioners and cut and carried away the crops worth Rs. 240."

It is clear from paras. 3 and 4 that the petitioners must have been dispossessed only on 1st December 1927 or 2nd December 1927, not earlier. Then para. 7 however says:

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(1) A. I. R. 1922 Bom. 273=64 I. C. 692 = 46 Bom. 526.
(2) A. I. R. 1922 Bom. 449=65 I. C. 212 = 46 Bom. 887.
(3) [1920] 47 Cal. 907=60 I. C. 969.

"Respondent 1 alleged that he obtained delivery of the property on 24th November 1927 and 25th November 1927 through the Court. The petitioners submit that no such actual delivery was in fact effected. If it was reported to the Court that any such delivery took place, it must have been merely a fake for nobody came near our lands."

Paragraph 8 says that the petitioners are occupancy tenants in possession of the land. Respondent 2 in these petitions who was the judgment-debtor admits the plaintiff's petition but denies that the land is an estate or that the petitioners had occupancy rights. The decree-holder is respondent 1. He denied that the petitioners were persons who had any possession of the suit lands. He contended also that the petitions are not maintainable and that he got possession on the date of delivery. The Subordinate Judge's statement that the plea as to maintainability was not taken in the counter-petition is not correct. For some reason which is not clear from the judgment of the Subordinate Judge and of which the petitioners before me complain as a serious irregularity, the decree-holder was asked to begin the case and after he finished examining his witnesses the claimants' witnesses were examined.

Witness 1 is the claimant in E. A. No. 202. In chief examination he says that he was ejected from the land with the help of the police. No date is mentioned. Taken along with the petition the date of this ejectment must be only 2nd December 1927. He then gives details of the holdings of the other petitioners. In cross examination he says :

"I paid cist at Rs. 6 per year for that land to Subbarayudu and after his death to his widow I was not present when the lands of the other claimants were delivered to the plaintiff with the help of the police."

Witness 2 is one of the joint petitioners in E. A. No. 203. He also says that he was ejected without giving any date.

In cross-examination he says : "The police came to my land and ejected me from it." He does not say that he paid any rent to Subbarayudu's widow the plaintiff's mother. No other witness is examined.

It is clear from the evidence of these two witnesses that they were ejected on 2nd December and that they know nothing about the ejectment of the other claimants in the case, as to which therefore there is no evidence on the record on which any Court could have passed orders, these witnesses themselves knowing nothing about it.

Mr. Varadachariar who argued the revision petitions before me put the matter thus. This being a matter in revision, he said he could not attack the findings of the lower Court on the evidence. But he argued that the Subordinate Judge found an entirely different case from that set up by the claimants. The claimants claimed occupancy tenancy on the ground that the village is an estate. The Subordinate Judge did not find occupancy tenancy. If he could have found it, he would have found it and should have found it. But obviously it was impossible for him to do so.

There being no evidence in the evidence of the claimants either about the village being an estate or about any kind of occupancy tenancy, the Subordinate Judge could not find in favour of occupancy tenancy. On that finding the learned advocate argues that the petitions ought to have been rejected and the Subordinate Judge ought not to have found a different case for the petitioners from that set up by them in their petitions. This is an irregularity which justifies interference in revision. But even apart from that, even on the findings the findings being merely that the petitioners were in possession of the suit lands before the death of the father and that they were wrongfully ejected in execution, without anything more, the lower Court's order cannot be sustained He argues that either the ejectment was on 24th November or it was on 2nd December. If the petitioners were absent from the scene of execution and therefore they were not ejected on 24th November (vide *Kocherlakota Venkata Krishua Row* v. *Vadrevu Venkatappa* (4) at p. 269, but only on 2nd December—this is the case of the petitioners—then the petitioners were not ejected in execution. The dispossession of the tenants was much later than the delivery and O. 21, R. 98 and 100, do not apply at all. The Subordinate Judge has no jurisdiction to pass an order under O. 21, R. 100. The petitioners have

(4) [1904] 27 Mad. 262.

their general remedy in law if they were wrongfully dispossessed.

But taking the other alternative that the Subordinate Judge meant to say that they were dispossessed on 24th November, though it is opposed to the plaintiff's case, and that the finding is binding on the High Court, the amin's report, Ex. A shows that the amin and the decree-holder were obstructed on the 24th by defendant and his men. No right of theirs consistent with the plaintiff's title was ever set up on that date; and only to such persons, i.e., persons who have rights of their own and who are not bound by the decree, does O. 21, R. 98, apply. It cannot help tenants of the judgment-debtor who are not occupancy tenants. I think these contentions are well founded. But the learned advocate for the respondent argues that Mr. Varadachariar's contentions are technical, that in revision technicalities ought not to be allowed to prevail and defeat substantial justice, that though the petitions of the claimants in the lower Court were inartistically drafted the substance is that they were tenants of the land and, even though any occupancy tenancy is not found, they will at least be tenants from year to year and that they ought not to be ejected because the two brothers were quarrelling. I entirely recognize the fairness of this contention provided it applies to the facts of this case. Seeing there are irregularities justifying interference provided the interest of justice require it, I am willing to look into the matter a little more deeply. I asked the learned advocate whose tenants the petitioners were, assuming that they were really tenants. The learned advocate answered that they were the plaintiff's tenants and in support of this suggestion he referred to the statement in P. W. 1's evidence that he was paying cist at Rs. 6 per year to Subbarayudu's widow after his death. There is no such statement to help all the other petitioners.

Of course the learned advocate suggested that all of them were plaintiff's tenants paying cist after the father's death. So that, it comes to this: that the plaintiff through his next friend filed a suit in 1926 to recover lands which were really in his own possession through his tenants but to eject his brother alleging that the brother was in possession, the brother never suggesting in his written statement that the lands were in the possession of the tenants and not in his possession. This farce of an original suit and an appeal is being carried out merely for the purpose of getting rid of the occupancy right set up by these tenants, and the learned advocate said that the plaintiff may have given counter-evidence to rebut the statement of P. W. 1, that rent was being paid to the mother. At this stage it was pointed out that the decree-holder was compelled to adduce his evidence first and then the claimants followed.

The learned advocate would not admit the fact until there is something on the record to support it. The affidavit filed by the petitioners in connexion with the stay petition, the allegations which were repeated in the revision petition and which remain uncontradicted to this day, was then relied on by the petitioner's advocate. The respondent's advocate then found the helplessness of his position. He suggested that it is possible that no rent was paid to any person and that the tenants were in possession of the lands only as tenants of whoever may ultimately turn out to be the lawful owner, and they were not interested in the quarrels between the two brothers. The situation is therefore this: this aspect of the case which turned up at the end is only an aspect which turns up on an exhaustive analysis of the case before me and the situation was arrived at only after being driven from position to position. This aspects was never suggested before the lower Court. Even the Subordinate Judge in his finding beyond saying that the petitioners were in possession of these items, since the death of the father, does not say anything more. He does not say that they were in possession as tenants from year to year. He does not say that they were in possession merely as tenants of some kind. He does not say that their possession was as tenants of the plaintiff.

Obviously he gave no weight to the statement in the deposition of the claimants' first witness that rent was paid to the widow of Subbarayudu. He does not say that the petitioners are in possession as tenants of whoever may turn out to be the lawful owners bona fide and that they are disinterested in the quarrels

between the brothers. On the finding of the Subordinate Judge and the other irregularities in the case, it is clear to me that this is not a case of persons bona fide in possession seeking protection from ejectment on account of quarrels between two other persons. If I am satisfied in this case that the claimants are tenants in possession of the lands, willing to be tenants of whoever may turn out to be the lawful owner, indifferent to the quarrels between the landholders taking no sides but anxious to protect their own tenancy and complaining that in the guise of quarrels between two brothers they ought not to be wrongfully ejected, I would not interfere in this revision petition.

But if on the other hand I am satisfied that, taking advantage of their not being parties, the defendant's men are now set up some time after the execution proceedings as an afterthought to put forward a case of tenancy, to put a further spoke in the wheel, and to prevent the decree-holder from reaping the benefit of his decree, I ought to interfere and set aside the lower Court's orders.

Having regard to the material irregularities in the enquiry before it, namely (1) a different case being made out and (2) the decree-holder being compelled to start his case, and having regard to the fact that the only obstruction made on the 24th was by the defendant and his men, there being not even the faintest suggestion of some persons claiming to be tenants of the plaintiff, (and seeing that, even they are tenants, they are bound by the decree not being found to be, occupancy tenants) having regard to the petitioners case itself that they were ejected on 2nd December, i. e., otherwise than in execution which was finished on 24th November, having regard to the stage in filing the petitions and having regard to the findings of the Subordinate Judge itself, which is very vague and which I am not bound to read as finding that specific case in which only the claimants can succeed. I am satisfied that this order of the Subordinate Judge ought to be set aside. Even if one is to suppose, as is now suggested before me, that some claimants are plaintiff's tenants or tenants of the lawful owner, it is only one man, P. W. 1, that can be so protected. The others have given no evidence as to their ejectment or tenancy. Seeing that all the claimants have made one case, and have not suggested even dissimilar cases, I think P. W. 1 also ought to fail. His is the only case about which I felt some hesitation.

The result is I set aside the orders of the Subordinate Judge. The petitioners will have costs here and in the lower Court in one case. No costs in the others.

P.R.S./R.M. *Orders set aside.*

A. I. R. 1931 Madras 538

ANANTAKRISHNA AIYAR, J.

(*Moturu*) *Mahalakshmamma* and *another*—Defendants—Appellants.

v.

Thangirala Bala Thripura Sundaramma—Plaintiff—Respondent.

Second Appeal No. 1087 of 1925, Decided on 11th November 1930, against decree of Sub-Judge, Guntur, in Appeal Suit No. 40 of 1924.

Hindu Law—Alienation—Widow— Suit by reversioner for declaration that sale was not binding—Court can, in case facts and circumstances warrant, uphold sale in part.

Where a widow sells immovable property of her husband in her hands, in a suit by a reversioner for a declaration that the sale is not binding on him it is open to the Courts, in case the facts and circumstances warrant, to uphold the sale in part.

The widow sold 1 acre and 75 cents of land for a consideration of Rs. 1,774-8-0. But the consideration of Rs. 806-10-6 only was found to be binding on the estate. It was also found that the parties bargained for the sale and purchase of the land at Rs. 1,050 per acre.

Held: that the ultimate reversioners to the estate would be entitled to recover 1 acre and 75 cents conveyed, less 79½ cents which the vendees would be entitled to retain: *A. I. R.* 1921 *Mad.* 172, *Rel. on.*; (1915) *M. W. N.* 8, *Expl.*; *A. I. R.* 1927 *P. C.* 37 and *A. I. R.* 1927 *P. C.* 244, *Ref.* [P 541 C 1, 2]

Ch. Raghava Rao—for Appellants.

B. Somayya—for Respondent.

Judgment.—The plaintiffs, who are the daughters of the late Krishnayya, instituted the original suit for a declaration that the alienations made by his widow (defendant 3) in favour of two sets of defendants, viz., defendants 1 and 2 on the one hand and defendant 6 on the other, are not binding on the reversioners after the death of defendant 3. The alienees put in separate written statements supporting their alienations. There was also another question raised whether defendant 5 was not adopted by the widow and whether the said adoption was valid. The trial Court found

against the adoption. The trial Court also found against the validity of the alienation under Ex. 6 in favour of defendant 6 ; but it found that the alienation in favour of defendants 1 and 2 under Ex. 9 dated 7th May 1917 was valid and binding, and it accordingly dismissed the plaintiffs' suit against defendants 1 and 2. On appeal by the plaintiffs, the learned Subordinate Judge of Guntur analyzed the evidence relating to the various debts which were set up as debts binding upon the estate and discharged by the vendee under Ex. 9. The lower appellate Court, in para. 11 of its judgment set out the several details making up the debt of Rs. 1,774-8-0 mentioned in Ex. 9. The learned Subordinate Judge came to the conclusion that out of that amount only Rs. 673-3-7 was shown to be binding on the estate. He therefore came to the conclusion that in the case before him the sale ought to be set aside, but that a charge should be created in favour of the vendees for the portion of the consideration found to be binding, when the reversion opened. He accordingly passed a decree substantially to that effect. The alienees, defendants 1 and 2, have preferred this second appeal.

Their case was argued elaborately by the learned advocate who appeared for them. He took me through various items of prior debts and submitted that the Subordinate Judge was wrong in disallowing as many as five items which, he submitted, should have been allowed in favour of the alienees. After having carefully gone through the facts as found on the evidence, discussed by the lower appellate Court with reference to these items, I have come to the conclusion that the appellants' contention should be upheld with reference to two such items. The first item relates to a sum of Rs. 62-7-11 dealt with in para. 15 at p. 5 of the appellate judgment. There was a promissory note executed by the deceased Krishnayya in favour of K. Venkatappayya. That debt was renewed by the widow, and the same was paid off when Ex. 9 was executed. The endorsements on the back of the old promissory notes make this point clear, and I think that the Subordinate Judge was not right in disallowing this sum of Rs. 62-7-11. Similarly with reference to a sum of Rs. 70-15-0, discussed in para. 21 at p. 7, the learned Subordinate Judge did not notice the importance of the endorsements appearing on the back of the prior promissory note executed by the widow's husband. The prior promissory note is Ex. 16 (c) (1), and that debt was discharged by Ex. 16 (c). Ex. 16 (c) itself was discharged at the time of Ex. 16 (a), and 16 (a) was discharged at the time of the sale to the appellants under Ex. 9.

The creditor was the same person, and the endorsement appearing on the back of Ex. 16 (c-1) makes it abundantly clear that that debt was paid off when money was borrowed under Ex. 16 (c). The learned Subordinate Judge was not right in disallowing this sum of Rs. 70-15-0.

Three othar items were discussed before me, viz. those covered by points 4, 5 and 6 discussed in para. 21 of the lower appellate Court's judgment. The learned Judge in one instance says that the witness who speaks in support of the debt is interested ; in another instance, the debt is alleged to have been borrowed in connexion with the annual ceremonies of Krishnayya, whereas the date of the debt is very much earlier than the date of the annual ceremony ; and as regards the payment of kist, it has not been proved that without raising the debt the kist could not be paid. The learned Judge thought it unsafe to rely upon the oral evidence relating to these debts, and I must uphold his finding on the three particular debts mentioned in para. 21, sub-headings 4, 5 and 6. The result, then is that instead of Rs. 673-3-7, held to be binding by the Subordinate Judge, I have to add a sum of Rs. 133-6-11, thus bringing the amount of binding debt to Rs. 806-10-6. The balance of Rs. 967-13-6 is not proved to be binding. We have therefore a case where, out of the price of Rs. 1,774-8-0 only Rs. 806-10-6 is proved to be binding and a major portion, Rs. 967-13-6 is not binding. What then is the legal effect to be given to the sale in view of these findings? The deceased left a house site and some cultivable lands. Ex. 9 purported to convey 1 acre 75 cents of land. The lower appellate Court discussed the question whether there was necessity for this sale, and it observed in para. 25 as follows :

"But in the circumstances there was no necessity to have sold the whole land. Once she had sold some 60 cents for Rs. 600. Some

extent like that could have been sold again for payment of debts. As the major portion of the consideration was held not to be for binding purposes, I am inclined to hold that the sale cannot be upheld and is not binding on the reversioners."

The learned advocate for the appellants drew my attention to the recent Privy Council case, *Krishna Das* v. *Nathu Ram* (1) and *Naimat Rai* v. *Din Dayal* (2) and a still more recent case, *Suraj Bhan Singh* v. *Sah Chain Sukh* (3), and he argued that the sale should be upheld even though the alienees have not been able to explain what was done with the major portion of the consideration, as already noticed by me. I am not able to understand the Privy Council judgment, in the way in which the learned advocate wants me to understand the same. The Privy Council laid down that in cases where a sale is upheld, the alienee is no more bound to look to the application of any small amount that might have been fetched by the sale over and above the actual debt which is binding upon the estate. The question whether there was an occasion for the sale, and whether the sale was justified or not, was not the question that their Lordships had to consider; and, as I remarked, the case before them was a case where the sale was binding; but the only question was what was to be done with reference to the small excess amount that remained after the binding debt was discharged. The case before me is a case where the Courts have to find whether there was necessity for the sale or not. Having regard to the finding that there was no occasion to convert this immovable property into money with reference to a major portion of the transaction, I think the lower appellate Court was right in coming to the conclusion that the sale as such of the land of 1 acre 75 cents was not justified. The learned advocate however argues that even in that view it does not follow that the alienees are not entitled to get any portion of the property and that all that they are entitled to claim is a charge with reference to that portion of the purchase money which the Court finds to be binding on the estate. He argues that the nature of the land and the other circumstances in the case should be considered by the Court before the Court in such a case could work out the equities between the parties. On the other hand the learned advocate for the respondents drew my attention to a decision of Sadasiva Ayyar and Napier, JJ., in *Rukhmani Sundarammal* v. *Muthu Ammal* (4) where a sale by a minor's guardian of 4 acres of dry land and 4 acres of wet land for a sum of Rs. 1,425 was sought to be impeached by the minor. The lower appellate Court found that Rs. 650 out of the price of Rs. 1,425 was binding on the estate, and held that the vendees should be allotted a proportionate extent of the land originally intended to be conveyed to them in the ratio of the consideration found by the Courts to be binding. The learned Judges disapproved of that course and held that the plaintiff was entitled in that case to recover the whole of the land alienated, and they gave a decree for a charge on the property in favour of the vendee for the amount found binding. The question how equities have to be worked out in any particular case would depend on the facts and circumstances of each case.

In the particular case before us, having regard to the fact that under Ex. 9 (a) the agreement that preceded the sale Ex. 9, there is a statement that the sale was to be at the rate of Rs. 1,050 per acre, I think that the question should be further considered as to the exact relief that should be granted in this case. It is also said that 60 cents were sold by the widow for Rs. 600. The question had not to be considered by the trial Court in the view that it took of the case, namely that the whole of the consideration mentioned in the sale was utilized for binding purposes. It is only when the lower appellate Court disallowed the contention of the alienees as regards a portion of the sale price that this question arose for decision. I think that the lower appellate Court's discussion of this question in the last few lines of p. 25 is not altogether satisfactory in the circumstances. The learned advocates are not now in a position to state what the nature of the evidence is and whether there is any other matter on the record relevant to this point. It therefore

(1) A. I. R. 1927 P. C. 87=100 I. C. 130=54 I. A. 79=49 All. 149 (P.C.).
(2) A. I. R. 1927 P. C. 121=101 I. C. 373=54 I. A. 211=8 Lah. 597 (P.C.).
(3) A. I. R. 1927 P. C. 244=105 I. C. 257 (P.C.).
(4) [1915] 26 I. C. 489.

seems to me that I should call for a finding from the lower appellate Court on the question whether, on the finding that only Rs. 806-10-6 is binding upon the estate, the present is a case where the alienees should or should not be allotted in the circumstances, a proportionate extent of the lands agreed to be conveyed under Ex. 9 (a). I am anxious to be placed in possession of all relevant circumstances appearing in the evidence in this case with a view to my finally resolving how to work out the equities of the parties in this particular case. The lower appellate Court will accordingly be directed to submit a finding on the evidence on record on the question whether the present is a case where the alienees should or should not be awarded any and if so, what portion of the lands covered by the sale deed, having regard to my finding that Rs. 806-10-6 is binding on the estate. Finding in six weeks and objections in ten days.

[In compliance with the order contained in the above judgment, the Subordinate Judge of Guntur submitted the following].

Finding. * * * *—For all the reasons given supra, I find that defendants 1 and 2 are entitled to a proportion of of the property sold. And that proportion is 79 and 247/507 cents (or roughly 79½ cents).

[This second appeal coming on for final hearing this day, after the return of the finding of the lower appellate Court the Court delivered the following].

Judgment.—In this case I called for a finding on two questions: (1) whether defendants 1 and 2 are entitled to a proportion of the property sold under Ex. 9, or only to a charge on the same for the amount found due and (2), if they are entitled to a portion of the land covered by Ex. 9, what proportion they are entitled to. The learned Subordinate Judge has returned findings to the effect that defendants 1 and 2 are entitled to a portion of the property sold having regard to the circumstances mentioned by him and that the proportion is 79½ cents out of 1 acre 75 cents.

The question has been argued before me whether in such cases the proper course is not to declare the sale to be not binding on the reversioner giving only a charge in favour of the purchaser to the extent of the purchase money found to be binding on the estate. The question as to how the equities should be worked out in any particular case would largely depend on the facts and circumstances existing in that case. No doubt a sort of working rule has been laid down in several decisions of this Court to the effect that when consideration to the extent of about, or more than, a moiety of the price is held to be binding on the estate, then the sale as such should be upheld, but the purchaser should be directed to pay to the ultimate reversioner the difference between the sale price and the amount found to be binding on the estate. The exact effect of the Privy Council rulings giving on the direction as to refund of a portion of the price to the reversioner may have to be considered in cases when the question arises. In the present case however I have found that out of the consideration of Rs. 1,774-8-0 a sum of Rs. 806-10-6 only should be taken to be binding on the estate. But the amount that I have held to be binding upon the estate is substantially less than a moiety of the price. That being so, the question arises as to how the equities between the parties should be worked out in the present case. It is in evidence in this case that an extent of 60 cents had been sold by the widow for Rs. 600; and it also appears that under the very agreement which gave rise to the sale, in question (IX-a) the price is fixed by the parties at Rs. 1,050 per acre. In these circumstances, I called upon the lower appellate Court to submit findings on the two points already mentioned by me, and I have already noted the findings submitted by the learned Subordinate Judge. It was argued by Mr. Somayya the learned advocate for the respondent that in such circumstances the sale should not be upheld in respect of any portion of the property sold: and he contended that the decision in *Rakmani Sundarammal* v. *Muthu Ammal* (4) is clear that the purchaser would be entitled only to a charge on the property in respect of Rs. 806-10-6. On reading the decision referred to by the learned advocate, I find that Sadasiva Aiyar, J. does not discuss this question. I find that Napier, J. refers to this point at p. 12 of the report. As I read the judgment of the learned Judge, he does not purport to lay down any general proposition of law applicable to such

cases. On the other hand the learned Judge speaks of equities arising in such cases. The exact nature of the agreement which led to the sale is not clear in that case. I think it is open to the Courts, in case the facts and circumstances warrant to uphold a sale in part. In the present case I have got Ex. 9-A which evidences the agreement in pursuance of which the property was sold. The agreement is clear that the basis on which the parties contracted was that the property was to be sold at Rs. 1,050 per acre. As I said, we have got also evidence in the case, which the learned Subordinate Judge has referred to, that 60 cents were sold for Rs. 600. The learned Subordinate Judge has come to the conclusion that there is no difficulty as regards apportioning the land which was the subject of sale in the present case. I am therefere led to the conclusion that the parties in the present case, bargained for the sale and purchase of the land at Rs. 1050 per acre, and as it was alleged that there was necessity to the extent of Rs. 1,774-8-0 the plot of 1 acre 75 cents was made the subject of bargain. Now that I have found that the consideration binding upon the estate is only Rs. 806-10-6, I think having regard to the facts of the present case, that I am not making a fresh contract between the parties by decreeing that defendants 1 and 2 should have 79½ cents out of 1 acre 75 cents covered by Ex. 9. On this question of working out equities I think that the Full Bench decision in *Baluswami Ayyar* v. *Lakshmana Aiyar* (5) affords me some guidance. There the managing member of a joint Hindu family, for purposes not binding upon the other coparceners and without their concurrence agreed to sell a specific item of joint family property. The Full Bench held that the purchaser in such a case could not enforce specific performance of the entire contract, but that in case the purchaser should elect to have the manager's (vendors') share of the property for the whole of the consideration stipulated, then it would be open to the Court to grant specific performance in respect of the said share only as indicated above. I think that the decision of the Full Bench in *Baluswami Ayyar* v. *Lakshmana Aiyar* (5) lends support to the view that I am inclined to take in this case. Having regard to the facts and circumstances appearing in the present case, and having regard to the inference that I draw from the agreement Ex. 9 (a) and the sale deed Ex. 9. and in the light of the special circumstances found by the lower appellate Court, I think that the proper decree that I should pass in the present case is that the ultimate reversioners to the estate of defendant 3 would be entitled to recover 1 acre 75 cents covered by Ex. 9 less 79½ cents (to be selected and separated by the Court if the parties interested be not then able to agree) to which I think the vendees should be held entitled in the circumstances. Of course, it goes without saying that the whole of the price paid by them viz. Rs. 1,774 odd, should be taken to be the price of the 79½ cents, so that no question of any refund by the ultimate reversioners in favour of defendants 1 and 2 or vice versa would arise. The decree of the lower appellate Court will be modified accordingly. The lower Court has directed that each party should bear his own costs in the two lower Courts. I think I should also pass the same order as regards the costs of this second appeal.

P.R.S./P.N. *Decree modified.*

(5) A. I. R. 1921 Mad. 172=63 I. C. 374=44 Mad. 605 (F. B.).

A. I. R. 1931 Madras 542

REILLY AND ANANTAKRISHNA AIYAR, JJ.

(*Chinta*) *Chandramma*—Appellant.

v.

Gunna Seethan Naidu —Respondent.

Appeal No. 359 of 1929 and Civil Revn. Petn. No. 1337 of 1929, Decided on 13th November 1930, against order of Dist. Judge, Ganjam, D/- 8-12-1928.

(a) Civil P. C. (1908), O. 34, R. 1 — Transferees of property subject to mortgage cannot be bound by proceedings in subsequent suit between prior mortgagee and mortgagor to which they were not parties — Mortgage, parties.

The general rule that no person should be affected prejudicially by proceedings to which he is not a party is applicable to mortgage suits also. For persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they were never made parties. This holds good as regards the cases of owners of the equity of redemption not made parties to the prior mortgagee's suit : 14 *M. I. A.* 144 and 18 *Cal.* 164 (*P.C.*), *Rel. on.* [P 547 C 1]

(b) Transfer of Property Act (1882), S. 91, (a)—There is no difference batween positio

of subsequent mortgagee and subsequent purchaser of equity of redemption.

The purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage. It is therefore not possible to draw any difference between the position of a subsequent mortgagee and a subsequent purchaser of the equity of redemption. It is clear that the first mortgagee could not by reason of his own wrong or default, acquire any higher rights than he had otherwise. He cannot take advantage of his wrong, he cannot acquire higher rights by reason of a litigation to which the owners of the equity of redemption were not made parties. That being so, if the puisne mortgagee or the owner of the equity of redemption be entitled to other rights and remedies over and above the right of redemption, such other rights and remedies would not be lost to them, and the mortgagee cannot be heard to say that those remedies were lost to them as a result of the suit to which they were not parties : 9 *I. C.* 513 (*F.B*) and 40 *Mad.* 77, *Foll.* [P 547 C 2, P 548 C 1]

(c) Mortgage — Rights of mortgagee — Simple mortgage — Mortgagee filing suit against wrong person — He can successfully bring second suit against right person — But only remedy open to him is of recovering his money by sale.

The circumstance that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. If it does not affect them at all, they cannot be heard to say that by virtue of the prior suit, which admittedly does not affect them, a (second) suit against them is not maintainable. So far as they are concerned, the second is the only suit against them, and the first suit and the proceedings connected with the same must be taken to be "non est" in the eye of the law : *A. I. R.* 1924 *Mad.* 650, *Rel.on.*; *A. I. R.* 1922 *Bom.* 334; *A. I. R.* 1928 *Rang.* 189; *A. I. R.* 1926 *All.* 480 and 30 *Mad.* 500, *Ref.* [P 548 C 2]

But the mortgagee in this second suit would not be entitled to recover possession, because the second suit is based on the original simple mortgage, and not on the footing of any decree, in the first suit, which ex hypothesi is not binding on the contesting defendants. Further the second suit could not be to foreclose the defendants, because it is not a relief to which a hypothecatee is entitled. That being so, it is clear that the only remedy that the mortgagee in the circumstances would be entitled to is to recover his money by the sale of the hypothecated property : 26 *All.* 464 and 6 *C. L. J.* 612; *held as dissented in* 9 *I. C.* 513 (*F. B.*). [P 549 C 1]

(d) Civil P. C. (1908), S. 115—Amendment allowed effect of which is trial of time barred suit—High Court will interfere.

If the result of an amendment would be to direct a plaint to be tried which on the face of it, is barred by limitation, the High Court will necessarily interfere in revision for non-interference will only multiply proceedings: 32 *Mad.* 334, *Rel. on.* [P 549 C 2]

M. Appalacharya and *Jiddu Lakshmayya*—for Appellants.

V. Govindarajachari—for Respondent.

Reilly, J. — Defendants 3 and 5 in this case were coparceners in a joint family, defendant 3 being the elder. In 1908 defendant 3 executed a simple mortgage in favour of one Joganna for Rs. 100, the date for payment being 6th June 1909. In 1909 defendant 5 sued defendant 3 for partition and got a decree for a half-share of their property, including a half-share of the property mortgaged to Joganna. He also got a decree against defendant 3 for costs. His decree for costs he assigned to defendant 2 who, in execution of it bought defendant 3's half-share of the mortgaged property in 1912. Afterwards defendant 5 sold the half-share which he had got by his partition decree to defendant 1. In 1914 Joganna sued for sale on his mortgage, making defendant 3 and no one else a party to that suit. He got a decree for sale, and in execution of that decree the plaintiff in the present suit eventually bought the mortgaged property in Court auction in 1924. The plaintiff in 1926 brought his present suit to recover possession; but in 1927 he put in an application to amend his plaint in order to get a decree that defendants 1 and 2 should be given an opportunity to redeem or to deliver possession to him and that, if they failed to do so, he should have another decree for sale against them. The District Munsif, who tried this suit, refused that application for amendment and dismissed the suit. On appeal the learned District Judge has allowed the amendment and remanded the suit to the District Munsif for fresh disposal. The appeal before us is against that order of remand.

Now it will be seen that defendant 5 got in his partition suit a decree for half of the property covered by the mortgage, and that half he subsequently transferred to defendant 1. Defendant 2 in Court auction bought defendant 3's half-share. So in effect defendants 1 and 2, even if defendant 3 ever had an exclusive right to the property mortgaged, have become transferees of the whole equity of redemption. Neither defendant 5 nor his transferee, defendant 1 nor defendant 2 was a party to Joganna's mortgage suit. The result of that, it cannot be disputed, is that that suit did

not affect their rights in any way. As they were left out of Joganna's suit, he could, and the plaintiff after his purchase could, have brought another suit against defendant 1 or defendant 2 or both for sale on the mortgage. That is clear and was decided in *Venkat Reddy* v. *Kunjappa Goundan* (1). The learned Judge recognizes that; but he is of opinion that time would run for such a suit from the date of the mortgage decree. I think it is obvious that he is wrong in that. Time for the second suit, if brought upon the mortgage, must run from the date for payment, or that date as extended by any circumstances which would extend it, and not from the date of the mortgage decree. That point was explicitly decided in *T. C. Bose* v. *Obedur Rahiman Chowdhury* (2). Now it happens that a second suit for sale on this mortgage was time barred, not only at the date when the plaintiff made his application to amend his plaint, but at the date when he put in his plaint itself in 1926. The learned District Judge has in effect by the amendment allowed the plaintiff to change the entire character of his suit, to change his suit for possession into a suit of another character, which was barred at the date when he put in his plaint. That is a kind of amendment which can obviously not be allowed.

But Mr. Govindarajachari for the plaintiff has tried to find another prop for the learned District Judge's decision. He represents that the amendment embodied not only a prayer for a decree for sale but for foreclosure and recovery of possession. The amendment itself does not put that explicitly. But, even if that was intended, as Mr. Govindarajachari has said, it would not be a prayer for foreclosure only. It is obviously a prayer for something more for foreclosure and for possession. Apart from the fact that foreclosure and recovery of possession are not remedies available to a simple mortgagee if such a liability could be imposed upon defendants 1 and 2, it would obviously be something more serious to them than liability to a decree for sale on the mortgage. If a decree for sale on the mortgage was still possible, that would mean that a preliminary decree might be made against them, giving them an opportunity to redeem, and, if they did not, the property would be put up for sale, and they would be entitled to any surplus over the amount due to the plaintiff. If they were liable to foreclosure and recovery, obviously there would be no surplus to go to them.

In that way their position would be worse than if they were liable to a decree for sale. And in another way they would be in a worse position. As I have mentioned, a suit for a decree for sale was time barred. But by this change of attack, this bringing in of a prayer for foreclosure, the plaintiff hopes to extend his limitation by five times. In that way again the position of defendants 1 and 2 would be much worse than if they were liable only to a decree for sale. Now, if defendants 1 and 2 had been impleaded in Joganna's mortgage suit, the only decree that could have been made against them would have been a decree for sale. As I have said, it cannot be disputed that that mortgage suit, to which they were not made parties, cannot affect their interests; and yet, though that suit cannot affect their interests, we are asked to say in effect that their omission from that suit exposes them to liability much greater than could have been enforced against them if they had been parties to that suit. Put like that, if I may say so without offence, the contention appears to cross the border line of absurdity and is one to which on no principle or reasoning that I can see could we accede. It is impossible to reconcile the liability which on this contention the plaintiff wishes to force on defendants 1 and 2 with the principle that, because they were left out of Joganna's mortgage suit, that suit cannot affect them in any way and leaves them in just the position in which they were before it.

But Mr. Govindarajachari has been able to point out to us some decisions which support his contention. In *Ram Prasad* v. *Bhikari Das* (3), it was decided that in a similar position a purchaser of the equity of redemption, who had been left out of the mortgagee's suit for sale, was entitled only to redeem and, if he did not do so within the time fixed, foreclosure and recovery of possession could be enforced against him. In

(1) A. I. R. 1924 Mad. 650=83 I. C. 1022=47 Mad. 551.

(2) A. I. R. 1928 Rang. 189 = 111 I. C. 132=6 Rang. 297.

(3) [1904] 26 All. 464.

Birinchi Singh v. *Sarada Prasad Mukerji* (4), it was stated that parties in the position of defendants 1 and 2 here, had only a right of redemption, and, if they did not redeem, they could not resist recovery. There was a similar decision in *Jugdeo Singh* v. *Habibulla Khan* (5), in which other Calcutta cases are cited in its support. With the very greatest respect I find myself unable to follow the reasoning in those cases. Their results appear to me to be entirely irreconcilable with the principle that the owner of the equity of redemption, if left out of the mortgagee's suit for sale, cannot be affected by that suit, though I may mention that principle is explicitly mentioned both in *Ram Prasad* v. *Bhikari Das* (3) and *Jugdeo Singh* v. *Habibulla Khan* (5). But I do not think it is really necessary to discuss those cases in any detail. The principles have been made clear in cases of this Court. In *Mulla Vittil Seeth* v. *Achutan Nair* (6), a Full Bench laid down that

"the purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage,"

and

"these rights are unaffected by the suit of the first mortgagee to which they were not made parties and the decree passed therein and the sale made in pursuance thereof."

There we have the proposition clearly laid down that the purchaser of the equity of redemption is in those circumstances in the same position as a puisne mortgagee. If he is left out of the first mortgagee's suit or the puisne mortgagee's suit he is just as much free of it as the puisne mortgagee would be if he was left out. In *Chinnu Pillai* v. *Venkatasami Chettiar* (7), K. Srinivasa Ayyangar, J., said:

"In no case can a prior simple mortgagee extinguish the right of the puisne mortgagee by foreclosure. Sufficient attention has not always been paid to this important fact where it is said that the junior mortgagee is bound to redeem or his only right is to redeem or that the senior mortgagee can compel redemption.".

We are entitled to substitute "the purchaser of the equity of redemption" for "the puisne mortgagee" or "the junior mortgagee" in those remarks of Srinivasa Ayyangar, J., which, if I may say so with respect, put the position clearly and correctly In *Entholi Kizhakkikandy Kanaran* v. *Vallath Koylil Unnooll* (8), a Bench of this Court decided that in a case such as this the purchaser in execution of a decree in a suit for sale on a mortgage cannot recover possession from the purchaser of the equity of redemption left out of that suit but can only bring a suit for sale against him.

That being the position, in my opinion the learned District Judge was wrong in allowing this amendment to be made. It was too late to make an amendment which would convert the plaintiff's suit into a suit for sale, and that was the only kind of suit which he was entitled to bring against defendants 1 and 2. As has been urged before us, the remand order is not one of those which is subject to appeal and so the appeal which has been preferred cannot be allowed. But the appellants have been careful to put in also a revision petition. In my opinion this is certainly a case for the exercise of our powers of revision. When the learned District Judge allowed the suit by amendment to be converted into a suit of another character, which was barred at the time the plaint had been put in, he was in my opinion guilty of a material irregularity, which should be put right by revision. I therefore propose that the revision petition be allowed and the appeal dismissed and that the decree of the learned District Munsif dismissing the suit with costs be restored and that defendants 1 and 2 be allowed their costs before the District Judge and in their revision petition here. In the appeal to us in my opinion there should be no order as to costs.

Anantakrishna Aiyar, J.—I agree. In Jones on Mortgages, para. 1395, the learned author states that

"while it is expensive and inconvenient to join all persons interested in a mortgage suit, it is much more expensive and inconvenient to go on with such a suit omitting any such party."

The present case illustrates the wisdom of the observation made by the learned author, if the reported cases are not sufficient to bring home to litigants the importance of having all interested persons as parties to suits relating to mortgages.

(4) A. I. R. 1924 Pat. 452=75 I. C. 942=3 Pat. 114.
(5) [1907] 6 C. L. J. 612=12 C. W. N. 107.
(6) [1911] 9 I. C. 513 (F.B.).
(7) [1917] 40 Mad. 77=34 I. C. 507.
(8) [1907] 30 Mad. 500=17 M. L. J. 431.

Defendant 3 executed a simple mortgage over the suit property in favour of one Joganna on 6th June 1908 Ex. D. The term fixed in the mortgage was one year, so that the amount became payable on 6th June 1909. In 1909 defendant 5 a coparcener of defendant 3, filed a suit for partition of the suit property making defendant 3 a party defendant to the suit. There was a decree in favour of defendant 5 for a moiety of the suit property (mentioned in the present proceedings as the northern moiety). Defendant 5 in execution obtained possession of that half, and he assigned his rights over that portion in favour of defendant 1 under Ex. 3 on 12th May 1914. Defendant 5 also obtained a decree for costs against defendant 3 in that partition suit O.S. No. 729 of 1909. In execution of the decree relating to costs, defendant 2 to whom that portion of the decree had been assigned by defendant 5 brought the other moiety belonging to defendant 3, (the southern moiety), to sale and defendant 2 became himself the purchaser. The sale certificate (Ex. 6) is dated 11th November 1912, and he got possession on 30th November 1912: vide Ex. 7. About two years afterwards Joganna the mortgagee from defendant 3, filed a suit—No. 478 of 1914—on 2nd October 1914 to recover the money due on his hypothecation bond Ex. D. He made as party defendant to his suit only defendant 3, and not defendants 1 and 2 who at that time had become owners of the two moieties of this property and who were in possession of the same on the date of the plaint.

Having obtained a decree, the decree holder assigned his rights to Janaki Ramayya who brought the properties to sale and the present plaintiff became purchaser of the properties in Court auction under Ex. A on 22nd August 1924. When he proceeded to obtain possession he was obstructed by defendants 1 and 2, and accordingly he instituted the original suit (which has given rise to the present appeal and revision petition) to eject the defendants and to recover possession of the properties from them. Defendants 1 and 2 raised the contention that the decree in Suit No. 478 of 1914 was not binding upon them, that defendant 3 had no rights in the property at the time of that suit; and they also pleaded that the decree in that suit could not in any way affect their rights and that the plaintiff's right to enforce the mortgage in favour of Joganna was barred by limitation. The learned District Munsif found this point in favour of defendants 1 and 2 and he dismissed the suit. In his judgment he recorded findings on the other issues that were framed in the case. On appeal by the plaintiff an application was made before the learned District Judge for an amendment of the plaint. The way in which the plaint was sought to be amended is this: "if defendants 1 and 2 did not redeem the simple mortgage in Suit No. 478 of 1914 and did not deliver possession of the suit item, the plaintiff may be entitled to collect the decree amount of Rs. 702-14-6 with interest up to the date of the Court sale and costs by the resale of the suit item."

The learned District Judge, relying on the decision of this Court reported in *Venkata Reddy* v. *Kunjappa Govinda* (1), allowed the plaintiff's prayer for amendment, and accordingly directed a retrial of the suit on the basis of the amended plaint. Defendants 1 and 2 have preferred the present civil miscellaneous appeal and revision petition.

As generally happens in such cases, counsel felt difficulty whether an appeal lies, and has accordingly filed an alternative civil revision petition in respect of the same matter. Now on these facts it follows that when Suit No. 478 of 1914 was instituted on 2nd October 1914, the equity of redemption in the mortgaged property had become vested in defendants 1 and 2. For this purpose it is not necessary for us to canvass the position whether the property belonged absolutely to defendant 3 or belonged to defendant 3 and defendant 5 in moieties as members of a coparcenary. In the view most favourable to the plaintiff I am prepared to assume that defendant 3 was solely entitled to the suit property. The result however of the decree in Suit No. 729 of 1909 was directly to effect a statutory transfer in respect of a moiety of the property in favour of defendant 5 when it was decreed in that suit that the suit item should be divided into two moieties and in pursuance of the decree the northern moiety was delivered to defendant 5, so that as regards that moiety, defendant 3 must be taken to have parted with his right in the same in favour of defendant 5 who in his turn conveyed his rights therein to defendant 1. Similarly, as regards the other moiety,

defendant 3's remaining interest in the same, subject to the mortgage, passed to defendant 2 who purchased the same in execution of the decree for costs, which was passed by the Court in Suit No. 729 of 1909 against defendant 3 and in favour of defendant 5. Defendants 1 and 2 were also in possession on the date of the plaint in suit No. 478 of 1914. It follows therefore that they were the persons entitled to the equity of redemption at the time of the prior mortgagee's suit in 1914. The mortgagor defendant 3 had no interest in the property, and as far as the properties are concerned he could in no way represent the owners in whom the right had become vested at that time. The effect of a decree obtained by a prior mortgagee in a suit to which the owners of the equity of redemption were not parties had to be considered in various cases in this Court. It has been laid down that the general rule that no person should be affected prejudicially by proceedings to which he is not a party is applicable to mortgage suits also. In the words of James, L. J:

"It is difficult to see how a right of entry or cause of action against one man in respect of his property could be either lost or gained by proceedings against another man in respect of his property: see *Brojanath Koondoo Chowdhry* v. *Khelut Chunder Ghose* (9) at p. 149.

Similarly in a later case in *Umes Chunder Sircar* v. *Zahur Fatima* (10) this is what the Privy Council said:

"Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they were never made parties."

The above general principle accordingly applies to cases of owners of the equity of redemption not made parties to the prior mortgagee's suit. The learned advocate for the plaintiff-respondent however argued that the result would only be that the right of redemption which defendants 1 and 2 had should not be taken to have been lost to them, and he urged that that is their only right after the decree in the mortgage suit aforesaid. I think it is too late in the day to contend for such a proposition. The question was considered by a Full Bench of this Court in *Vittil Seeth* v. *Achuthan Nair* (6) where it was held that none of the rights of persons who were omitted to be made parties would be affected by reason of a decree obtained behind their back. It was also suggested by the plaintiff's learned advocate, Mr. Govindarajachari that the present is a case where the person left out was not a puisne mortgagee but a purchaser of the equity of redemption. If there is any difference, it seems to me that the effect of the difference would be more against his client than in his favour, but I need not stop to enquire whether there is any material difference on this point between the case of a puisne encumbrancer left out and a subsequent purchaser of the equity of redemption left out in the circumstances, for in the Full Bench case in *Vithil Seeth* v. *Achuthan Nair* (6) the learned Judges stated the second proposition, which they took to be established, as follows:

"The purchaser of the equity of redemption after the first mortgage and the second mortgagee both stand on the same footing with reference to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage."

It is therefore not possible to draw any difference between the position of a subsequent mortgagee and a subsequent purchaser of the equity of redemption so far as the principle now sought to be made applicable is concerned. Then the learned advocate argued that if they had been made parties they would be entitled to redeem, and that he submitted, is their only right. That position again is answered by the Full Bench, the third proposition laid down by the Court being that

"those rights (rights possessed by persons who are not made parties to such suits) are unaffected by the suit of the first mortgagee to which they were not made parties and the decree passed therein and the sale made in pursuance thereof: see also *Chinnu Pillai* v. *Venkatasamy Chettiar* (7)."

If that be so the question arises what exactly are the rights of a puisne mortgagee or the owner of the equity of redemption in such circumstances. It is clear that the first mortgagee could not, by reason of his own wrong or default, acquire any higher rights than he had otherwise. A hypothecatee is not entitled to possession, nor is he entitled to any remedy by way of foreclosure. The substance of Mr. Govindarajachari's argument (if I followed him correctly) is

(9) [1871] 14 M. I. A. 144=16 W. R. 33 (P.C.).
(10) [1891] 18 Cal. 164=17 I. A. 201=5 Sar. 507 (P. C.).

that though as hypothecatee the prior mortgagee is not entitled either to possession or to a remedy by way of foreclosure, yet as a result of the prior decree he has acquired these special rights. That is going in the teeth of the pronouncements made by authorities which are binding upon us. He cannot take advantage of his wrong, he cannot acquire higher rights by reason of a litigation to which the owners of the equity of redemption were not made parties. That being so, if the puisne mortgagee or the owner of the equity of redemption be entitled to other rights and remedies over and above the right of redemption, such other rights and remedies would not be lost to them, and the plaintiff cannot be heard to say that those remedies were lost to them as a result of the suit to which they were not parties. Now the learned advocate drew our attention to certain passages from three decisions where it is generally stated that persons in the position of defendants 1 and 2 have got the right to redeem. Nobody would think it worthwhile to quarrel with such a proposition if it means what it states, namely, that they have got the right of redemption; but if it be intended to lay down that they have got only the right of redemption, then both on principle and by virtue of authorities which are binding on us, that position does not seem to be tenable. In *Chinnu Pillai* v. *Venkatasamy Chettiar* (7) at p. 79 Coutts-Trotter, J., as he then was, observed as follows;

> "The principle is that of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so, and the earlier cannot redeem the later except by consent."

The matter is put very tersely by K. Srinivasa Ayyangar, J., at p. 85, where it is stated:

> "In no case can a prior simple mortgagee extinguish the right of the puisne mortgagee by foreclosure. Sufficient attention has not always been paid to this important fact, where it is laid that the junior mortgagee is bound to redeem, or his only right is to redeem or that the senior mortgagee can compel redemption."

As has been already mentioned the right to redeem is a right and not an obligation. If a person has got also other rights to exercise it is not open to a person in the position of the plaintiff to compel such person to exercise any one right rather than any other. It is therefore clear that the present plaintiff would not be entitled to claim any rights higher than the rights of the original mortgagee Joganna and could not derive special rights by virtue of a suit filed by Joganna against persons other than the real owners of the equity of redemption.

This leads to the consideration of the question as to what exactly are the remedies open to an auction-purchaser in the position of the plaintiff. Sadasiva Ayyar, J., in the case reported in *Lakshmanan Chetty* v. *Muthayya Chetty* (11) would seem to have been of opinion—I say "opinion" because it was not necessary for the decision of the case—that a second suit based upon the original mortgage was not available in the circumstances. That question had to be considered in a later case by a Bench of this Court Kumarswami Sastri and Waller, JJ., in *Venkata Reddy* v. *Kunjappa Goundan* (1). After referring to the observations of Sadasiva Ayyar, J., in the case already mentioned the learned Judges proceeded to consider whether there is anything in the Code or any other provision of law which would disentitle the plaintiff from maintaining a second suit based upon the original mortgage. They came to the conclusion that he could do so, and, if I may say so with respect, quite correctly. The circumstance that the mortgagee filed a suit against a wrong person does not affect the rights of the real owners of the equity of redemption. If it does not affect them at all, one fails to see how they could be heard to say that by virtue of the prior suit which admittedly does not affect them, a (second) suit against them is not maintainable. So far as they are concerned the second is the only suit against them and the first suit and the proceedings connected with the same must be taken to be "non est" in the eye of the law. The extreme contention urged on both sides is unsustainable. It being therefore clear that a second suit is maintainable to recover money due on the mortgage after making the necessary persons interested in the equity of redemption parties to the suit, the question will then arise as to the exact remedy that they would be entitled to in

(11) [1920] 62 I. C. 833.

such a suit. Before considering this I may just mention that the maintainability of the second suit in such circumstances has been accepted by the Bombay High Court in *Dattatraya* v. *Venkatesh* (12), by the Rangoon High Court in *T. C. Bose* v. *Obedira Rahiman Chowdhury* (2) and by the Allahabad High Court in *Lakshmi Narain Das* v. *Hirdey Narain* (13). As I already mentioned, *Venkata Reddy* v. *Kunjappa Goundan* (1) is also an authority in favour of such a proposition. I may also state that as early as *E. K. Kanaran* v. *V. K. Unnooll* (8) Boddam and Miller, JJ., were of opinion that a second suit for sale in such circumstances is maintainable and is the proper remedy.

Now in the second suit what is the remedy that the plaintiff is entitled to? For reasons already mentioned, he would not be entitled to recover possession, because the second suit is based on the original simple mortgage, and not on the footing of any decree in the first suit which ex hypothesi is not binding on the contesting defendants. Further, the second suit could not be to foreclose the defendants, because it is not a relief to which a hypothecatee is entitled. That being so, it is clear that the only remedy that the plaintiff in the circumstances would be entitled to is to recover his money by the sale of the hypothecated property, and that is the view that has found acceptance in all the cases I have mentioned above. No doubt the learned advocate for the respondent is right in saying that the decisions in *Ram Prasad* v. *Bhikari Das* (3), *Jugdeo Singh* v. *Habibullah Khan* (5) and *Birinchi Singh* v. *Sarada Prasad* (4) support the position adopted by the lower appellate Court. Of these *Ram Prasad* v. *Bhikari Das* (3), and *Jugdeo Singh* v. *Habibullah Khan* (5) were prior to the Full Bench decisions of this High Court reported in *Vittil Seeth* v. *Achuthan Nair* (6) and have been considered there ; and the propositions enunciated by the learned Judges of the Full Bench involve the inference that the decisions in those two cases were not acceptable to them. We are bound by the Full Bench decision, and that being so, we cannot accept the contention based on those other decisions cited by the learned advocate for the respondent.

(12) A. I. R. 1922 Bom. 334=69 I. C. 165.
(13) A. I. R. 1926 All. 480=97 I. C. 4.

As we have come to the conclusion that a suit for sale is the only relief to which the person in the position of the plaintiff is entitled, the question arises whether the lower appellate Court was right in having allowed the plaint to be amended by also adding a prayer for the recovery of money by the sale of the properties. The learned District Munsif declined to allow the amendment on the ground that the suit to recover money by sale of the mortgaged property would be barred by limitation ; however the learned District Judge allowed the amendment ; but as the suit to recover money based upon a mortgage of 1908 is clearly barred by limitation (because the period of limitation began to run from 6th June 1909, when the amount became payable, and the present plaint was filed only in 1926), there is no use in allowing the plaint to be amended. The suit being one to recover money due upon a mortgage, the period of limitation applicable to such a suit is Art. 132, Limitation Act. Of course, proceedings in the prior suit or any other proceedings might be relied on if there be acknowledgment of the plaintiff's right, or there might be part payments, which might save limitation. But it is not pretended that there are any such in the present case, and neither the plaint nor the application for amendment in the case before us suggests the existence of any such factor which would save limitation. The suit being therefore prima facie barred by limitation, in so far as the prayer to recover money by the sale of the properties is concerned, I think that the present is a case where we should interfere in revision, inasmuch as the learned advocate for the respondent is right in contending that an appeal does not lie having regard to the wording of O. 43, R. 1-(u), Civil P. C. I am of opinion that the present is preeminently a case for interference in revision, if the result of the amendment would be to direct a plaint to be tried which, on the face of it, is barred by limitation. As remarked by Miller, J., in *Sree Krishna Doss* v. *Chandookchand* (14) the High Court will interfere in revision where there is no doubt as to the rights of the parties, and the result of non-interference will only be to multiply proceedings and to direct an enquiry which should result in nothing favourable

(14) [1909] 32 Mad. 334=4 I. C. 509.

to the plaintiff having regard to the clear law applicable to the case. We have followed that decision of Miller, J., recently, and I think that the present is a case where we should interfere in revision. I may state that this question as regards the rights of parties and how far the subsequent suit should be only to recover money due on the mortgage, has been elaborately discussed by the learned Judge, Mookerjee, J., in *A. I. R.* 1926 *All.* 480. I do not think it necessary to refer in detail to the observations in that case, nor to the observations in 6 Rangoon 297, which are also to the point. In the view I take I need not consider in this case the principles which should guide the Court in fixing the amount that should be decreed to the plaintiff, if the claim be not barred by limitation.

The decision in *Venkata Reddy* v. *Kunjappa Goundan* (1) relied on by the learned District Judge only lays down that a second suit is maintainable, in the circumstances, to recover money by sale of the mortgaged properties. No question of limitation arose in that case, because the mortgage deed was dated in 1914 and the second suit was instituted in 1919—before the expiry of 12 years. That case is therefore no authority on the question of limitation which arises in this case. In my opinion the learned Judge's order allowing the amendment of the plaint and remanding the suit for retrial is not sustainable and should be set aside.

In the exercise of our powers of revision, we allow C. R. P. 1337 of 1929, and reverse the decision of the learned District Judge and restore the decision of the District Munsif with costs in the lower appellate Court and in the revision petition. As my learned brother has stated in his judgment there will be no order as to costs in the Civil Miscellaneous Appeal No. 359 of 1929.

P.R.S./V.S. *Decision reversed.*

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* A. I. R. 1931 Madras 550

WALLACE AND PANDALAI, JJ.

(*Kintali*) *Chandramani Prushti* — Plaintiff—Appellant.

v.

Jambeswara Rayagaru and *others*— Defendants—Respondents.

Appeal No. 161 of 1928, Decided on 9th December 1930, against decree of Dist. Judge, Ganjam, in Original Suit No. 13 of 1927.

(a) Civil P. C. (1908), S. 11 — Plea of res judicata available against Hindu father is not available against his son who does not claim property through him.

A plea of res judicata as regards the question of validity and consideration for the mortgages available against the Hindu father is not available against the son if he does not claim the family property through his father but claims it by reason of his birth as a coparcener in the family. [P 551 C 1]

*** (b) Hindu Law—Alienation—Father — Son born after alienation can challenge it if property is alienated without consent of coparceners.**

A son who is born after the alienation of the family property by his father can question the validity of that alienation if there being other members they had not consented to the alienation : 33 *All.* 654, *Rel. on.*; 33 *All.* 283; 38 *All.* 126; 34 *Cal.* 372, *Dist.* [P 551 C 2]

C. Sambasiva Rao—for Appellant.

G. V. Krishnamurthi — for Respondents.

Pandalai, J.—The plaintiff appeals from a decree of the learned District Judge of Ganjam dismissing his suit brought on six simple mortgages marked A, A-1, A-2, A-3, A-4, and A-5, executed by defendant 1 to him between September 1909 and July 1911 for a total sum of Rs. 2,000. Defendant 2 (respondent 2), the principal contesting defendant, is the minor of defendant 1. The other defendants, of whom defendant 3 is a divided cousin by adoption of defendant 1, and defendants 4 to 9 are persons holding under defendant 3 were made pro forma defendants. A number of formal defences were raised which were all found in favour of the plaintiff. The substantial defence on the merits was that the mortgages sued on were sham transactions made without consideration with the object of defeating any claims which defendant 3 might make to the property or the income on the basis of his adoption which defendant 1 was then denying. On this the learned Judge found in favour of the defence and hence dismissed the suit.

The main questions in the appeal are whether the mortgages sued on are supported by consideration and whether the defence that they were not so supported is open to defendants 1 and 2 or either of them. Logically, the second point should precede the first as, if it is found in favour of the appellant the first point would not arise.

Defendant 1 and his brother's adopted son, defendant 3, were living together before 1909 when they quarrelled and

defendant 1 denied the adoption and drove defendant 3 out of the house. Litigation followed in which the adoption was upheld. In 1914 defendant 3 sued for partition and obtained a decree for his share and costs and mesne profits. In execution of this decree defendant 1's and 2's shares were attached. The plaintiff who had obtained the mortgages now sued on between 1909 and 1911 preferred a claim based on them in execution which was dismissed. He brought a suit, O. S. 14 of 1918, to set aside the claim order, and though he failed in the first Court (Ex. 7) in appeal the District Judge upheld the mortgages as true and valid and supported by consideration (Ex. E). To this suit defendant 1 was party. This suit on the mortgages was brought afterwards. Clearly the question of the validity and consideration for the mortgages is res judicata as between the plaintiff and defendant 1. The learned Judge below misunderstood Ex. E when he considered that the Judge who decided that case, after upholding the mortgages, left the same question open as between the parties to the suit. This he did not in fact do and had not the power to do. The sentence in Ex. E which reference is made clearly refers to defendant 1's minor son (present defendant 2) or anyone else who could legally raise the question and not defendant 1 himself. We hold that the defence of want of consideration is not open to defendant 1 (respondent 1.)

As to defendant 2, he is not barred from raising the same question on the ground of res judicata, as he does not claim the family property through his father, but by reason of his birth as a coparcener in the family. There is however the point arising from the fact that he was not born on the date of the mortgages in question but only, as found by the learned Judge, which is not objected to by him, in 1912. According to the Hindu law as now well settled, *Chuttan Lal* v. *Kallu* (1), *Lachmi Narain Prasad* v. *Kishen Kishore Chand* (2), *Bholanath Khettry* v. *Kartick Kissen Das Khettry* (3), Mayne, Edn. 7, S. 342, a son who was born after the alienation of the family property by his father cannot question the validity of that alienation if the father was at the time of the alienation the only member of the family, or if there being other members they had consented to and so validated the alienation. In this case defendant 1 was not the only member of the family at the dates of these mortgages but there was defendant 3 who became divided only by the decree in the suit of 1914. Not only is there nothing to show that he had consented to but everything to show that he repudiated these mortgages which were held not binding on him. It is therefore open to defendant 2 to question these mortgages: *Tulshi Ram* v. *Babu Lal* (4).

On the merits we have been taken through the evidence as to the consideration for the mortgages sued on. After giving the best consideration to the circumstances mentioned by the learned Judge for preferring the opinion of the first Court in Ex. 7, we have come to the conclusion that the better view is that of the District Judge in appeal in Ex. E. The mortgage Ex. A was for Rs. 400 and given for two promissory note debts Exs. D. for Rs. 225 and D-1 for Rs. 110 and for some cash. This is spoken to by the plaintiff and the writer P. W. 9. Ex. A-1 is for Rs. 400 paid in cash. This is spoken to by P. W. 4. Ex. A-2 is for Rs. 200 in payment of two promissory notes D-2 for Rs. 100 and D-3 for Rs. 100. These are spoken to by P. W. 6, P. W. 7 and P. W. 5. Ex. A-3 is for Rs. 400 including a promissory note debt; Ex. D-4 for Rs. 127. This is spoken to by P. W. 5. Ex. A-4 is for Rs. 300 of which Rs. 150 was in payment of a promissory note D-5. This transaction is spoken to by P. W. 3 and P. W. 7. Lastly, A-5 is for Rs. 300 paid in cash and is spoken to by P. W. 6 and P. W. 7. All the mortgages are also spoken to by the writer P. W. 9 and the plaintiff.

These mortgages were executed at a time when litigation and family disputes existed between defendants 1 and 3, and they are executed for household and litigation expenses. The plaintiff is a village money-lender, a Komati, and defendant 1 is a Brahmin. There is no reason for assuming any conspiracy between them. The learned Judge has laid emphasis on the rapidity with which these transactions followed each other.

(1) [1911] 33 All. 283=8 I. C. 719.
(2) [1916] 34 All. 126=33 I. C. 913.
(3) [1907] 34 Cal. 372=11 C. W. N. 462.
(4) [1911] 33 All. 654=10 I. C. 908.

If that is a ground for surprise, it is equally surprising that, if the object was to create a mortgage in order to defraud third parties (defendant 2 was not then alive), so many as six mortgages were thought necessary for that purpose when it would have been far more easy to create one document. In one case, i. e. Ex. A-2, the mortgage was executed the next day after one of the promissory notes (D-3) recited as paid off by the mortgage. This was regarded as suspicious. The reason appears to be that on the date of D-3 itself the parties contemplated executing a mortgage, as the date of the purchase of the stamp for A-2 shows, but as they were living some miles from the registration office a note was first given and the mortgage was registered the next day. Similar explanations are possible for the other transactions. In any case we see no ground to reject the large body of apparently disinterested testimony given by the plaintiff, which the defendants have not in any way attempted to meet. Defendant 1 did not even go into the box to deny receipt of consideration. We must therefore find that the mortgages sued on were executed for proper consideration and necessity. No question of illegality or immorality has been raised. Defendant 2 being the son is also bound by Hindu law to pay his father's debts. The mortgages are therefore binding on defendant 2. There will be six mortgage decrees as prayed with costs in both Courts. Time for payment 15th July 1931.

P.R.S./V.S. *Appeal allowed.*

A. I. R. 1931 Madras 552

MADHAVAN NAIR, J.

(*Gorti*) *Brahmayya*—Appellant.

v.

Perumalla Subbarayudu — Respondent.

Second Appeal No. 2082 of 1927, Decided on 17th December 1930.

Transfer of Property Act (4 of 1882), S. 82—Mortgagee purchasing part of mortgaged property at auction sale — If sale in mortgagee's favour is valid mortgage debt is proportionately reduced.

When a mortgagee buys at auction the equity of redemption in a part of the mortgage property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole property comprised in the mortgage. But this principle has no application where there is no valid sale in favour of the mortgagee: 22 *All.* 284, *Appr.* and 43 *Mad.* 372, *Ref.*

But in this case the above mentioned principle was not applied as there was no valid sale in favour of the mortgagee. [P 553 C 1, 2]

V. Viyyana—for Appellant.

Ch. Raghava Rao—for Respondents.

Judgment.—Defendant 6 is the appellant. Defendant 1 was the owner of two items of property. Item 1 was mortgaged to one Moseh. Afterwards defendant 1 and his sons mortgaged the same item and item 2 to the plaintiff under Ex. A dated 3rd March 1915. Defendant 1 then became an insolvent and the Official Receiver brought these two items to sale. Defendant 6 purchased item 1 subject to the prior mortgage of Moseh and the plaintiff purchased item 2. The Official Receiver has executed a sale-deed to defendant 6 but no sale-deed has been executed to the plaintiff.

The suit out of which this second appeal arises was instituted by the plaintiff to recover the sum of money due upon the mortgage executed by defendant 1 in his favour. The contesting defendant is defendant 6. His main contention was that by the purchase of item 2 by the plaintiff his mortgage became extinguished both in law and in fact and that item 1 is not liable for plaintiff's mortgage. His plea was accepted by the first Court but in appeal the District Judge held that there was no valid sale of item 2 to the plaintiff. He also held that there was no estoppel against the plaintiff, one of the other pleas urged by defendant 6. In the result, the plaintiff was given a decree for sale. Item 2 was ordered to be sold first and for the balance item 1 was to be sold.

In second appeal by defendant 6 Mr. Krishnaswami Ayyar does not argue, as was contended for in the first Court, that by the purchase of item 2 by the plaintiff his mortgage became totally extinguished; but he contends that there was a practical merger and that the principle in *Bisheshur Dial* v. *Ram Sarup* (1), approved by this Court in *Ponnambala Pillai* v. *Annamalai Chettiar* (2) should be applied to this case. In *Bisheshur Dial* v. *Ram Sarup* (1) it was held that

(1) [1900] 22 All. 284=(1900) A.W.N. 69.
(2) [1920] 43 Mad. 372=12 I.C. 130.

> "when a mortgagee buys at auction the equity of redemption in a part of the mortgage property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole property comprised in the mortgage."

It appears to me that this is the proper principle applicable to the facts of this case, provided it is proved that there was a valid sale of item 2 in favour of the plaintiff. So the question to be considered is whether item 2 has been validly sold to the plaintiff. On this point the finding of the lower Court is against the appellant. This finding is attacked by the learned counsel for the appellant.

It is admitted that there was no sale-deed executed by the Official Receiver in favour of the plaintiff. The equity of redemption was purchased by the plaintiff for Rs. 11. It is argued in the first place that the value being below Rs. 100 a sale deed is not necessary to effect a valid sale and that even if it is necessary to execute a sale-deed the doctrine of part performance can be relied on by defendant 6 in order to prove that the plaintiff has a valid title to the property ; but for the acceptance of either of these arguments, assuming that they can be accepted, it is necessary that there should have been "delivery" of the property to the plaintiff in consequence of the sale. The learned District Judge has distinctly found that there was no such delivery and so there was no valid sale. If this finding is upheld, then, the second appeal must fail. Mr. Krishnaswami Ayyar argues that this is a perverse finding. The question is considered by the learned District Judge in para. 3 of his judgment. No doubt the plaintiff says in his evidence that he got delivery of property ; but the document showing it has not been filed. As pointed out by the learned Judge the plaintiff does not say that he is in possession of the land. Though the plaintiff says he got delivery of the property the crops were taken away by defendant 1 and others. The plaintiff had to file a criminal complaint and his complaint was dismissed. The learned Judge points out that the plaintiff is not in possession of the property but that somebody else is in possession. From these circumstances the learned Judge has concluded that though the plaintiff says that he got delivery as a matter of fact it cannot be held that he got actual delivery and so he came to conclusion that there was no delivery of property to the plaintiff and so there was no valid sale. Having regard to the evidence in the case I cannot say that the finding of the learned Judge is perverse; I must accept this finding. Since there has been no delivery it must be held that there was no valid sale of item 2 to the plaintiff and so the further question how far the principle of the decision in *Bisheshur Dial* v. *Ram Sarup* (1) applies to this case does not arise. This second appeal is dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

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* A. I. R. 1931 Madras 553

WALLACE AND PANDALAI, JJ.

Saudagar Muhammad Abdul Rahim Baig Saheb—Defendent—Appellant.

v.

Saudagar Muhammad Abdul Hakim Baig Saheb and *others*—Plaintiffs—Respondents.

Appeals Nos. 280 to 283 and 460 to 463 of 1924, Decided on 28th November 1930, against decrees of Sub-Judge, Bezwada, D/- 30th June 1924.

*** (a) Mahomedan Law—Joint family business can be carried on by any of whatsoever race he may be.**

There is nothing in law to prevent a joint family business for the benefit of all the members being carried on by any of whatever race he may be. [P 556 C 1]

(b) Mahomedan Law—Joint family—Madras Presidency—It is common for Mahomedans to live and trade together after death of common ancestor.

It is not an uncommon thing in the Madras Presidency where members of a Mahomedan community live surrounded by Hindus that they absorb and adopt Hindu social ideas and tend to look on their own social customs from a Hindu point of view. It is very common in the Madras Presidency for descendants of Mahomedans to live and trade together and the property of the ancestor is then held by the several members of the family in the shares to which they are entitled under the Mahomedan law. [P 556 C 2]

(c) Mahomedan Law—Joint family—Application of law—Each case has to be decided on facts.

Where the descendants of a deceased Mahomedan live and trade together and the property is held by the several members according to their shares under Mahomedan law, the Court in a suit for profits by the other members of the family will not obviously apply Hindu law, but that is not the proper way to decide cases of such kind though it may be the way of least resistance. Such cases are not problems of law

nor does their decision depend upon the ideas of law which the parties have put in their pleadings but are concerned with questions of fact and have to be decided on the facts. [P 556 C 2]

* (d) **Mahomedan Law — Joint family—Adult members can carry on family trade for benefit of all members—Court will uphold such arrangement and legal consequences following it.**

There is nothing contrary to law in Mahomedan adult members of a family carrying on a family trade for the benefit of all the members of the family including the minors and the females, and the Courts will therefore uphold it and such legal consequences as in law follow from it, although the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family or all the legal consequences of a lawful partnership.[P 556 C 2]

* (e) **Mahomedan Law — Joint family—Eldest son carrying on trade of his deceased father for benefit of family stands in fiduciary relation to other members and is liable to account for profits—Trusts Act, Ss. 23 (f) and 80.**

A Mahomedan cloth-dealer died leaving a major son a widow and some minor sons and daughters. The major sons on the death of their father continued the cloth trade as a family trade for the benefit of the family and made profits thereby. The widow and the minor sons filed a suit for account of the profits and division of the same, against the major son. The eldest son defended the suit.

Held: that the eldest son by his conduct after his father's death put himself in a fiduciary relationship to the widow and the minors and it did not matter whether his position was called that of trustee de son tort or executor de son tort: 51 *I. C.* 236 and *A. I. R.* 1927 *Bom.* 75, *Foll.* [P 557 C 1]

Held also: that the eldest son held the assets not as co-ownerbut because of his fiduciary relationship. Ss. 23 (f) and 88, Trusts Act, applied to the case and the eldest major son was bound to hold for the other members of the family any advantages he had gained by availing himself of his fiduciary character and by utilizing the share of the other members in the father's assets for his own pecuniary advantage. [P 558 C 2]

G. Lakshmanna and *P. Satyanarayana Rao*—for Appellant.

B. Bocker, *Immamudin*, *Raifuddin*, *R. Krishnaswami*, *Court-guardian*—for Respondents.

Judgment.—These eight appeals arise from four original suits which were disposed of by the lower Court in four judgments which are practically one judgment. The suit was filed in the following circumstances. A Mahomedan, Abdul Hakim Baig, who was a cloth trader, died on 30th September 1912, leaving a widow, two major sons, two minor sons and three minor daughters. The widow, the two minor sons and the youngest daughters are the plaintiffs in the four suits. The two major sons are defendants 1 and 2 in the four suits. The plaintiffs' general assertion, apart from minor differences, which will be dealt with later on, is that on the death of the father defendants 1 and 2 continued his cloth trade as a family trade for the benefit of the family and made profits thereby, that although an attempt at partition was made in 1915 it did not alter the position of the parties, that the family trade was continued from 30th September 1912, the date of the father's death, till October 1918, when owing to disputes between defendants 1 and 2 it came to an end, that these defendants taking advantage of their position as eldest males in the family used in that trade the shares of the other members in their father's assets and thus became executors de son tort liable to account to the plaintiffs for the profits they have made by such use of the plaintiffs' monies and the plaintiffs are therefore entitled to a decree for an account from 19th December 1918 and a division of the trade profits in proportion to their family shares. The various plaintiffs sue for various sums which they estimate to be due to them on such accounts.

The general defence was that the trade carried on by defendants 1 and 2 after their father's death was entirely for themselves, and, while they admit that in that trade they employed the shares of the other members of the family, these, they say, were treated as mere loans of capital for which interest has been allowed in the firm's books. The lower Court has awarded the plaintiffs the sums set out as due to each in the alleged partition of 1915, plus interest at 6 per cent from that date. All the four plaintiffs appeal. Their appeals are Nos. 460 to 463 of 1924. Defendant 1 has presented an appeal in each of the four suits. His appeals are Nos. 280 to 283 of 1924, objecting to some points in the lower Court's decree which will be dealt with later.

The main question for decision is what was the nature, both in fact and in law, of the business carried on by defendants 1 and 2 after the father's death, and what was the relation, in fact and in law, of the plaintiffs in that business. We have no doubt that from the date of the father's death up to at least the date of the alleged family partition on 7th

March 1915 the business was in fact carried on by defendants 1 and 2 as a family business. Prior to the father's death it was a "one man show", defendants 1 and 2 being mere helpers and not partners with their father, and the business was therefore one of the main assets left by the father to his family. After his death his various heirs took in law their several shares under the Mahomedan law. But it in fact appears that no attempt was then made to settle and distribute these shares. The trade was not wound up, the accounts, Exs. 5 and 17, were not closed, the trade accounts were continued on the same books as before, no change in the constitution of the firm is noted in the books, no list of partners after the father's death was drawn up, the same constituents were dealt with, all the old stock was taken over by and the debts of the father's firm were collected as owing to his successors. There is every indication in favour of, and none really contrary to, the view that between 1912 and 1915 the father's trade was continued by defendants 1 and 2 as a family business for the benefit of all the heirs of their father. It is only necessary to refer in passing to some of the more important documents throwing light on this matter.

The original name of the firm was S.M. Abdul Karim Baig. To this after the father's death was added the words "and sons" and this is the sole feature in favour of defendant 1's contention on this point. But even here there is no indication that "and sons" was confined to the two adult sons. In support of the view that no real change was effected we may note, as a sample, press-book, Ex. E, letters mark 7 and 8, p. 20 of the print, mark 11, p. 27, marks 17 and 18, pp. 26 and 27. That the change meant little or nothing is clear from the letter mark 14, p. 38, to the Accountant-General dated 17th February 1913, in which defendant 1 reports that the business is still carried on in the name of Abdul Karim Baig Sahib, without the addition of "and sons." In the press-book, Ex. E-4, mark 4, p. 62, the firm reports, on 1st May 1913 that it has been established for nearly 30 years. There is no hint in any of the correspondence that the old business has been wound up or is going to be wound up or that any different business has been started. The correspondence throughout implies that the old business is being continued. Defendant 1 regards orders given to the old firm as made to its successor (marks 22 and 23, p. 29 of the print and mark 26, p. 31). The stamp of the father's firm is still used (mark 26, p. 32). In a letter (p. 37) asking for payment of the amount for which the father was insured in the Sun Life Assurance Company defendant 1 enters the names of the widow and the minors also as heirs and urges prompt payment because "we merchants are losing interest." Most important is the power-of-attorney, Ex. A, executed on 1st March 1913 in favour of defendant 2 by all the members of the family, defendant 1 holding himself out as guardian of the minors. . . . .

". . . . . to transact . . . . all our affairs and business in our own names and all and every other business of what kind or nature soever in British India"

is the style of this power-of-attorney. There is no foundation for the contention now advanced that these words are to be restricted to the mere registration of documents. Defendant 1 himself says the power of-attorney was for the purpose of collecting debts. It is perfectly general in its wording and if it was intended to exclude the cloth business, no doubt it would have said so. Also, very important is Ex. X, dated 5th September 1914, a report of the firm in answer to a circular from the Bank of Madras, Guntur, asking them to report the names of the members of the firm. In that letter defendants 1 and 2 report that the members of the firm are their two selves and their two minor brothers by guardian, defendant 1. The latter's effort to get rid of this evidence by saying that he signed a blank paper is wholly disingenuous, and we are surprised that the lower Court gave any credence to such an obviously self-interested disclaimer. Ex. X is an act of the firm signed by defendant 1 himself as well as defendant 2 and is clearly binding on both. The argument now put forward that defendant 1 by Ex. X was merely declaring his intention to admit to partnership the minor brothers when they come of age is not put forward by himself and there is no reason to accept it. Minors may be admitted by partners to the benefits of a partnership: see S. 247, Contract Act. In 1921 defendant 1 examined in a criminal case said

'we eight persons are not partners in the firm of A. K. & Sons. We divided our shares in the year 1915 : see Ex. 13 a very clear implication that the firm continued as it was originally until 1915."

The various disingeneous statements of defendant 1 made in this deposition and in his deposition in this trial to explain away such matters as Exs. A and X and the absence of entries of any changes in the accounts, the use of his minor brothers' names or initials in aliases of the firm indicates that his conduct in this matter has not been straightforward. To all this may be added the testimony of P. W. 3, a gumastha of the deceased father and after him of defendants 1 and 2 until 1916, who says that after the father's death defendant 1 continued his father's trade with all its assets and liabilities, and the evidence of P. W. 4, another gumastha of the firm from 1911 to 1918 to the same effect. All this shows quite clearly that the business was regarded as a family business in which all the members of the family were interested. The power-of-attorney is signed by all. Those regarded formally as members are all the males of the family and the designation "and sons" was therefore added. There is no break in the business after the father's death. Its credit and goodwill were taken over and used by the "and sons" firm. The business is in fact continued just as if the father had not died. His assets, separately held in theory though they may be in law by the various heirs. continued as the assets of the business. It is quite clear that the first part of the plaintiffs' case that the business was in fact continued after the father's death as a family trade for the benefit of the family is fully justified.

Defendant 1 answers to this that as in law there cannot be a Mahomedan joint family: see *Abdul Khadar* v. *Chidambaram Chettiar*(1) therefore there cannot be a family trade, and this is the argument which has found favour with the lower Court. It seems to us irrelevant. The point is not whether this trade was one to which the law will impute all the incidents and legal implications of a Hindu joint family trade, but whether in fact the business was carried on for the benefit of the whole family. There is nothing in law to prevent such a business being carried on by anyone of whatever race he may be. From what we have already said we are satisfied that the trade was being continued as a family trade. Defendant 1 also regarded himself after his father's death as the guardian of the minors and acted as if he really were. This is plain from Exs. A and X already noted. No doubt he could not be guardian de jure, but that is again beside the point. It is plain that he was acting as guardian de facto. Thus he regarded himself as the representative of the minors in the trade and justified as such in using their moneys for it and protecting their interests. He looked upon himself as to all intents and purposes the eldest member of a Hindu joint family does, namely as manager of a joint family business, and guardian of the minors, except that as the family was Mahomedan the family trade in this case was carried on by him on behalf of all the heirs of the deceased founder of the trade and thus on behalf of the females of the family also. It is not an uncommon thing in this Presidency, where members of the Mahomedan community live surrounded by Hindus, that they absorb and adopt Hindu social ideas and tend to look on their own social customs from a Hindu point of view. This tendency has been recognized in various rulings in this Court in *Hussain Sahib* v. *Hassain Saib* (2), for example, where it has been pointed out that it is common in this Presidency for descendants of Mahomedans to live and trade together, and the property is then held by the several members of the family in the shares to which they are entitled under Mahomedan law. Clearly that is what has happened here. That the Courts will not apply Hindu law to Mahomedans is obvious, but that is not the proper way to decide a case of this kind although it may be the way of least resistance. Such cases are not problems of law, nor does their decision depend on the ideas of law which the parties have put into their pleadings, but are concerned with questions of fact and have to be decided on the facts. The correct view in our opinion therefore is that there is nothing contrary to law in Mahomedan adult members of a family carrying on such a family trade for the benefit of all the members of the family including the minors and the females, and the Courts

(1) [1909] 32 Mad. 277=3 I. C. 876.

(2) [1917] 41 I. C. 184.

will therefore uphold it and such legal consequences as in law follow from it, although the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family or all the legal consequences of a lawful partnership.

What, then, are these legal consequences in this case? In the light of the facts which we have set out, it seems to us that the conclusion cannot be resisted that defendant 1 by his conduct after his father's death put himself in a fiduciary relationship to the widow and the minor members of the family. He assumed the management of their father's business as if he was in law, what he conceived himself to be in fact, the manager of a family business for the benefit of all. He assumed the position of guardian of all the minors, male and female, and acted as such, a position obviously of fiduciary relationship : see *Sitha Boi* v. *Rada Boi* (3). He regarded the minor males as full members of the firm. He and defendant 2, in their self-imposed management of the family business, retained it intact as it had been at the father's death and did not wind it up or distribute to each sharer his quota or allow it to be abstracted from the firm. They by virtue of their position as the adult males got possession of the shares of the widow and the minors and retained these in the firm. By this assumption of family management it does not matter whether we call their position that of trustees de son tort or executors de son tort the relationship in which defendant 1 stood to the widow and the minors was essentially a fiduciary one. The present case is similar to that in *Vrandavan* v. *Parshotam*, *A. I. R.* 1927 *Bom.* 75, in which a similar view was taken.

Defendant 1 argues, in addition to the argument with which we have already dealt, that what is not legally correct cannot be actually possible, one or two points ; first, that the matter of guardianship was never raised in the plaints. That is true; the two leading points in the plaints were family trade and executor de son trot. But the guardianship matter is merely a plank in that platform, and the matter of fiduciary relationship does not rest on that alone or chiefly, but on the general assumption by defendants 1 and 2 of management of their father's trade for the benefit of all his heirs. The matter of guardianship was raised in the lower Court at the time of trial and is dealt with by the Subordinate Judge, but with the same erroneous notion that one who cannot be a guardian de jure cannot act as guardian de facto and carry on a business as such. The decision in *Abdul Khadar* v. *Chidambaram Chettiar* (1), relied on by defendant 1, is not really in point. The question there was whether the act of a guardian de facto of a Mahomedan minor could in law bind the minor adversely to his interests. We think therefore there is no force in this contention by defendant 1.

The next point was that defendant 1 cannot be in law styled an executor de son tort because he did not do any act which belongs to the office of executor. It seems to us to matter very little what sort of name we give him in law or whether the plaintiffs were right in their plaints in describing him as an executor de son tort. The relationship in which he stood to the plaintiffs was, as we have held, clearly fiduciary.

Then defendant 1 argues that, as he was legally in the position of co-owner with his co-heirs, he must be conceived to have been in possession of their shares as co-owner, and therefore not in a fiduciary capacity, as the relationship of co-owner is not in law a fiduciary one : *Abdul Khadar* v. *Chidambaram Chettiar* (1) and *Abdul Samad Khan* v. *Bibijan* (4). Here again it is a question not of law but of fact, and to our minds it is quite clear from the facts we have set out that defendant 1 was assuming a position much more of trust than of a mere co-owner, and that he came into possession of the assets of the other members not because of his co-ownership but because of the fiduciary relationship he adopted towards them into which he entered on their behalf.

Apart from the general question of whether defendant 1 is liable to account to the plaintiffs for the profits made by him on the ground that he made these profits in a fiduciary capacity, defendant 1 urges that at least the profits got by foreign trade from 1912 to 1915, shown as Rs. 11,864-10-0 in Ex. 2, should not

(3) [1919] 51 I. C. 236.

(4) A. I. R. 1925 Mad. 1149=91 I. C. 618.

be included. His argument is that this figure represents profits on a brokerage trade in Manchester cloths which was started after his father's death, the capital for which he and defendant 2 obtained from the insurance money of the Oriental Life Assurance Company, which was left to them exclusively by their father. With this sum they say they opened on 27th January 1913 a National Bank account, Ex. 4, on which they operated for their foreign trade. But it is clear from that account itself, and from defendant 1's own evidence, at p. 260 of the print, that the foreign trade was not in fact separated from the ordinary cloth trade. The items of both are mixed up together. Defendants 1 and 2 in fact seem to have regarded the Oriental Life Assurance Company's policy amount as a loan by them to the family firm, and in the settlement. Ex. 2, it appears that interest has been allowed to them therefor, being included in the figure of Rs. 580 at p. 133 of the print. Out of this National Bank fund certain shares in the Buckingham Mills were purchased for Rs. 2,925 and again that figure is included in Ex. 2 (a part of the amount shown in deposit with Binny & Co. p. 116) in the trade assets available for distribution to all members of the family though the interest on the shares is regarded as the perquisites of defendants 1 and 2 only (p. 134-5). This attempt to isolate a particular branch of the family trade and earmark it for defendants 1 and 2 alone cannot therefore be upheld.

A dividing line however both in fact and in law has to be drawn between the period 1912-15 and the period 1915-18. In March 1915 owing to one minor sister having come of age and having demanded her share, the firm's accounts were looked into and an attempt was made to ascertain the assets of the firm not on that date but on the date of the father's death, and to partition these assets among the various heirs. It was really rather a hopeless task owing to the failure of defendants 1 and 2 to close the firm's accounts at the time of their father's death and the resultant figures are only approximate. This partition is evidenced by Ex. 2. As it stands, it allotted all the profits between 1912 and 1915 wholly to defendants 1 and 2 on the footing that the trade after their father's death was not a family trade but their own exclusive trade. Another minor daughter came of age in 1918 and also was then given her share according to Ex. 2. These two daughters gave release deeds, Ex. 6, dated 1st April 1916 and 6 (a), dated 1st July 1918. Ex. 2 and the partition which it represents were forced on defendants 1 and 2 by the demand of one co-heir for her share and it was carried through by these defendants alone. The process by which they came to the result that the profits between 1912 and 1915 were their own private profits and were not divisible as assets among the family can be regarded as barely honest. They had on their case used for themselves exclusively the whole credit and good will of their father's firm which had been going on for about 30 years, a very definite asset which ought to have been valued and divided between the co-heirs. Further, having obtained control of the shares of the other members of the family by the simple process of constituting themselves trustees and guardians for them, they used these shares in the business to obtain the profits which they under Ex. 2 proceeded to divide between themselves alone. We are satisfied that after the death of the father defendant 1, along with defendant 2, carried on the father's business as a person bound in a fiduciary capacity to protect the interests of the plaintiffs. Ss. 23 (f) and 88, Trusts Act, will consequently apply. He was therefore bound to hold for the benefit of the plaintiffs any advantage he gained by availing himself of his fiduciary character and by utilizing the plaintiffs' shares in their father's assets for his own pecuniary advantage; and the measure of that advantage up till 7th March 1915 is the figure of profits both on his own trade and on the foreign goods as set out in Ex. 2. The plaintiffs are therefore each entitled to the profits between 1912 and 1915 arising to each of them proportionate to their shares of the capital employed. The plaintiffs do not now challenge the figures in Ex. 2 although the figures are merely approximate, but only the method of division. The figures of profits therein given from 1912 to 1915 are Rs. 13,402-13-0 on the local trade and Rs. 11,864-10-0 on the foreign trade.

But after this partition of 1915 the position in fact and in law changed

radically. From the date of Ex. 2 separate khatas for each member then remaining in the family were kept and their own individual credits and debits entered therein, Ex. 17-B. None of the plaintiffs has attacked the fact of this partition. It is true that in their plaints the plaintiffs in Appeals Nos. 280 to 283 speak of defendant 1 and 2 having "purported" to partition and of some properties having been omitted. But issue 1 in all the suits clearly shows that all the plaintiffs accepted the partition as a fact, and the only question about it which fell to be decided was, what was the value of each share. Such a position it is obviously difficult to maintain when the family trade has ceased to be family trade because the family members themselves have partitioned. Any combination actual or theoretical, between the members of the family ceased at such a partition, and the plaintiffs must be regarded as having accepted that position. It is true that none of them categorically pleads that the family trade had then come to an end; all plead that the defendants were even after the partition in the position of executors de son tort in dealing with the respective shares of each plaintiff; but such a contention cannot be upheld in the circumstances. There is no question here of renunciation of a trust to which S. 46, Trusts Act, would apply. The mother, for example, must be taken in the absence of evidence to the contrary, which she does not provide as she has not gone into the witness-box, to have known of the partition and accepted it as putting her own separate share at her disposal. If she then allowed it to be used for the trade she was perfectly aware that there was no longer a family trade for her benefit and the continued use of her share could only then be as capital lent to the firm consisting of defendants 1 and 2. She cannot therefore contend that defendant 1 was any longer dealing with her share in a fiduciary capacity. Similarly the minors who now accept the partition of the various shares cannot plead that the trade by two separated members was any longer being conducted as a family trade for the benefit of the rest. It is true that no independent person represented them at the partition, but they have not complained of that or made it a ground of action. We conceive then that it is not open to them to maintain that after the partition the family trade continued as a family trade for their benefit, and therefore defendant 1 was any longer engaging in it in a fiduciary relationship towards them. No case was put forward in the plaints that after 1915, when the family trade had ceased, defendant 1 remained guardian de facto or quasi trustee, and therefore responsible to the minors as guardian de son tort or as trustee de son tort. Any claim that he remained executor de son tort will not avail as it is not shown that he was engaging in any act which belongs to the office of executor. As to ownership, the suit was not on the footing of partnership, nor is there any basis for the contention that after 1915 the other members of the family were admitted to the benefits of the partnership within the meaning of S. 247, Contract Act. We are therefore of opinion that from 7th March 1915 the plaintiffs are entitled only to interest on their individual shares in the firm, regarded as loans of capital. That interest has been awarded by the lower Court at 6 per cent and no attack on that rate has been raised in the pleadings or before us.

The net result in Appeals Nos. 460 to 463 of 1924 is that the share of each plaintiff will be re-calculated on the figures of Ex. 2, including for general distribution the figures of profits on the "godown" and "foreign goods." On each total so ascertained interest will be allowed at 6 per cent per annum up to the date of payment. The proportion of shares is, to the widow 11/88, to each minor son 7/44, and to the daughter 7/88. We do not see any sufficient reason for allowing any special remuneration under S. 95, Trusts Act, to defendant 1 as manager in view of our opinion that his conduct has not been straightforward. From the totals so ascertained payments admitted as directly made to the plaintiffs in Appeals Nos. 460, 461 and 462 by defendant 2, namely, Rs. 12,000, in Appeal No. 460, Rs. 8000 in Appeal No. 461, and Rs. 6000, in Appeal No. 462, must be deducted, and also the amounts shown as drawn out in cash by each plaintiff in his or his separate khata, Ex. 17, on which counter-interest at 6 per cent must also be allowed. These latter deductions were left by the trial Judge to be disposed of in a collateral suit bet-

ween the parties about the partition of immovable property; but as they were not so disposed of we have now to provide for them here.

These deductions are the matters raised in Appeals Nos. 280 to 283 of 1924. Defendant 1, the appellant in these appeals further claims that the amount of these deductions should be increased because of an arrangement between himself and defendant 2 under Ex. 7 lessening to some extent the proportion of his liability in the family trade. Obviously this private arrangement cannot be used to curtail the plaintiffs' rights and this request must be disallowed. The decrees of the lower Court are therefore set aside and the amount due to each plaintiff will be calculated on the above footing and decreed. The decree calculations will be shown to the counsel on both sides before the final decrees are drawn up. The matter of costs will be spoken to after these calculations are at our disposal, to be spoken to ten days hence.

Order.—The amounts now calculated by the office are now found to be the amounts due.

A. S. No. 460 of 1924	Rs. 5,263-10-0
A. S. No. 461 of 1924	8,322-7-10
A. S. No. 462 of 1924	894-1-3
A. S. No. 463 of 1924	2,879-11-9

In *A. S. No.* 460 *of* 1924.—Rs. 5,000 was paid in November 1924 towards the decree. On that date Rs. 4,925 was due to appellant. The difference Rs. 75, with interest at 6 per cent up to date of payment from November 1924, will be due to defendant 1 from appellant by way of restitution. *A. S. No.* 460 *of* 1924.—Decree will now be passed in favour of defendant 1 for that sum to be paid by appellant. Appellant will get full costs in this appeal. *A. S. No.* 461 *of* 1924.—Decree is for Rs. 8,322-7-10 with interest at 6 per cent up to date of payment. Each party to bear his own costs. *A. S. No.* 462 *of* 1924.—Decree for Rs. 8,94-1-3 with interest at 6 per cent up to date of payment. Appellant will get her costs in the appeal. *A. S. No.* 463 *of* 1924.—Decree for Rs. 2879-11-9 with interest at 6 per cent up to date of payment. Appellant will get her costs in the appeal. *A. S. No.* 280 *to* 283 *of* 1924.—Appellant will get half his costs here in these appeals.

P.R.S./R.M. *Order accordingly.*

A. I. R. 1931 Madras 560

JACKSON, J.

(*Sheik*) *Hyder Sahib*—Petitioner.

v.

Sabjan Sahib—Respondent.

Criminal Revn. Case No. 624 of 1930, Criminal Revn. Petn. No. 579 of 1930, Decided on 30th January 1931.

Penal Code (1860), S. 441—"Possession" includes constructive possession.

Constructive possession is included in the word "possession" in S. 441. Therefore where a certain house is in constructive possession of the complainant in that the complainant after obtaining possession in due course of law locks the house and goes out, such possession is sufficient: 2 *All.* 465, *not Foll.*; *A. I. R.* 1931 *Mad.* 231, *Foll.* [P 560 C 2]

S. K. Ahmad Meeran Sahib—for Petitioner.

T. S. Venkataraman—for Respondent.

Order.—This is a petition to revise an acquittal. The lower appellate Magistrate found that accused 2 was in a house which was in the constructive possession of the petitioner in that petitioner after obtaining possession in due course of law had locked the house and gone out. But since this was not actual physical possession he found, following *In the matter of Govind Prasad* (1), that there could be no annoyance and therefore no criminal house trespass. With the greatest respect I cannot accept the view expressed in *In the matter of Govind Prasad* (1), for it narrows the meaning of the section to ridiculous limits.

Suppose a man locks up his house and goes for a walk; suppose he locks up his godown, and some one enters with intent to annoy or offend, is it to be said that there is no annoyance or offence, unless he was actually sitting in his house or godown?

In fact the thief who has waited for the owner to depart could plead under *Govind Prasad, In re* (1), that he was not criminally trespassing. Constructive possession is included in the word "possession" in S. 441, I.P.C. In the light of these observations the acquittal is set aside and the appeal will be reheard. The view expressed above is expressed in an unreported case of this Court in *Chinna Venkatra* v. *Pedda Kisama* (2).

P.R.S./P.N. *Revision allowed.*

(1) [1879] 2 All. 465.
(2) A. I. R. 1931 Mad. 231=1931 Cr. C. 327.

* A. I. R. 1931 Madras 561 (1)

REILLY AND ANANTAKRISHNA AYYAR, JJ.

(*Thoppai*) *Venkatarama Ayyar* — Appellant.

v.

A. Govindarajalu Ayyar—Respondent.

Appeal No. 433 of 1926, Decided on 12th February 1931, against order of Dist. Judge, Madura, D/- 15th July 1926.

*** Civil P. C. (1908), S. 144—Decree reversed on appeal—Appellant is entitled to interest on costs paid by him.**

An appellant is entitled to interest on costs paid by him to the respondent under a decree afterwards reversed on appeal, which have to be refunded by him by way of restitution: *A.I.R.* 1921 *All.* 241; 20 *W.R.* 49; 8 *All.* 262, *Foll.*

[P 561 C 1]

P. N. Appuswami Ayyar—for Appellant.

T. Krishnaswami Iyengar and *S. K. Narasimhachari*—for Respondent.

Judgment.—The question is whether the appellant is entitled to interest on costs paid by him to the respondent under a decree afterwards reversed on appeal, which have to be refunded to him by way of restitution. In *Rodger* v. *Comptoir d'Escompte De Paris* (1), their Lordships of the Privy Council did not allow interest on costs to be refunded and remarked that it had never been the habit in ordering the refunding of costs paid under a decree to order that refunding with interest. In *Forester* v. *Secy. of State* (2), they remarked that interest on costs to be restored was "less favoured" than interest on other amounts to be restored. But in *Kedar Nath Pakrasee* v. *Doya Mozee Debia* (3), a Bench of the Calcutta High Court and in *Ram Sahai* v. *The Bank of Bengal* (4), a Bench of the Allahabad High Court allowed interest on costs so refunded. And since those decisions S. 144 of the present Civil P. C., has been enacted to enable restitution to be made so as to place the parties in the position which they would have occupied but for the decree reversed and provides for interest being ordered for that purpose without any restriction to interest on amounts other than costs. In *Gokul Prasad* v. *Ram Devi* (5), a Bench of the Allahabad High Court awarded interest on costs to be refunded in order to give effect to the provisions of the section. In the present case the learned District Judge has given no reason for not allowing interest on the costs in question. In our opinion he could have allowed interest and should have done so.

This appeal is allowed, and interest on the costs to be refunded is awarded at 6 per cent. But, as the appellant has claimed a higher rate and has pressed this appeal for a small amount, there will be no order as to costs here.

P.R.S./R.M. *Appeal allowed.*

(1) [1871] 3 P.C. 465=40 L.J. P.C. 1=24 L.T. 111=19 W.R. 449=7 Moor. P.C. 314.
(2) [1877] 3 Cal. 161=4 I.A. 137=3 Sar. 717.
(3) [1873] 20 W.R. 49.
(4) [1886] 8 All. 262.
(5) A.I.R. 1921 All. 241=63 I.C. 513.

A. I. R. 1931 Madras 561 (2)

KUMARASWAMI SASTRI AND REILLY, JJ.

Gajapathi Krishna Chandra Deo Garu Zamindar of Nandigam Estate—Defendant—Appellant.

v.

Maharaja Manya Sultan Bahadur Varu, Raja of Vizianagaram—Plaintiff—Respondent.

Appeal No. 16 of 1928, Decided on 25th February 1930, against decree of Sub-Judge, Berhampore, in O. S. No. 21 of 1923.

(a) Easements Act (1882), S. 13—Certain estate partitioned in 1864 between *T* and *N* keeping tank common to both for irrigation of their villages—Tank breached in 1876 and restored to original condition in 1913—Plaintiff was purchaser of certain villages embracing some tank bed from *N*—In 1899 when plaintiff purchased these villages they were not submerged, tank being in state of disrepair — After construction of repairs, lands purchased submerged and suit brought for injunction, damages and for directing defendants to remove newly constructed bund—Lower Court dismissing suit against *T* and decreeing it against *N* observing that he had no right to submerge lands sold by him and plaintiff could question submersion as no rights to inundate were reserved at date of sale—No reservation held necessary—Mere fact that after repairs were made water inundated plaintiff's land which was in tank bed held not to give plaintiff right to sue for damages.

Certain estate was partitioned in 1864 between two zamindars *T* and *N*, keeping a tank bund and the lower part of the tank bed common for irrigating the villages of both the zamindars. The tank was constructed in 1813 and it was breached in 1876 and no effective repairs were made till 1913 when it was restored to its original condition. In 1899 plaintiff purchased two villages from *N* which embraced part of the bed of the tank which could only be submerged when the tank was full. At the time of purchase owing to the tank being in a state of disrepair, the tank bed was restricted, but after it was brought to the original condition

by repairs made in 1913 a portion of the land purchased by plaintiff from *N* was submerged as was the case for 14 years even after partition till breach. A suit was consequently brought for injunction and damages and for directing the defendants *T* and *N* to remove the newly constructed bund at the places where it was breached. The lower Court dismissed the suit as against *T* as he was no party to the sale by *N* to plaintiff, but decreed it as against *N*, observing that he had no right to submerge the lands which were sold by him and that the plaintiff was entitled to question the submersion as no right to inundate was reserved at the date of sale.

Held; per *Kumaraswami Sastri, J.*—That no reservation was necessary where there was a conveyance or partition of property; *Pyer* v. *Carter*, 1 *H. & N.* 916 and *Watts* v. *Kelson*, (1871) 6 *Ch. A.* 166, *Rel. on.*; *Wheeldon* v. *Burrows*, 12 *Ch. D.* 31, *Ref.* [P 566 C 1]

Held further: per *Kumaraswami Sastri, J.*—That the mere fact that part of the property belonging to *N* was sold which included the tank bed would not of itself take away the right of *N* who was the owner of the rest of the property to repair the tank unless there was any negligence in the repairs and the mere fact that he stored water in the tank after repairing the bund and that the water inundated the plaintiff's land which was in the tank bed would not give the plaintiff a right to sue for damages. [P 566 C 1]

Held: per *Reilly, J.*—That from the very nature of the partition by which the tank bund and a part of the tank bed was kept common and the fact that for 14 years even after partition the part of the tank bed within the limits of the land purchased by plaintiff was submerged whenever the tank was full, the intention of the parties must have been to preserve in the interest of both the zamindars to submerge the tank bed in the land purchased by plaintiff whenever there was a full supply to the tank to facilitate the irrigation of the villages of both the proprietors and that right of easement cannot be affected by sale to the plaintiff.

Held further: that such right to flood the lands by storing water in an irrigation tank was continuous as well as an apparent easement: *Wheeldon* v. *Burrows*, 12 *Ch. D.* 31, *Ref.*

(b) Tort—Negligence — Storing of water for agricultural purposes is not actionable in damages unless there is negligence.

The storing of water for agricultural purposes is a natural and lawful user and is not actionable in damages unless there was negligence proved: 1 *I. A.* 364 (*P. C.*), *Foll.* [P 566 C 2]

B. Jagannadha Das and *V. V. Jogayya*—for Appellant.

S. Venkatesa Ayyangar—for Respondent.

Kumaraswami Sastri, J.—Defendant 2 is the appellant.

This appeal arises out of a suit filed by the plaintiff who is the Raja of Vizianagaram against defendant 1 who is the Zamindar of Pata Tekkali, and defendant 2 who is the Zamindar of Nandigam, for an injunction restraining the defendants or either of them from restoring and improving the irrigation tank called the Padmanabha Sagaram or to construct new weirs at any portion of it so as to affect the rights of the plaintiff in the lands situate in Mallividu and Kallada villages, to direct them to remove the newly placed bund of Padmanabha Sagaram tank at the places where it was breached in 1878 and to remove the newly constructed surplus weir, or in the alternative for damages which the plaintiff estimates at Rs. 1,000 per annum.

The facts leading to this appeal are as follows: The estate of Tekkali and Nandigam formerly formed one estate known as the Tekkali Estate. The Padmanabha Sagaram tank was constructed about the year 1813 or so, by a former proprietor of the estate in order to irrigate certain villages. The estate was partitioned in 1864 and became two estates, one known as Pata Tekkali which is now owned by defendant 1 and the other known as Nandigam which now belongs to defendant 2. In the year 1878, owing to abnormal rains, the bund breached considerably and it was not capable of storing as much water as it used to do. The proprietor of the Nandigam Estate at that time got into debt and financial difficulties and the estate was subsequently taken over by the Court of Wards and managed. After the estate was restored to the heirs of that zamindar the tank repairs began in 1910 and were completed in about 1913. In 1920 the plaintiff complained that the effect of the repairs was to flood a portion of his lands in the village of Mallividu and this suit was filed in 1923 for the reliefs above stated.

When the Nandigam estate was managed by the Court of Wards, they resolved to sell some villages in the estate in order to discharge the debts incurred by the zamindar, and put up for sale five villages. These villages were purchased in auction by the Raja of Vizianagaram on 12th June 1899. Two of the villages with which we are concerned were Khallada and Mallividu.

The plaintiff's case is that by reason of the repairs and the erection of the surplus weir 74 acres 49 cents of his lands in Mallividu and 7 acres 30 cents

of his land in Khallada have been submerged and rendered unfit for cultivation. He states in his plaint that the Padmanabha Sagaram tank which bounds the village of Mallividu was a tank constructed in the beginning of the 19th century to irrigate the lands of defendants 1 and 2 when the two estates were joint; that the estate became severed in 1864; that in 1878 the Padmanabha Sagaram tank was breached and was since abandoned as a tank by defendants 1 and 2 and remained in the same condition till 1913; that in 1912 there was a dispute between the plaintiff and defendant 2 regarding the eastern boundaries of Mallividu village and the survey authorities fixed it by placing stones along the boundary as given to the plaintiff's predecessor-in-title by the sale to him in 1899; that when the villages were purchased by the plaintiff's predecessor-in-title the tank bed of the Padmanabha Sagaram was restricted and that defendants 1 and 2 having abandoned the tank in 1878 and allowed it to continue in that estate till 1913 when they not only restored the tank to its condition previous to 1878 but considerably raised the bund and constructed a surplus weir lost all their rights to restore the tank to its original condition thereby affecting the rights of the plaintiff as they existed in 1899, the year of the purchase.

Defendant 1 filed a written statement stating that the Padmanabha Sagaram tank is the joint property of himself and defendant 2; that defendant 1 has his own right to take water from the Sagaram in certain proportions in certain places jointly with defendant 2 and to his exclusion in other places ; and that it is not true that the tank breached in 1878 or was abandoned from that time or continued in a ruined state till 1913. He says that as a matter of fact the tank was being repaired in the interval every now and then as occasion arose; that he has not lost his right to restore the tank to its original condition; that he was no party to the sale by the Court of Wards or to the proceedings before the survey officer and that he is not bound by them. He admits that the tank was repaired in 1913 but denies that the bund was raised to a height more than what it was previously, and that the plaintiff has suffered any damages, and states that even if the plaintiff has suffered any damages he, defendant 1, is not liable for the same. He says that the lands referred to in the plaint have always been under submersion; that even more lands were being submerged; that owing to the collusion of defendant 2 with the plaintiff defendant 2 built a weir to the north of the tank bund and fewer lands than usual are now being submerged; that the new weir forms the subject-matter of dispute between him and defendant 2; that the lands referred to in the plaint form part of the tank bed and that the plaintiff has no right to cultivate the same. He denies that the plaintiff has uninterrupted and open enjoyment as of right of the lands under the tank. He states that his rights are not barred by limitation.

Defendant 2 filed a written statement admitting the breach of the tank in 1878 but denying that the tank was abandoned by the defendants and alleging that it was being repaired from time to time. He states that the defendants never lost the right to repair the tank. He denies that the bed of the tank was restricted by the survey officers as alleged by the plaintiff and states that any act of the survey officers would not bind him. He states that he is not aware of any arrangement between the Court of Wards and the Raja of Vizianagaram, and in any event it will not bind him; that it is not true that the tank bund has been raised or in any way altered beyond what it was before the breach; that the plaintiff has sustained no damage and even if he did defendant 2 is not responsible as he only restored the tank to its original condition, that the lands referred to by the plaintiff were as a matter of fact subject to submersion from time immemorial and formed part of the bed of the Padmanabha Sagaram tank; that the plaintiff cannot now question the right of the defendants as those lands were always subject to submersion except when the tank was not full of water, that the defendant's right to repair the tank is not barred by limitation ; that though one of the surplus weirs was newly constructed, there was formerly a weir by the side of the newly constructed weir and that the new construction does not cause any damage to the plaintiff.

The Subordinate Judge held that the defendants never abandoned the

Padmanabha Sagaram tank but that temporary repairs were being executed ; that both the defendants were jointly entitled to the tank and the water stored therein and that they have not lost their right to repair the tank. As regards the repairs which were actually effected the case of the plaintiff that the bund was raised to a higher level than it was before was abandoned. As a matter of fact it was found that the bund was not raised but that it was lower than the original level. He also found on the evidence that 76 acres 83 cents in Mallividu village were liable to submersion and were being actually submerged till 1878 before the tank was breached but after the breach the waterspread became restricted, that they were not under submersion for some time prior to 1899 and that after the purchase by the Vizianagaram Estate in 1899 the area submerged varied, the variation depending on the rainfall. He finds that no lands were submerged in Khallada village. So far as defendant 1 was concerned, he was of opinion that defendant 1 was not a party to the sale or the survey proceedings between the plaintiff and defendant 2 and that the plaintiff is not entitled to any relief against defendant 1. As regards the issues as to the right of the plaintiff to the Padmanabha Sagaram tank and whether the plaintiff is entitled to have the bund of the tank lowered and the subsequent weir removed he states that they were not pressed. He was however of opinion that defendant 2 had no right to submerge the lands which were sold by the Court of Wards and that the plaintiff was entitled to question the submersion as no right to inundate was reserved by the Court of Wards at the date of the sale. In the result he gave a decree for the plaintiff for Rs. 600 damages for the years 1921, 1922 and 1923. He gave an injunction against defendant 2 restraining him from increasing the height of the bund of the tank or of the surplus weirs or of both and refused the other reliefs claimed by the plaintiff.

No appeal or memorandum of objections was filed by the plaintiff as regards that portion of the decree which dismissed the suit against defendant 1 so that that portion of the decree has become conclusive and final. The result of it is that on the findings of the Subordinate Judge that the tank was the common property of defendants 1 and 2 that defendant 1 is not bound by anything which the Court of Wards did and has a subsisting right to repair the tank and restore it to the condition in which it was before the breach in 1878 the plaintiff could have no right to complain if defendant 1 chose to-morrow to repair the tank by raising the bund to its original level and submerge all the lands which the plaintiff now complains are being submerged and rendered unfit for cultivation.

So far as defendant 2 (one of the joint owners) however is concerned a decree has been passed making him liable for damages for the restoration of the bund.

I agree with the Subordinate Judge that there was no abandonment of the tank at any time either by Tekkali or Nandigam proprietors. The bund was breached and though effective repairs were made only in 1912 and 1913 there was correspondence as to repairs which we have already referred to and the ryots were taking water from the tank though there was a very small quantity of water.

As regards the purchase by the plaintiff of the five villages referred to in the plaint including Mallividu and Khallada these villages originally belonged to the Nandigam Estate. The predecessor-in-title of defendant 2 had heavily encumbered the property. In order to discharge the debt the Court of Wards resolved to sell six villages by public auction. The sale was notified in the official District Gazette of Ganjam. The notification was not filed as an exhibit in the lower Court. The Subordinate Judge has remarked that the notification was not before him. An application was filed before us to admit the document in evidence. The document is part of the Official Gazette and there is no question of its genuineness. The affidavit in support of the application says that the notification which was published in the Ganjam District Gazette dated 1st June 1899 was not filed by oversight. The advocate for the appellant requests permission to file it under O. 41, R. 27, Civil P. C. As there is no dispute about the genuineness of the document and as the extent of the lands sold and the upset price would have some bearing on the argument of the respondent that he suffered a great loss and purchased the property for a

high price on the footing that there would be no submersion we decided to admit the document.

As the Judge finds that Khallada has not been inundated but that the only damage was as regards the Mallividu village, the fact that in the sale proclamation the description of this village gives a very small extent of 14 acres wet and 5 acres dry as cultivated and fixes the upset price at Rs. 825 supports the argument of the appellant that this was really tank bed, that everybody knew that Padmanabha Sagaram tank bed occupied a great portion of that village and that the respondent's contention that he purchased it on the footing that the whole village was cultivable cannot be true. At the auction sale the Raja of Vizianagaram purchased these villages. The sale deed is Ex. PP, dated 31st May 1901. The delay in the execution of the sale deed arose owing to a question being raised as to the boundaries of Khallada and other villages. Exs. B, B (1) and D set out what the disputes were.

We find from Ex. TT, proceedings of the acting Collector of Ganjam, dated 28th September 1900 that 'he was of opinion that the claim of the Vizianagaram Samasthanam to the boundary as originally laid down in the old bed of the Padmanabha Sagaram and inspected by them prior to sale must be accepted. Eventually the sale deed was drawn up and executed on 31st May 1901. The sale deed gives the boundaries and as usual recites that easements, advantages, appurtenances, and privileges of whatsoever nature, condition or state were assigned. All that this deed means is that any easements which the Nandigam Estate possessed in these lands as against the other owners were conveyed. This deed does not take away any rights which the Nandigam Estate as owner of the lands not conveyed had over the villages conveyed. There is no express reservation, but that does not in our opinion make any difference.

There were survey proceedings in 1912 between the Vizianagaram Raja and the Nandigam proprietor as to the boundaries. Having found that possession was in the plaintiff and that the title passed under the sale deed the survey officer ordered the alteration of the demarcation and survey and the inclusion of the whole plot in Mallividu village.

Under the Survey and Boundaries Act all that is conclusive is that these lands which according to the order of the Collector, Ex. TT, already referred to and to the finding of the Sub-Judge, formed part of the tank bed passed under the conveyance and were the property of the Vizianagaram Estate. There was no question raised as to the easements over these lands or as to the right to restore the tank. These questions were outside the scope of the Survey and Boundaries Act and no decision of the survey officer would be effective. But in this case there has been no decision on those points. The utmost that can be said is that the case should proceed on the footing that the Vizianagaram Estate is entitled to a portion of the tank bed situate in Mallividu village, that defendant 2 cannot question the sale by the Court of Wards and claim the land as his and that if there was no right to submerge plaintiff would be entitled to damages.

On the findings of the Subordinate Judge which we accept, namely that the Padmanabha Sagaram tank was common to both the defendants, that the tank was never abandoned that prior to the breach in 1878 the lands now complained of were being submerged, that the sale by the Court of Wards included a portion of the tank bed and that the claim to restore the tank is not barred by limitation the question is whether the plaintiff who purchased a portion of the tank bed is entitled to complain if the owners of the tank repaired the bund in such a manner as not to submerge any more lands than were submerged before the breach.

The ground on which the Subordinate Judge puts the liability on defendant 2 is that the Court of Wards having sold the property and defendant 2 being bound by the sale the plaintiff is entitled to question the submersion as no right to inundate was reserved by the Court of Wards who acted as guardian of defendant 2. We do not think it necessary that any rights should be reserved.

It is clear that when the Tekkali Estate was partitioned into two estates—Pata Tekkali and Nandigam—and this tank was kept as a common tank irrigating the villages belonging to both the proprietors, Nandigam Estate could not have objected if Pata Tekkali had repaired the

breach of the ground that some of his lands were being submerged.

The sale by the Court of Wards representing the Nandigam Estate to the Raja of Vizianagaram of the five villages could not posisbly affect the rights of Pata Tekkali. The only question is whether as between Nandigam and the purchaser the Raja of Vizianagaram, Nandigam lost his right to repair the breach and restore the tank to its original condition.

So far as the Indian law is concerned, no reservation is necessary where there is a conveyance or partition of property. The Easements Act follows the law as laid down in *Pyer* v. *Carter* (1) which was referred to with approval by Mellish, L. J. in *Watts* v. *Kelson* (2) and does not adopt the law as laid down in *Wheeldon* v. *Burrows* (3) that in the case of a grantor express reservation was necessary with certain exceptions as in the case of ways of necessity, while in the case of a grantee of part of a tenement all those continuous and apparent easements over the other part of the tenement which are necessary for the enjoyment of the part granted and have been hitherto used therewith would pass as a general rule.

The mere fact that the Court of Wards sold a part of the Nandigam Estate which included this tank bed would not of itself take away the right of the zamindar who was the owner of the rest of the property to repair the tank unless there was any negligence in the repairs—and it is not suggested here that there was any negligence—or unless he raised the bund higher than it was when the tank was breached.

The mere fact that he stored water in this tank after repairing the bund and that the water inundated the plaintiff's land which was in the tank bed would not give the plaintiff a right to sue for damages.

Reference has been made by the respondent to the English law on the subject of storing water as laid down in *Rylands* v. *Fletcher* (4) and the other cases and to the observations of Blackburn, J., where the learned Judge lays down the rule governing those cases as follows:

"We think that the true rule of law is, that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape."

Reference is also made to the cases where a person by artificially raising the surface of his own land causes water, even though arising from natural rainfall, to pass to his neighbour's land, and interferes with his enjoyment.

I think these principles are inapplicable to irrigation tanks in India which have been in existence for several years. The fifth report shows that when permanent settlements were made instructions were given by the East India Company as to tanks in existence and also new tanks that may be constructed (p. 184, para. 59) and there is no reason to draw any distinction between tanks in existence at the time of the Permanent Settlement and that constructed afterwards. Their Lordships of the Privy Council in the case I shall refer to presently speak of the duty "of maintaining existing tanks and of constructing new ones." The Madras Estates Land Act also casts on the landlord the duty of repairing tanks in existence without any reference as to when they were constructed.

The law on the subject has been clearly settled by the decision of their Lordships of the Privy Council in *Madras Railway Company* v. *Zamindar of Carvetenagarum* (5) where it has been held that the storing of water for agricultural purposes is a natural and lawful user and is not actionable for damages done unless there was negligence proved. In dealing with this point their Lordships of the Privy Council observed:

"The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindu and Mahomedan law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places was originally undertaken by the Government of India, and upon the settlement of the country has, in many instances, devolved on zamindars, of whom the defendant is one. The

(1) [1857] 1 H. & N. 916=26 L. J. Ex. 258=5 W. R. 371.
(2) [1871] 6 Ch. 166=40 L.J. Ch. 126=24 L.T. 209=19 W. R. 338.
(3) [1880] 12 Ch. D. 31=48 L. J. Ch. 853=41 L. T. 327=28 W. R. 196.
(4) [1850] 3 H L. 330.
(5) [1874] 1 I. A. 364=14 Beng. L. R. 209=22 W. R. 279=3 Sar. 391 (P.C.).

zamindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court and vouched by history and common knowledge it becomes apparent that the defendant in this case is in a very different position from the defendants in *Fletcher* v. *Rylands* (4).

In that case the defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns "a nonnatural use" of their land. They were under no obligation public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their Lordships a duty of very much the same description as that of the railway company to maintain their railway."

Under the Madras Estates Land Act the tenants can compel a landlord to repair a tank which is the source of irrigation by a proper application to the Collector.

There can be little doubt that this tank which was built about 1813 was inundating the lands now in question till the breach in 1878. The plaintiff purchased a portion of the bed of the tank. When he purchased that portion, owing to the tank not having been repaired, the bed was overgrown with trees and shrubs. From the very nature of things he must have known that if the bund was repaired, the land would be flooded. No representation was made to him that the owners would not repair the bund. It is no doubt true that from 1878 to 1900 the tank was in a state of disrepair but the right to repair was never abandoned. Attempts were being made to restore the tank by the owner of Pata Thekkali and the only thing that stood in the way was that the Court of Wards owing to the Zamindar of Nandigam estate having mortgaged the lands and encumbered the estate did not think it prudent to embark upon an expense about the repair as any benefit that would arise would be enjoyed by the mortgagees. It cannot be said that there was anything in the case which would have reasonably led the Vizianagaram Zamindar (the purchaser) to infer that there was any abandonment by the Nandigam Estate. It seems to me to be clear that where a person buys property which is a portion of a tank bed he must know that the bed is liable to submersion if the owner of the tank should repair it. And having regard to the sale proclamation and to the price which was paid for this village I have little doubt that there would have been no representation that the tank would not be repaired and that these lands could be converted by the purchaser into cultivable wet lands.

The mere fact that the bund was not repaired from 1878 to 1910 would not amount to an abandonment of any easements or rights as mere nonuser is sufficient.

Chapter 5, Easements Act, deals with the extinction, suspension and revival of easements. S. 38 says that extinction may be by a release by the dominant owner, expressly or impliedly in favour of the servient owner, and Expl. 2 to the section distinctly says that mere nonuser of an easement is not an implied release within the meaning of the section.

Section 47 states that a continuous easement is extinguished when it ceases to be totally enjoyed as such for an unbroken period of twenty years and that a discontinuous easement is extinguished when for a like period it has not been enjoyed as such. Such period shall be reckoned in the case of a continuous easement from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner, and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner.

Treating the case as one of easement the right to flood the lands by storing water in an irrigation tank is a continuous easement as after the tank is constructed no further act is necessary. Rain, when it falls fills the tank, and the tank overflows. It is analogous to the case of a man building a house and putting up a window. It is also an apparent easement.

I am of opinion that the decision of the Subordinate Judge awarding damages or granting an injunction against defendant 2 cannot be supported.

It is unnecessary in the view I take of the case to consider the further question as to whether on the allegations in the

plaint that both the defendants repaired the tank and the decision of the Judge that defendant 1 is not liable for damages and that the sale by the Court of Wards is not binding on him, no damages can be awarded against defendant 2, or the further argument that the Court of Wards when they sold the property could not have entered into any covenant the effect of which would be to throw a personal liability on the zamindar and prevent him from using the tank as an irrigation tank.

I would reverse the decree of the Subordinate Judge and dismiss the plaintiff's suit with costs of defendant 2 throughout. The memorandum of objections is also dismissed with costs. It is unnecessary in this case to decide anything as to the rights of the parties should the bund be further raised.

Reilly, J.—It is admitted that the Padmanabha Sagaram was constructed not later than 1813, at a time when the present Pata Tekkali and Nandigam Estates were parts of one estate, the original Tekkali Estate, and that, as the bund was then constructed, the water in the tank when full covered considerable areas in several villages, including Mallividu and Khallada, with which we are concerned in this case. It is also admitted that a very serious breach was made in the tank bund by a flood in 1878 and that breach was never completely and thoroughly repaired until 1913. The allegation that in the repairs of 1913 the original height of the weir was raised has been given up. Indeed the Commissioner's reports and plan disprove it. It is clear therefore that no more land has been submerged in consequence of the repairs of 1913 than was submerged by the tank as originally constructed. The plaintiff's land in Mallividu and Khallada, so far as it has been submerged in consequence of the repairs of 1913, is within the original tank bed. The plaintiff in 1899 bought the Mallividu and Khallada villages from the Nandigam Estate, and included in his purchase part of the tank bed, though that part was not being submerged at that time in consequence of the breach of the tank-bund.

Mr. Jagannada Das for defendant 2, the Zamindar of Nandigam, in one part of his argument tried to persuade us that, when Nandigam sold the two villages to the plaintiff, an easement to submerge the parts of them within the tank bed was implicitly reserved to Nandigam by Cls. (c) and (d), S. 13, Easements Act. I have no doubt that neither of those clauses can apply to that sale. The right of submersion could not be an easement of necessity under Cl. (c) in such circumstances ; and it may be remarked that for 35 years, from 1878 to 1913, the Zamindar of Nandigam enjoyed his estate without the benefit of it. Nor could the right come within Cl. (d) as necessary for the enjoyment of the Nandigam Estate as it was enjoyed at the time of the sale in 1899, when the bund has been breached for 21 years. These contentions are in no way essential for this appeal : but they appear to have been put forward because Nandigam is anxious for some reason to succeed in this appeal without, if possible, winning a victory for Pata Tekkali also.

Those two estates were formed by partition of the Tekkali Estate in 1864. That was more than 30 years after the tank was constructed. It is admitted that the water of the tank has been used for villages of both estates since the partition and was intended under the partition so to be used. The learned Subordinate Judge in his judgment has made inconsistent statements about the ownership of the tank since the partition. In para. 25 he says that :

> " there is absolutely no evidence to show that the Tekkali Estate has any right as owner or joint owner to any portion of the Padmanabha Sagaram tank bed."

But in the previous paragraph he has recorded a finding that "the tank belongs to defendants 1 and 2" and has described them as the "owners thereof." No means of reconciling these statements has been suggested to us. But it is admitted that the bund of the tank and the part of the waterspread nearest to the bund—a very considerable area—were left common to the two estates at the partition. In the plaint it is alleged that the Zamindars of Pata Tekkali and Nandigam abandoned the tank in 1878 and that they restored the bund in 1913, and it is pleaded that the tank-bed was restricted at the time of the plaintiff's purchase in 1899. Defendant 1, in his written statement definitely asserted that the tank belonged to both defendants. Defendant 2 said nothing on this point in his written statement. On the pleadings it is clear that

all parties proceeded on the basis that the tank bund and the lower part of the tank bed, whatever its present extent might be, was owned in common by the two defendants. There is no reason to suppose that that is not still the position. In the latter part of his argument Mr. Jagannadha Das said that he admitted this "for the purpose of this case". It is not necessary to consider now whether anything is gained for Nandigam by putting the admission in that guarded way, as at any rate it agrees with the pleadings of both the plaintiff and defendant 1 and leaves no dispute on the question in this case.

The position therefore is that at the partition of 1864 the tank bund and a considerable part of the bed of the tank were kept common to the two estates, and of the rest of the original Tekkali Estate, some villages were allotted to Pata Tekkali and others, including Mallividu and Khallada, which embraced part of the bed of the tank the upper part which would not be submerged except when the tank was full or nearly full, were allotted to Nandigam. That being so, the important question appears to me to be whether at the partition of 1864 any right to submerge that upper part of the tank bed in Mallividu and Khallada was reserved, by way of easement in favour of Pata Tekkali and Nandigam, the tenants-in-common of the bund of the tank and the lower part of its bed. If such an easement was then reserved, it could not be affected by the sale of Mallividu and Khallada to the plaintiff by Nandigam and, unless it has been lost, it still subsists in favour of Pata Tekkali and Nandigam.

Such an easement would be a continuous one in the technical sense and also an apparent one, as its extent could be calculated easily from the height of the weir by a competent person. It would also have been necessary for the enjoyment of the tank bund and the lower part of the tank bed as they were enjoyed at the time of the partition. If the partition has been a simple one, by the terms of which Mallividu and Khallada, fell to the Nandigam Estate and the tank bund and the lower part of the tank bed to Pata Tekkali, there is no doubt that such an easement would have been created by the partition in favour of Pata Tekkali. That is the principle of S. 13 (f), Easements Act ; and, though that Act was not in force in 1864, the time of the partition the Act made no change in the law in that respect : see *Pearson* v. *Spencer* (6), *Allen* v. *Taylor* (7), *Phillips* v. *Low* (8), *Nicholas* v. *Nicholas* (9) and *Purshotam Sakharam* v. *Durgoji Tukaram* (10). Authorities indeed are hardly required on that point, as in such a partition each party is in turn a grantee, and the ordinary rule applies that such an easement goes by implication with the grant. Here the position is not so simple, as though Nandigam was grantee in the case of Mallividu, Khallada and other villages and Pata Tekkali was granted in respect of another set of villages, both the grantors, Pata Tekkali and Nandigam retained the tank-bund and the lower part of the tank bed in common. So far as Mallividu and Khallada were concerned, Nandigam was grantee and Pata Tekkali was grantor, but both grantor and grantee retained the tank bund and the lower part of the tank bed. Did that transaction create an easement in favour of Nandigam and Pata Tekkali over the part of the tank bed within the limits of Mallividu and Khallada? Unfortunately the partition deed has not been produced. But we know that for 14 years after the partition until the breach was made in 1878—the part of the tank bed within the limits of Mallividu and Khallada was submerged whenever the tank was full.

We also know that the water of the tank was required, and is still required, for villages below the tank both in Nandigam and in Pata Tekkali. Nandigam is as much interested now, and was as much interested at the time of the partition, in the right to submerge parts of Mallividu and Khallada as Pata Tekkali. In the circumstances it appears from the very nature of the transaction, by which, while the rest of the original Tekkali Estate was divided, this tank bund and the lower part of the tank bed were reserved to be held in common, that the intention of the parties must have been to preserve in the interests of both the right to submerge the upper part of

(6) 3 B & S. 761.
(7) [1881] 16 Ch. D. 355=50 L.J. Ch. 178.
(8) [1892] 1 Ch. 47=61 L.J. Ch. 44=65 L.T. 552.
(9) [1900] 81 L.T. 811.
(10) [1886] 14 Bom. 452.

the tank bed in Mallividu and Khallada whenever there was a full supply to the tank. This is not a case of setting up an implied reservation in favour of the grantors against the doctrine of *Wheeldon* v. *Burrows* (3). It is rather on examination something implied in favour of the grantees. Nandigam and Pata Tekkali granted to each other their rights in certain villages below the tank which were then irrigated by the tank. That implied in favour of each grantee the right to water from the tank for irrigating the villages below the tank which fell to his share, and that right could not be enjoyed to the extent it was then enjoyed unless the grantors together retained the right to submerge the parts of Mallividu and Khallada which were within the tank bed. By the very nature of the transaction therefore the grant of Pata Tekkali's interest in Mallividu and Khallada to Nandigam was subject to that easement being created in favour of both Nandigam and Pata Tekkali.

If that is the right view of the transaction—and so it appears to me—the rest of the case is simple. Nandigam could not affect that easement by the sale to the plaintiff in 1899. Nor is the continuance of the easement affected by the fact that it was not used from 1878 to 1913, while the tank bund was breached. Under S. 47, Easements Act, nonuser does not extinguish a continuous easement until it has lasted for 20 years from the day on which enjoyment was obstructed by the servient owner or made impossible by the dominant owner. It is not suggested that Nandigam of Tekkali ever did anything to make their enjoyment of the easement impossible or that the plaintiff ever obstructed their enjoyment. On the contrary the plaintiff did not even bring this suit until ten years after the breach had been closed and use of the easement had begun again. I agree that the plaintiff can get no relief in this suit. It was represented to us at one stage for the plaintiff that if the submersion of land in Mallividu were allowed to continue he would be very hardly used as he had bought that village at a high price believing the land submerged to be cultivable. We could not decide the case on any such consideration. But it is satisfactory to know that there is no basis for the plaintiff's supposed grievance. As he bought 5 villages, including Mallividu and Khallada, in auction for a lump sum we do not know what he paid for Mallividu. But the sale notification shows that of the whole village only a small fraction was represented to be cultivable land, and the explanation of that no doubt is that a large part of the village was, as anyone could ascertain, liable to submersion if the tank bund was repaired.

I agree that this appeal should be allowed and the suit dismissed with costs of defendant 2 in both Courts and that the memorandum of objections also should be dismissed with costs. Defendant 1 has not appealed against the order that he should bear his own costs in the Subordinate Judge's Court.

P.R.S./P.N. *Appeal allowed.*

A. I. R. 1931 Madras 570

JACKSON, J.

N. Seshagiri Ayyar—Plaintiff—Appellant.

v.

T. N. Ramachandra Ayyar and *others*—Defendants—Respondents.

Second Appeal No. 107 of 1928, Decided on 27th October 1930, against decree of Dist. Judge, Chingleput, in A. S. No. 335 of 1926.

(a) Civil P. C. (1908), S. 64—Attachment cannot avoid previous transfer.

The effect of an attachment is to prevent any subsequent transfer but its effect would not be to avoid a previous transfer. [P 571 C 1]

A attached a certain debt due from *B* to defendants 1 and 2. *N* also attached the same debt and he adjusted his claim arranging that the debt of the garnishee (*B*) should be made over to him a day before *A*'s attachment took effect.

Held : that *A* had no right to interfere with the transaction before his attachment was effective ; 41 *Mad.* 849, *Ref.* [P 571 C 1]

(b) Civil P. C. (1908), S. 73—Scope.

Potential decree-holders have no right to rateable distribution (*obiter*).

(c) Civil P. C. (1908), O. 21, R. 46—Executing Court need not determine if debt attached is really due.

It is not the business of the executing Court to determine whether the debt attached is really due : *A. I. R.* 1926 *Rang.* 175, *Ref.* [P 571 C 1]

(d) Civil P. C. (1908), S. 64—Scope.

Section 64 avoids transfers contrary to, not during the continuance of, the attachment. [P 571 C 1]

P. S. Narayanaswami Ayyar—for Appellant.

K. S. Krishnaswami Iyengar—for Respondents.

Judgment.—The appellant as receiver in a certain suit attached a debt due from the garnishee, defendant 3, to defendants 1 and 2. In another suit one Nemasah had attached the same debt, and he adjusted his claim, arranging that the debt of the garnishee should be made over to himself a day before the appellant's attachment took effect. Of course Nemasah was not in any way debarred from making a private transfer by his own attachment. S. 64, Civil P.C., avoids transfers contrary to, not during the continuance of, the attachment. Nor can it be argued that the appellant had any right to interfere with the transaction before his attachment was effective. He may have been a potential decree-holder, but potential decree-holders have no right to rateable distribution. The appellant's claim can only be based on the circumstance that the garnishee objected to his interim attachment, and it was made absolute: vide Ex. C. This objection was under O. 21, R. 58; and R. 63 will also apply, as settled in *Mallikarjuna Prasada Nayudu* v. *Virayya* (1). Subject to the result of a suit the order is conclusive. But the order can hardly be said to be conclusive of the garnishee's rights. It has been held that it is not the business of the Court to determine in these attachment proceedings whether the debts are really due. *Ma Saw Yin* v. *Hockto* (2), and in the present case it is quite clear as pointed out by the District Munsif, that the Court never determined that question, or indeed heard the garnishee on the matter. All that it did was to attach the debt at its face value, and the effect of that attachment would be to prevent any subsequent transfer; but its effect would not be to avoid a previous transfer.

I may observe that if the decision in *Mallikarjuna Prasada Nayudu* v. *Virayya* (1) be read in the light of *Arunachalam Chetty* v. *Periaswami Servai* (3). Wallis, C. J., does not seem quite satisfied that the phrase "an objection made to the attachment of property attached in execution of a decree" covers an objection made to an attachment of property before judgment; because in the latter case he holds that it cannot be laid down generally that property attached before judgment is attached "in execution of a decree" within the meaning of Art. 11, Lim. Act. How then could it be within the meaning of O. 21, R. 58; for precisely the same term is used "property attached in execution of a decree?" Considering that the Civil Procedure Code and the Limitation Act are invariably regarded as in pari materia, it would be very hard to reconcile the two cases in *Mallikarjuna Prasada Nayudu* v. *Virayya* (1) and *Arunachalam Chetty* v. *Periaswami Servai* (3). And the present case seems to afford a good example of the danger of applying R. 63 with all its implications to objections against attachments before judgment. However that is obiter. In this case, as shown above, I see no reason to differ from the lower appellate Court that the claim of the garnishee was not concluded by the order on the appellant's petition for attachment.

The appeal is dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

(1) [1918] 41 Mad. 849=47 I. C. 1000 (F. B.).
(2) A. I. R. 1926 Rang. 175=97 I. C. 247=4 Rang. 100.
(3) A. I. R. 1921 Mad. 163=70 I. C. 439=44 Mad. 902 (F. B.)

A. I. R. 1931 Madras 571

RAMESAM, J.

(*Chena Veena*) *Chidambaram Chettiar* and *others*—Appellants.

v.

Chokkalingam Naickan and *others*—Respondents.

Second Appeal No. 824 of 1924, Decided on 16th December 1930, against decree of District Judge, Ramnad, in A. S. No. 38 of 1920.

(a) Madras Estates Lands Act (1908), S. 26—S. 26 is not retrospective —"Premium, loan or valuable consideration" explained.

Clause 1, S. 26, is not retrospective in its operation though certain sections of the Act are clearly retrospective. [P 573 C 2]

The premium, loan or other valuable consideration must be something other than the rent reserved by the lease and the rent itself cannot be regarded as such valuable consideration on the ground that nothing was being derived from the land previously. [P 573 C 1]

(b) Madras Estates Land Act (1908), S. 26—"Period"—Meaning explained.

The word "period" refers to a section of time and cannot cover a case of perpetuity: 59 *I.C.* 275 and 31 *I.C.* 184, *Ref.* [P 574 C 1]

Advocate-General and *V. Narayana Ayyar*—for Appellants.

K. Rajah Ayyar and *S. Ramanujachari*—for Respondents.

Judgment. — This second appeal which comes on for hearing in 1930 on account of deaths of various parties arises out of a suit filed in 1915, the plaint itself being filed on 19th August 1914. The plaintiff got a decree in November 1915. There was an appeal and the District Judge dismissed the appeal in 1917. There was a second appeal to the High Court, No. 1801 of 1917. The High Court reversed the decrees and remanded the case for fresh disposal according to law. The Special Deputy Collector passed his fresh decree in December 1919 and the District Judge's decree was in February 1924. The suit was filed by a Nattukottai Chettiar to recover rent in respect of the suit land. He claims the rent at the normal rate which lands of similar quality would be liable to pay. But the defendant resists this claim on account of certain prior transactions and he says he is liable to pay rent only at the rate of Rs. 6 per chei. For the purpose of understanding the defendant's plea we have now to look at the earlier transactions relating to the suit land.

The village of Surakulam in which the suit land is situate and other villages were leased for a period of 30 years, that is from fasli 1292 to fasli 1321 by the then Zemindar of Sivaganga to one Alagirisami Tevar : Ex. E. There is a clause in the lease deed providing that so far as the waste lands in the village are concerned the lessee might give cowles in any manner he pleases only during the period of the lease and after the termination of the period of the lease they will be liable to half waram. This obviously means that he might enter into any contract of lease he likes in respect of such land provided the cowle is only for the period of the lease. After the expiration of the lease the land will be liable to half waram. In 1886 Alagirisami Tevar made a permanent lease of the suit land to the defendant. The cowle is Ex. 1 and the muchalika executed by the defendant is Ex. F. This lease is a permanent lease according to which a rent of Rs. 25-1-7 was fixed including road cess. This works out at Rs. 6 a chei. The lands were admittedly waste lands at the time. Prima facie Alagirisami Tevar had no right in 1886 to give a lease for a period extending beyond the period of his lease of 1882. But afterwards in March 1887 he obtained a perpetual lease of the village.

Some time later, all his rights in the village were sold in execution of a decree and purchased by the present plaintiff on 27th April 1900. The present plaintiff after waiting up to the end of fasli 1322, that is, up to the transaction of the period of 30 years from the date of the first lease, Ex. E, demanded of the defendant to pay him the proper rent to which the land is liable and on the defendants' refusal filed the present suit. On the former occasion the only points taken were: (1) whether the relationship of landlord and tenant subsists between the parties and (2) whether the rent claimed is fair and reasonable and as I have already said, the plaintiff got a decree in the Courts below. In second appeal the High Court was of opinion that the lease of 1886 was a permanent lease, differing in this respect from the Courts below and framed certain new issues which are as follows :

(1) Whether the plaintiff (Mappilasami Tevar) made any representation as stated in para. 7 of the written statement :

(2) Whether the defendant was aware that Kulandaisami had only a limited estate.

(3) Under what circumstances and why a favourable rate of rent was fixed in Ex. 1.

(4) Whether by the operation of S. 26, Estates Land Act or by the principle of estoppel enunciated by S. 43, T. P. Act, the plaintiff is precluded from reverting to waram.

The Deputy Collector found on the new first issue that Alagirisami Tevar made no representation to the defendant. On issue 2 he found that the defendant knew that Alagirisami had only a 30 years' cowle. On issue 3 he found that the reason for fixing a low rate of rent was that the lands were waste at the time. On issue 4 he found that the contract was not for a loan or a premium or other valuable consideration within the meaning of S. 26, Estates Land Act. He also found that S. 43, T. P. Act, does not apply. He therefore gave a decree to the plaintiff. On appeal the District Judge agreed with the Deputy Collector's finding on the first three issues, but on issue 4 he found that there was consideration for the permanent lease. He says :

" The consideration for the permanent cowle was the fixing of rent at Rs. 6 a chei for a land which until then was producing no income at all for a long period. The fixing of that rate was in the circumstances a sufficient valuable

consideration within the meaning of S. 26, Estates Land Act, and I am unable to agree with the lower Court that there was no consideration for the permanent cowle to the defendant."

In the result he allowed the defendant's appeal and decreed rent only at the rate of Rs. 6 per chei. This second appeal has been filed by the plaintiff.

The first point argued before me relates to S. 26, Estates Land Act. The section runs thus :

"Where for the purpose of clearing and bringing waste land in the estate into cultivation or for the purpose of making any permanent improvement or for planting trees on the holding, or where under a contract made prior to the commencement of this Act for any premium, loan or other valuable consideration the raiyat has accepted a patta, etc."

The section deals with three cases. The first case is where a patta is granted for the purpose of clearing or bringing waste land into cultivation. The second case is where it is granted for making any permanent improvements or for planting trees. The third case is where it was made for any premium, loan or other valuable consideration under a contract made prior to the commencement of the Act. It is the third case that was discussed by the Courts below. Now so far as this is concerned it seems to me that the construction of the section by the first Court is right and that of the District Judge is erroneous. The section refers to premium, loan or other valuable consideration. According to the District Judge the rent fixed in the lease deed itself, however low, is some consideration, seeing that nothing was derived from the land prior to the lease; but on this reasoning all leases of waste lands for a rent, however low it may be, would be for consideration though made perpetually and would be binding on the landlord. It is just to avoid this that the legislature has enacted S. 26. Instead of saying "all leases of waste lands for some rent, however low it may be, are binding" as in Cl. 1 the legislature refers to premium, loan or other valuable consideration. It seems to me that the premium, loan or other valuable consideration must be something other than the rent reserved by the lease and the rent itself cannot be regarded as such valuable consideration on the ground that nothing was being derived from the land previously.

I therefore differ from the learned District Judge's conclusion as to the construction of S. 26. Mr. Sitarama Rao appearing for the respondent then fell back on Cl. 1, S. 26, which refers to clearing and bringing waste land in the estate into cultivation but it seems to me that Cl. 1, S. 26, is not retrospective in its operation. Apart from the general principle that no Act can be retrospective unless the intention is very clear, the Estates Land Act, itself makes such intention abundantly clear in many of its sections. For instance, in S. 6 the words "now in possession" show that it is intended to be retrospective as held by a Full Bench. Again in S. 26 itself Cl. 3 uses the words "made prior to the commencement of this Act." If Cl. 1 was also intended to be retrospective, it might have used similar language. It is not a reply to this argument to say that the object of Cl. 1 is that it is intended to apply to leases both before and after the Act. If so, it would have expressly said so. For instance in S. 3 (7) in the definition of old waste in sub-Cl. (i) we have

"such period being either after or partly before and partly after the passing of the Act or within 20 years before the passing of this Act."

In Cl. (ii) we have the words "after the passing of this Act." Again in S. 8, Cls. (i) and (ii) we have "whenever before or after the commencement of this Act, etc." I think it is clear that if Cl. 1, S. 26, was intended to apply to leases before the passing of this Act, it would have expressly said so. Prima facie the section speaks from the date of the enactment and it refers to cases of pattas granted for the purposes of clearing and bringing waste lands into cultivation only after it. In 1886 the law bearing upon this question, namely, how far leases for a low rate granted by a landholder should bind his successor was contained in S. 11, Rent Recovery Act. Under that section leases granted by a landholder are binding on the successor only if granted bona fide. Now, as I have already mentioned, under Ex. E, the lessee was prohibited from giving cowles of waste lands except for the period of his lease and any permanent lease granted by him in contravention of this provision of this lease cannot be regarded as bona fide. I am therefore of opinion that neither Cl. 3, S. 26, Estates

Land Act, nor S. 11, Rent Recovery Act can help the respondent, and as both the lower Courts have found that the necessary facts for the application of S. 43, T. P. Act, do not exist in this case, that section too does not help the respondent according to the view uniformly held by the Madras High Court : see *Krishnamachariar* v. *Tiruvenkatachariar* (1).

In this view it is unnecessary to consider the further point raised by the learned advocate for the appellant, viz., that S. 26 only applies to leases for certain periods and not perpetual leases. I think there is a good deal to be said in favour of this contention. I think the word " period " refers to a section of time and cannot cover a case of perpetuity. Cl. 2 makes this stronger. It refers to the expiration of the period for which such a low rent is payable. I am therefore inclined to uphold this contention also. The case in *Raman Nair* v. *Kunhi Kolandan Mudaliar* (2), cannot help the respondent. The decision simply refers to forfeiture of the term contracted for whether there is a specific period or a perpetual term. In that case the Judge had not to construe the word " period " in any enactment.

Mr. Sitarama Rao raises two other questions: (1) that even if S. 43, T. P. Act, does not help his client, S. 109 of the Act helps him. This point was never raised before and it is unfair to allow a new question to be raised at the end of 16 years of litigation. But apart from this the chapter on leases in the Transfer of Property Act, does not apply to agricultural leases.

Another point raised by him is based upon the proviso to S. 52 (3), Estates Land Act. Apart from the obvious unfairness of allowing a new point like this, at the end of 16 years of litigation there is another reason why this contention should be disallowed. If the point was raised in 1915, the plaintiff might have cured it by taking proper steps immediately. I therefore disallow both the new points raised for the first time.

The result is, the second appeal is allowed and the Deputy Collector's judgment restored with costs here and in the lower appellate Court.

P.R.S./B.V. *Appeal allowed.*

(1) [1920] 59 I. C. 275.
(2) [1915] 31 I. C. 184.

A. I. R. 1931 Madras 574

CURGENVEN AND CORNISH, JJ.

(*Sri*) *Iswarananda Bharathi Swami of Ednir Mutt* —Plaintiff—Appellant.

v.

Board of Commissioners for Hindu Religious Endowments, Madras — Defendant—Respondent.

Appeal No. 168 of 1930, Decided on 4th March 1931, against decree of Dist. Judge, South Kanara, in O. S. No. 4 of 1929.

Madras Hindu Religious Endowments Act (1927), S. 84 (2) — Person aggrieved by Religious Endowments Board's decision under S. 84 (1) is debarred by S. 84 (2) from proceeding by suit.

When by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted, and, in the case of injury, the party cannot proceed by suit. S. 84 (2) therefore debars a person aggrieved by the decision of the Religious Endowments Board under S. 84 (1), from proceeding by a suit : 12 *Mad.* 105; 36 *Mad.* 120; 31 *Bom.* 604 and *A. I. R.* 1922 *Cal.* 4, *Rel. on.*; (*Other cases referred*).

[P 575 C 2]

S. Srinivasa Iyengar and *B. Sitarama Rao*—for Appellant.

P. Venkataramana Rao—for Endowments Board.

Cornish, J.—The plaintiff sued for a declaration that the building in which he resides and in which the worship of the deity, Sri Gopalakrishna Devaru, is performed, though it is popularly called the Ednir Mutt, is not an institution to which the Madras Religious Endowments Act 2 of 1927, applies. The plaint was filed on 17th April 1928. The defendant, the Religious Endowments Board, had by its order dated 27th April 1927, after giving notice to the plaintiff and holding an inquiry, decided that the institution was a mutt within the Hindu Religious Endowments Act. This order of the Board, as appears from para. 6 of the plaint, is the cause of action on which the plaintiff founds his suit. The learned District Judge has held that the suit is barred by S. 84 (2) of the Act and has dismissed it and we think that he was right.

A mutt as defined by the Act, S. 9 (7), means :

"an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples, and succession to

whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institutions."

Section 84 as it stood at the date of the Board's order (it has since been amended) provided (1):

"If any dispute arises as to whether a mutt . . . . . is one to which this Act applies . . . . . , such dispute shall be decided by the Board. (2) A trustee affected by a decision under sub S. (1) may within one year apply to the Court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final."

There is no doubt that a dispute had arisen between the plaintiff on one side who maintained that the institution was his private property, and the Board on the other which claimed that the institution was a mutt within the definition of the Act. The Board was therefore competent to decide the dispute under S. 84 (1) of the Act: see *Vythilinga Pandara Sannadhi* v. *Sadasiva Ayyar* (1). The argument was directed to showing that the Court's jurisdiction to entertain this suit is not ousted by S. 84 (2). A number of cases have been cited in support of the proposition that an enactment providing that the decision of a special tribunal upon a particular matter shall be final does not import a total exclusion of the Court's jurisdiction over the matter. Thus, a determination or order which is in excess of the jurisdiction conferred upon the tribunal would be liable to be set aside by suit or by the Court in the exercise of its powers of revision, as the case might be: see *Secy. of State* v. *Fahamiddannissa Begam* (2), *Matangini Debi* v. *Girish Chunder Chongdar* (3), *Nataraja Mudaliar* v. *Municipal Council of Mayavaram* (4) and *Parthasarathi Naidu* v. *Koteswara Rao* (5). And the jurisdiction of the Court will not be ousted unless it is expressly or impliedly excluded by the enactment creating the special tribunal. *Stevens* v. *Chown* (6) at p. 904, *Bhai Shankar* v. *The Municipal Corporation of Bombay* (7) and *Valli Ammal* v. *The Corporation of Madras* (8).

But the well-established principle is that when by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted, and, in the case of injury, the party cannot proceed by suit: see *Ramachandra* v. *Secy. of State* (9), *Sailesh Chandra Sarkar* v. *Sir Bejoy Chand Mahatap* (10), *Bhai Shankar* v. *The Municipal Corporation of Bombay* (7) and *Nataraja Mudaliar* v. *Municipal Council of Mayavaram* (4). The mode of redress open to the plaintiff in respect of the interference with his rights by the Board's order is definitely provided by S. 84 (2) of the Act, viz., an application to the District Court. In our opinion therefore it is not open to him to seek redress by means of this suit. His appeal is accordingly dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

(1) A. I. R. 1928 Mad. 1272=112 I. C. 589=29 Cr. L. J. 1085.
(2) [1890] 17 Cal. 590=17 I. A. 40=5 Sar. 391 (P.C.).
(3) [1903] 30 Cal. 619=7 C.W.N. 433.
(4) [1913] 36 Mad. 120=12 I. C. 311.
(5) A. I. R. 1924 Mad. 561 = 78 I. C. 98 = 47 Mad. 369 (F.B.).
(6) [1901] 1 Ch. 894=70 L.J.Ch. 571=84 L.T. 796=49 W. R. 460=65 J. P. 470=17 T. L. R. 313.
(7) [1907] 31 Bom. 604=9 Bom. L. R. 417.
(8) [1915] 38 Mad. 41=16 I. C. 971.
(9) [1889] 12 Mad. 105.
(10) A. I. R. 1922 Cal. 4=65 I. C. 711.

A. I. R. 1931 Madras 575

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

Sankappa Rai and *others*—Defendants—Appellants.

v.

Keraga Pujary and *others*—Plaintiffs—Respondents.

Appeal No. 266 of 1925, Decided on 24th November 1930, against decree of Sub-Judge, South Kanara, D/- 7th November 1924.

Evidence Act (1872), S. 33—Proceeding in Court not having pecuniary jurisdiction is not judicial proceeding—Evidence taken in such proceeding cannot be used in retrial.

A proceeding before a Judge or Magistrate who has no pecuniary jurisdiction is not a judicial proceeding and the evidence of a witness given in such a proceeding cannot be used under S. 33 on a retrial before a competent Court: 3 *Mad.* 48; *A. I. R.* 1926 *Lah.* 582 and 38 *Cal.* 639, *Rel. on*; 8 *I. C.* 545, *Diss from.* [P 577 C 1]

K. Y. Adiga—for Appellants.

B. Sitarama Rao and *K. Srinivasa Rao*—for Respondents.

Judgment.—The suit out of which this appeal arises relates to the property of a family of Billavars of the South

Kanara District who follow the Aliyasantana law. It was originally filed by plaintiffs 1 to 12, alleging themselves to be members of the family, against 42 other members of the family (defendants 2 to 43) and a mortgagee (defendant 1) for a declaration that two mortgage bonds executed by various members of the family were not valid and binding upon the family property. The defendants denied that these plaintiffs were in fact members of their family and an issue upon this point was raised. During the trial of the suit supplemental plaintiffs 13 to 19 were added, possibly to prevent an adverse finding upon this issue from involving the suit's dismissal, there being no question that these supplemental plaintiffs belong to the defendant's family. The learned Subordinate Judge has found that plaintiffs 1 to 12 are in fact members of the family and further that the suit mortgage bonds are invalid as against the property, but he gives defendant 1, the mortgagee, a charge on that property to the extent of Rs. 700 in respect of a binding liability to that amount. The appeal is preferred by defendant 1, a member of the defendant's family to whom defendant 1 has transferred his rights, and it is contested by plaintiffs 1 to 11.

We propose first to deal with the question of disputed relationship. The contentions of plaintiffs 1 to 12 are illustrated by the family tree attached to the plaint. From this it will be seen that plaintiffs 1 to 11 claim descent from one Dere, daughter of one Sankaru who was a granddaughter of another Sankaru, the common ancestor, the defendants and a large number of others being shown as descended from junior branches deriving from the same original source. Plaintiff 12 claims a descent quite separate from that of the remainder. She will be found entered as Chomu, daughter of defendant 20, Devi, and sister to defendants 26 and 27, Karia and Dooma. It is necessary therefore to consider the claims of plaintiffs 1 to 11 and of plaintiff 12 separately, but there is one piece of evidence common to both, the admissibility of which may be decided at once. The trial of the suit was begun before the District Munsif of Kasargod and defendant 20 was examined as D. W. 1. In the course of her deposition she made certain statements in regard to the relationship of these plaintiffs which the lower Court has deemed admissible under S. 33, Evidence Act. After this evidence and some other had been taken the Court returned the plaint on the ground that the value of the subject matter was above its pecuniary jurisdiction and it was accordiugly filed in the Court of the Subordinate Judge from whose decision this appeal arises.

Defendant 20 had died before she could be examined again and accordingly her deposition was made use of in the manner stated. Now S. 33 requires that evidence of this character, to be relevant, should have been given by a witness in a judicial proceeding, and it is contended before us that no proceeding is a judicial proceeding within the meaning of that section if it is conducted by a Court which has no jurisdiction to undertake it. There can be no doubt in our view that a Court which engages in the trial of a suit the value of which is beyond its pecuniary jurisdiction is doing something which it has no jurisdiction to do just as much as if it tried a suit of a nature which it was not empowered to try or originating in some place to which its jurisdiction did not extend. The provisions of S. 11, Suits Valuation Act, with regard to pecuniary jurisdiction, and the parallel provision in S. 21, Civil P. C., with regard to territorial jurisdiction no doubt allow exceptions to the rule that proceedings without jurisdiction are void and of no effect.

They do not, as has been suggested to us, except in the circumstances in which they are applicable, give jurisdiction where it would not otherwise be enjoyed. If that is the effect of the decision reported in *Raghavachariar* v. *Raghavachariar* (1) we are unable to agree with it and we do not find that it has since been followed or referred to. It is not possible in our view to draw any distinction, for the purpose of applying this section of the Evidence Act, between want of jurisdiction of one kind and of another, and it seems that a necessary test to discover whether what purports to be a judicial proceeding is in fact one lies in the competence of the judicial officer who conducted it. The circumstance that before he can verify his incompetence, he must often try the issue of jurisdiction by taking evidence does

(1) [1910] 8 I. C. 545.

not necessarily make even that evidence admissible, as taken in a judicial proceeding, and much less so where, as here, the evidence which it is desired to use relates not to the question of jurisdiction at all but to the merits of the case. On the general question of the effect of a lack of jurisdiction there is the authority of a case in this Court reported in *Rami Reddi* v. *Seshu Reddi* (2). It has also been held in *Buta Singh* v. *The Crown* (3), that a proceeding before a Judge or Magistrate who has no jurisdiction is not a judicial proceeding and the evidence of a witness given in such a proceeding cannot be used under S. 33, Evidence Act, on a retrial before a competent Court, the particular kind of jurisdiction involved in that case being territorial. For an expression of the general proposition that if a Court has no jurisdiction over the subject-matter of the litigation its proceedings are mere nullities reference may be made to *Rajalakshmee Dassee* v. *Katyayani Dassee* (4). We must accordingly hold that the contents of the statement, Ex. A, cannot be used in evidence in this case.

* * *

There is not a vestige of legal evidence enabling us to trace the descent of plaintiffs 1 to 11 from an ancestor common to themselves and the defendants, and we must hold accordingly that their claim to be members of the family has not been established.

Nor do we find any stronger evidence in support of plaintiff 12's claim. The learned Subordinate Judge himself confesses that but for the statement in Ex. A, which we have now held to be inadmissible, he would have decided against this plaintiff. We agree with him that the error which acceptance of this relationship would require to be found in the mortgage bond, Ex. 7, cannot have been intentional and we would add that it is most unlikely in an Aliyasantana family that any doubt should exist as to the identity of any member's mother. Plaintiff 12 refrained from going into the witness box where her claims might have been tested by cross-examination. We think the evidence clearly insufficient to show that she is related to the family in the manner alleged.

We turn then to the question of the validity and the binding character of the suit mortgage bonds.

* * *

We have only to add that the supplemental plaintiffs have not thought fit to contest this appeal; so that, now that the original plaintiffs have been nonsuited on the question of relationship, there is no one upon the record before us qualified to dispute the binding character of these mortgages. Apart from that circumstance however we are clearly of opinion that they are binding upon the family property and we must accordingly allow the appeal, set aside the decree of the lower Court and direct that the suit be dismissed with costs. Plaintiffs 1 to 11, will pay the costs of defendant 21 in this appeal. The memorandum of objections preferred by the plaintiffs is dismissed with costs.

P.R.S./S.N. *Suit dismissed.*

(2) [1881] 3 Mad. 48.
(3) A. I. R. 1926 Lah. 532=97 I. C. 752=7 Lah. 396.
(4) [1911] 38 Cal. 639=12 I. C. 464.

A. I. R. 1931 Madras 577

ANANTAKRISHNA AYYAR, J.

Gopala Kudva and *others*—Plaintiffs—Appellants.

v.

Juvappa Kamathi and *another*—Defendants—Respondents.

Second Appeal No. 914 of 1926, Decided on 29th July 1930, against decree of Sub-Judge, South Kanara, in A. S. No. 68 of 1925.

(a) Landlord and Tenant—Suit for ejectment—Tenant alleging permanent right of occupancy has to prove it—Mere proof of long occupation does not satisfy onus—Rule is applicable to South Kanara as well.

Where in a suit for ejectment by the landlord, the defendants allege a defence that they have a permanent right of occupancy in the land, the burden of proving that they have such a right is upon the defendants. Mere proof of long occupation at a fixed rent does not satisfy that onus. The proposition applies to cases between landlord and tenant arising in South Kanara as elsewhere in the Presidency : *A. I. R.* 1924 *P. C.* 65, *Foll.* ; *S. A. No.* 850 *of* 1921 and *S. A. No.* 480 *of* 1924, *Rel. on.* ; 28 *I. C.* 599 and 30 *Mad.* 528, *not Foll.* [P 579 C 1]

(b) Civil P. C. (1908), S. 100 — Suit for ejectment by landlord — Finding whether tenant has proved kayamgeni right or not is finding of fact—High Court can only interfere where judgment of lower Court is based on line of argument unsustainable in law.

Whether kayamgeni right is proved by the tenant or not in a suit for ejectment by the landlord is mainly a finding of fact with which the High Court has no jurisdiction ordinarily

to interfere in second appeal unless the judgment of the lower Court discloses any line of argument which cannot be sustained in law. In case of such error by the lower Court the proper course for the High Court is to draw the attention of the lower Court to the existing state of law and leave him as the appellate authority on the facts to come to a conclusion on the question concerned. [P 579 C 1, 2]

(c) Landlord and Tenant—Adverse possession—Tenant having permissive possession cannot by merely denying landlord's rights convert it into adverse possession.

When a person has become a tenant under a landlord, he cannot by merely denying the rights of the landlord, convert his possession, which was originally permissive into adverse possession against the landlord : *A. I. R.* 1924 *P. C.* 65 and *A. I. R.* 1923 *P. C.* 205, *Foll.* [P 580 C 1]

B. Sitarama Rao—for Appellant.

M. A. T. Coelho and *E. A. Lobo*—for Respondents.

Judgment.—On the allegation that the defendants were chalgeni tenants under the plaintiff and that the tenure had been determined by due notice to quit, the plaintiff instituted the original suit to recover possession of the land with some profits. Both the lower Courts have dismissed the plaintiff's suit. Hence, this second appeal has been preferred by the plaintiff.

The first point noted by the lower appellate Court for decision is: "Do the defendants hold the suit property on kayamgeni or chalgeni?" The finding upon this point is contained in paras. 8 and 9 of the lower appellate Court's judgment. After noticing that the defendants had been paying only a uniform rent of Rs. 18 per annum, that in about 1902 or 1903 the defendants refused to pay increased rent, and that in about 1912 the defendants informed the plaintiff under Ex. O (reply notice) that they were holding the properties as kayamgeni tenants, the lower appellate Court proceeded to state as follows :

"In these circumstances, it seems to me that a presumption has to be made in favour of the defendants that the tenure is kayamgeni or mulgeni : *Kittu Kegadthi* v. *Channamma Shettathi* (1) and *Raghavacharlu* v. *Secy. of State* (2)."

The learned counsel for the appellant relies upon the observations of their Lordships of the Privy Council in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3) that

"the onus of proving that they had a permanent right of occupancy in lands was upon the defendants who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus."

With reference to the Privy Council case quoted before him, this is what the learned Subordinate Judge observed :

"But that was a case from the Tanjore District, in which the defendants claimed a permanent occupancy right. I do not think that the said ruling has application to the kayamgeni or mulgeni tenure, which is special to South Kanara. I think this Court is bound by the two rulings of the Madras High Court quoted above, which have special reference to such tenures, so long as they are not overruled."

The lower appellate Court therefore held that the defendants were kayamgeni tenants, and dismissed the plaintiff's suit for possession.

The learned advocate for the appellant argued that the learned Subordinate Judge evidently thought that the decisions in *Kittu Kegadthi* v. *Channamma Shettathi* (1) and *Raghavacharulu* v. *Secy. of State* (2) decided a point of principle peculiar to the South Kanara District only, and that the decision of the Privy Council in the case reported in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3) should not be taken to have any application to the South Kanara District, as the learned Subordinate Judge observed, "so long as the two Madras decisions are not overruled." The effect of the Privy Council decisions in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3) on the two decisions of this Court referred to by the learned Subordinate Judge was pointed out by Krishnan, J., in S. A. No. 850 of 1921. After quoting the following passage from the judgment of their Lordships of the Privy Council in the case reported in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3), namely :

"it cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant,"

the learned Judge proceeded to observe as follows :

"The question of the burden of proof in such cases has been considered by the Privy Council in two recent cases. Their Lordships have now laid down that where the relationship of landlord and tenant is admitted by a tenant, it is for the tenant if he sets up a permanent tenancy in his favour to prove that permanent tenancy. The old authorities cited by the District Judge cannot therefore be taken to be good

(1) [1907] 30 Mad. 528.
(2) [1915] 28 I. C. 599.
(3) A. I. R. 1924 P. C. 65=82 I. C. 226=51 I. A. 83=47 Mad. 337.

law any longer as regards the question of the burden of proof. In this view I cannot accept the District Judge's disposal of the case on the finding that the landlord has not proved that the tenancy of the defendant is under chalgeni lease. He must consider the whole of the evidence and come to a definite conclusion whether the defendant has established that his tenure is a kayamgeni tenure. I must call for a fresh finding on the evidence on record."

I have therefore a recent pronouncement by a learned Judge of this Court in a second appeal from South Kanara that the old authorities

" cannot therefore be taken to be good law any longer as regards the question of burden of proof."

Similar view has also been expressed by Reilly, J., in S. A. No. 480 of 1924. This is what the learned Judge said :

" The proposition, that in South Kanara there is no presumption against a tenant having permanent occupancy right and no burden upon him to prove that right if he sets it up, can hardly be maintained after the decision of the Privy Council in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3) which appears to me to be applicable to South Kanara as to other parts of India and has been applied to South Kanara in S. A. 850 of 1921."

It is therefore clear that the most recent decisions of this Court relating to the South Kanara District have laid down that the ruling of the Privy Council in the case reported in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3) should be as much applied to cases between landlord and tenant arising in South Kanara as elsewhere in the Presidency.

The learned advocate for the respondent however argued that one might as well ignore the last few sentences in para. 8 of the learned Subordinate Judge's judgment; and he further contended that the learned Subordinate Judge had mentioned circumstances from which it was open to him to come to the conclusion that the defendants had proved mulgeni right set up by them. The circumstances mentioned by him, namely, possession by the defendants for about 70 years at a uniform rent of Rs. 18 per annum, their setting up of such rights in 1902, and in 1912, to the knowledge of the landlord (he submitted), are relevant in considering whether kayamgeni right has been proved or not. He also drew my attention to one or two unreported cases where Courts have based their findings in favour of kayamgeni rights on circumstances similar to those that appear in the evidence in the present case. But as the learned advocate for the respondent himself rightly observed, the whole thing is mainly a finding of fact with which the High Court has no jurisdiction ordinarily to interfere in second appeal, unless the judgment discloses any line of argument which cannot be sustained in law. But I am unable to agree with the learned advocate for the respondent that the last few sentences in para. 8 of the lower appellate Court's judgment could be discarded altogether. On the other hand it seems to me that having those facts before him, the learned Subordinate Judge thought that it was not necessary for him to appreciate their evidentiary value having regard to the circumstances of the case, because two decisions of this Court laid down that the presumption was that the defendant under such circumstances should be taken to hold as kayamgeni tenant. No doubt, if the weight of those decisions had not been shaken by the subsequent Privy Council decision, no legal flaw could be found with the reasoning and finding of the learned Subordinate Judge. Having regard to the ruling of the Privy Council in the case reported in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3) I think that the learned Subordinate Judge's judgment is vitiated by the error into which he fell, when he thought that the Privy Council ruling did not apply to South Kanara, and consequently his finding could not be accepted in the circumstances.

Following the procedure adopted by Krishnan, J., in the case cited, I think that the proper thing for me to do is to draw the attention of the learned Subordinate Judge as to the state of the law at present and leave him, as the appellate authority on facts, to come to a conclusion on the question. I therefore call upon the lower appellate Court to record a revised finding on the first point raised by him, namely :

" Do the defendants hold the suit property on 'kayamgeni or chalgeni' on the evidence on record.?"

The finding will be submitted in six weeks and ten days will be allowed for filing objections.

I may note that it has not been argued before me that, if otherwise the defendants had not been able to prove mulgeni right, the landlord's right to eject them has become barred by virtue of adverse possession. The decision of the Privy

Council in *Nainapillai Marakayar* v. *Ramanathan Chettiar* (3) and *Madhavrao Waman* v. *Raghunath Venkatesh* (4) are clear to the effect that when a person has once become a tenant under a landlord, he could not by merely denying the rights of the landlord convert his possession, permissive as it was originally, into adverse, against the landlord.

In compliance with the order contained in the above judgment, the Subordinate Judge of South Kanara submitted the following :

Finding.—The High Court has called upon me to submit a finding on the following issue :

" Do the defendants hold the suit property on kayamgeni or chalgeni ? "

I am further directed to record the finding on the evidence already on record.

* * * *

These circumstances indicate rather conclusively that the defendants' plea that they are kayamgeni tenants is true and I find accordingly.

This second appeal coming on for hearing after the return of the said finding the Court delivered the following :

Judgment.—I called upon the Subordinate Judge to submit a finding on the question whether the defendants hold the suit property on kayamgeni or chalgeni, on the evidence on record. The present learned Subordinate Judge has found that the defendant's plea that they are kayamgeni tenants is true. The learned advocate for the plaintiff-appellant has filed objections to this finding. He contended that the facts proved do not support the defendants' plea that they are kayamgeni tenants. Possession for a long period and payment of a uniform rate of rent might not by themselves be enough to prove that the defendants are kayamgeni tenants and not liable to be ejected: *Subramania Chettiar* v. *Subramania Mudaliar* (5). In the present case however the judgment of the first Subordinate Judge and the finding submitted by the present Subordinate Judge refer to some other facts from which, I think, it was legally open to the present learned Subordinate Judge to come to the finding that the defendants' plea that they are kayamgeni tenants has been proved. The question is not what exactly I would be inclined to find myself on the facts and the circumstances of this case, but whether there are circumstances from which it was open in law to the lower appellate Court to base its finding. On the whole I have come to the conclusion that the finding must be accepted in second appeal. The result is that the second appeal is dismissed with costs.

P.R.S./R.M. *Appeal dismissed.*

(4) A. I. R. 1923 P. C. 205=74 I. C. 362=47 Bom. 798.

(5) A. I. R. 1929 P. C. 156=116 I. C. 601=56 I. A. 248=52 Mad. 549.

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* A. I. R. 1931 Madras 580

CURGENVEN AND CORNISH, JJ.

R. N. Samuvier and *another*—Plaintiffs—Appellants.

v.

R. N. Ramasubbier—Defendant—Respondent.

Appeal No. 21 of 1929, Decided on 8th January 1931, against decree of Sub-Judge, Tinnevelly in O. S. No. 28 of 1925.

*** (a) Registration Act (1908), S. 49—Document of dissolution of partnership only repository and appropriate evidence of agreement of dissolution—Document alone can be looked at under Evidence Act, S. 91, for terms—Document purporting to transfer interest in partnership holding immovable property requires registration — Evidence Act (1872), S. 91.**

Two brothers *A* and *B* were partners in two money-lending firms *X* and *Y*. In the firm *X* one *S* had half a share and *A* and *B* had the other half. In the firm *Y*, *A* and *B* were partners. The two firms had dealings with each other. *A* and *B* deciding to sever their interest executed an agreement on 4th June 1923 by which *A* was to take over all *B's* interest in the firm *X*, while those of *A* in the firm *Y* were assigned to *B*. *B* at the same time accepted a liability for Rs. 1,30,000 due by firm *Y* to firm *X*. Subsequently *S* and *A* dissolved the partnership in the firm *X* and it was arranged that the debt due from firm *Y* should be taken over by *A*. *A* sued *B* to recover the amount.

Held : that the agreement dated 4th June 1923 was intended by parties to be instrument of dissolution and was what the parties considered to be the only repository and appropriate evidence of their agreement and under S. 91 could alone be looked at for the terms of it : *A. I. R.* 1923 *P. C.* 50, *Foll.* [P 582 C 1, 2]

That the interest, in the partnership assets, which the agreement purported to assign was an interest in immovable property and therefore the document being unregistered was not receivable in evidence of any transaction affecting the property : *A. I. R.* 1929 *P. C.* 269, *Ref.*; *A. I. R.* 1926 *Mad.* 1040, *Diss. from*; (*Case law discussed.*) [P 582 C 2]

(b) Partnership—There is no true analogy between partners of firm and shareholders in joint stock company—Company.

There is no true analogy between partners in a firm and shareholders in a joint stock

company because whereas a company is a juridcal person and its identity is unaffected by the transfer of its shares, a partnership is legally speaking, only an aggregate of individuals and changes with every change of personnel : *Ashworth* v. *Munn*, 15 *Ch. D.* 363, *Ref.* [P 583 C 1]

(c) Registration Act (1908), S. 17—Scope.

A document transferring a share in the assets, including immovable property of a firm requires registration : 17 *Bom.* 235, *Ref.* [P 583 C 2]

*** (d) Registration Act (1908), S. 49—Terms in contract, some affecting immovable property and some not, designed as indivisible whole to effect fair distribution of assets—Terms not relating to immovable property cannot be picked out and enforced.**

Where a contract comprises a number of counterbalancing terms, some affecting immovable property and some not, designed as an indivisible whole, to effect a fair distribution of assets, such of the terms as do not relate to immovable property cannot be picked out and enforced regardless of the consequences of such a course ; (*Case law discussed.*) [P 583 C 2 P 584 C 1]

*** (e) Registration Act (1908), Ss. 17 and 49—Terms of contract relating to moveable and immovable property inextricably united—Only course is to regard transaction single transaction affecting immovable property.**

No hard and fast rule can be drawn as to the divisibility and therefore the enforceability of some terms in a contract apart from the remainder. If justice can be done between parties by a partial enforcement, the Court will enforce and not otherwise.

Where therefore the terms of a contract, some relating to immovable property and others to moveable property are inextricably united, the only course is to regard it as a single transaction affecting immovable property within the meaning of S. 49 and to decline to receive the document as evidence of any terms of it. [P 584 C 2]

*** (f) Registration Act (1908), S. 17—Partnership assets comprising immovable property—Partner has charge upon immovable property on dissolution of property—Charge amounts to interest in land.**

Per *Cornish, J.*—A partner has no right to any specific items of the partnership property as representing his share. But he has in respect of the amount which falls due to him where an account is taken upon a dissolution of partnership, a charge upon the immovable property of the quondam partnership (when the assets comprise such property) and this charge is an interest in land : *Ashworth* v. *Munn*,(1880) 15 *Ch. D.* 363, *Ref.* [P 585 C 2]

(g) Part Performance—Applicability.

Per *Cornish, J.*—The doctrine of part performance is unavailing against the striugent provisions of S. 49, Registration Act. [P 586 C 2]

S. Varadachariar and *P. R. Srinivasan*—for Appellant.

T. M. Krishnaswami Ayyar and *T. M. Ramaswami Ayyar*—for Respondent.

Curgenven, J.—The plaintiff, who appeals, brought this suit against his brother for a sum of Rs. 18,800-3-1. The learned Subordinate Judge has narrated in full the circumstances leading up to the claim. To understand how it arose, it is only necessary to explain that there were two firms in which both parties were partners. One of these firms worked under the vilasam V. S. R. S., and in it one Sankarana rayana Ayyar had a half-share while the two brothers had the other half share. It was a money-lending business, and it also ran a chit fund. The other firm was known as the R. S. firm; it was also engaged in money-lending, and the plaintiff and defendant were the partners. The two firms had dealings each with the other.

In 1923 disagreements arose between the brothers, and they decided to dissever their interests. By an agreement, Ex. K, dated 4th June of that year, the plaintiff purported to take over all the defendant's interests in the V. S. R. S. firm, while those of the plaintiff in the R. S. firm were assigned to the defendant. The latter at the same time accepted liability for a sum of Rs. 13,000 odd due by the R. S. firm to the V. S. R. S. firm. Later in February 1925, Sankaranarayana Ayyar and the plaintiff dissolved their partnership in the V. S. R. S. firm, and it was arranged that the debt due from the R. S. firm, which by that time amounted to Rs. 18,340-6-1, should be taken over by the plaintiff. It is this sum that formed the subject-matter of the suit. The defendant raised a number of legal objections to the claim, and it is with these that we are concerned. The first part of the argument is based upon the circumstance that the agreement, Ex. K, between the parties was not registered. It purported, as we have seen, to dissolve two partnerships, and since each partnership involved immovable property, title to which necessarily, it is contended, underwent modification, the whole document is subject to the disqualifications imposed by S. 49, Registration Act—it can neither affect the property nor be received as evidence of any transaction affecting it. Several replies have been attempted to this objection. In the first place the actual transaction is assigned to an anterior date, when the document would be no more than a record of an earlier oral agreement, and not itself the embodiment and sole repository of the contract. But

supposing this contention to fail, it is urged that the objection with regard to the registration does not apply where a partnership involving immovable property is dissolved; or if, again, this position is not maintainable, some parts of the transaction, and in particular that part which gives rise to the present claim, are not affected. A further line of defence resorted to by the defendant is that the plaintiff has not acquired the right to sue by a valid assignment of the actionable claim.

There can be no doubt, in my view, that the agreement of 4th June 1923 was, and was intended by the parties to be, the instrument of dissolution. It was not the less so merely because the operations thereby involved could not all be executed upon the day upon which the document was signed, but some came into force earlier and some were left to be done later. Thus it may be, as the plaint recites, that from some day in May the parties began to open separate accounts, but the document itself recognizes the necessity for registered conveyances, and provides that they should be subsequently executed. The document is formal in design, and opens with the words "agreement entered into on 4th June 1923". The plaint (para. 4) gives its date as the date up to which the parties carried on their transactions as joint partners. In para. 11 it is referred to as having been "confirmed and brought into force", and other similar expressions occur elsewhere. Allusion to earlier dates on which certain changes involved in the two dissolutions were introduced does not, in my view, go far to show that what was clearly drafted as a written agreement should be discarded in favour of a prior oral one. There are indications in the evidence that it was not until trouble was apprehended from this source that such a theory took shape. Thus the plaintiff, when examined on 11th February 1928, said that when division was effected on 24th May 1923

"it was decided that an agreement should be drawn up and executed in duplicate and each should keep one as a voucher to evidence the arrangements come to."

On the 16th February, he made the incompatible assertion that

"at the time of the division of the assets there was no intention to reduce to writing the arrangements come to,"

and went on to say that Ex. K was drawn up merely as a record of an already completed division. Another contradiction of this construction is to be found in his lawyer's notice to the defendant, Ex. 6. I have no doubt that the written agreement was, in the words of Couch C. J. quoted by their Lordships of the Privy Council in *Subramanian* v. *Lutchman* (1)

"what the parties considered to be the only repository and appropriate evidence of their agreement,"

and, under S. 91, Evidence Act, can alone be looked at for the terms of it.

The next point is whether the document could effect its purpose without registration. As has been said, it sets out to dissolve two partnerships, making various dispositions, which need not be given here in detail, with regard to the moveable and immovable property until then held by each firm. I would here record my view, in reply to an argument addressed to us, that the terms of this deed can only be construed as actually assigning rights in the immovable property, and not, as is provided for by S. 17 (2) (v), Registration Act, "merely creating a right to obtain another document which will, when executed create" etc., rights in the property; so that as has been laid down by the Privy Council in *James Skinner* v. *R. H. Skinner* (2), it cannot escape the provisions of the Act merely because paras. 15 and 16 of it may contemplate the execution and registration of other documents. In *Venkataratnam* v. *Subba Rao* (3), Phillips and Madhavan Nair, JJ., have held that a document of the nature of Ex. K does not require registration, but with all respect I am unable to adopt the reasoning upon which that decision is based. The theory underlying it is that both before and after a partner releases his rights the property is and still remains the property of "the partnership," meaning by that phrase, I think, the learned Judges would have conceded a legal entity which does not itself undergo change. But this is surely to lose sight of the fact that

"if from any cause whatsoever any member of a partnership ceases to be so, the partnership is dissolved as between all the other members: Contract Act, S. 253 (7)."

(1) A. I. R. 1923 P. C. 50=71 I. C. 650=50 I. A. 77=1 Rang 66=50 Cal. 338.
(2) A. I. R. 1929 P. C. 269=119 I. C. 633=56 I. A. 363=51 All. 771.
(3) A. I. R. 1926 Mad. 1040=96 I. C. 881=49 Mad. 738.

Accordingly where, to take the case of the V. S. R. S. firm as an example, there is a partnership of three persons, and one goes out, the whole partnership is dissolved. If the remaining two persons resume business as partners, it can only be by the formation, tacit or express, of a fresh partnership. If the original partnership of three held immovable property, and it afterwards vests in the new partnership of two, it can surely only be by a transfer of interest from the one to the other. The analogy drawn between partners in a firm and shareholders in a joint stock company does not seem to be a true one, because whereas a company is a juridical person, and its identity is unaffected by the transfer of its shares, a partnership is, legally speaking, only an aggregate of individuals and changes with every change of personnel. Some discussion of this point by the Court of appeal will be found in *Ashworth* v. *Munn* (4), one of the Mortmain cases referred to in the next stage of the argument. It is worth remark that S. 17, Registration Act, excludes from its provisions

"any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property,"

which may perhaps justify the inference that in similar circumstances the exclusion of instruments relating to partnerships was not contemplated by the framers of the Act, and certainly shows an intention to distinguish between such companies and ordinary partnerships.

Assuming then that a partner in a firm possessing immovable property holds an interest in that property, it would seem to follow that upon a dissolution a transfer of that interest takes place. The question whether he does hold such an interest has been elaborately discussed by Jardine and Telang, JJ. in *Joharmal* v. *Tejram Jagrup* (5), where the English case law dealing with the subject has been considered at length. The former learned Judge admitted that the tendency of decisions in England had been to bring partnership agreements conveying interests in land among other assets within S. 4, Statute of Frauds, as had been done under the Statute of Mortmain, and although he seems to have inclined towards the general proposition that in India a document transferring a share in the assets, including immovable property of a firm does not require registration, I do not find that he expressly committed himself to that view. Telang, J., gave reasons for adopting the contrary position, in which I would respectfully express my concurrence. To go no further than to the provisions of the Contract Act, under S. 253, all partners, in the absence of a contract to the contrary, are joint owners of the partnership property; and although certain restrictions are imposed upon them, qua partners, in dealing with their shares in that property, that does not make them the less joint owners, and if joint owners they be it is difficult to see how they can be said to possess an interest in the property. The same considerations apply of course even more plainly where, as here with the R. S. firm, a partnership of two undergoes dissolution. Each ex-partner acquires certain sole interests in immovable property by the conversion of rights previously held jointly. I conclude then that the agreement Ex. K cannot operate to effect the immovable property of which it treats, and in so far at least as it evidences a transaction affecting immovable property, it is inadmissible in evidence.

The appellant next contends that we may take the terms of the agreement piecemeal, and enforce any not directly affecting immovable property, among these latter being the suit claim. The question first arising here is, does it even operate to dissolve the two partnerships? Analogy sought in the severance of joint status among the members of a Hindu family is, I think, likely to be fallacious. We are here dealing not with status but with contract. In *Gray* v. *Smith* (6), Kekewich, J., held that an agreement by one of the partners to retire and to assign his share in the partnership assets including immovable property, is an agreement to assign an interest in land, and falls within the Statute of Frauds, a decision which, although not argued, was approved by the Court of Appeal. But it does not seem necessary here to settle this point, because I think that the authorities are clear that where a contract comprises a number of counter-

(4) [1880] 15 Ch. D. 363=50 L. J. Ch. 107=43 L. T. 553=28 W. R. 965.

(5) [1893] 17 Bom. 235.

(6) [1890] 43 Ch. D. 208=59 L. J. Ch. 145=62 L. T. 335=38 W.R. 310.

balancing terms, some affecting immovable property and some not, designed as an indivisible whole to effect a fair distribution of assets, you cannot pick out such of these terms as do not relate to immovable property and enforce them regardless of the consequences of such a course. The decision in *Lakshmamma* v. *Kameswara* (7), has been criticized as giving weight to prior cases decided under the Registration law as it stood before 1877, when the document could not be received in evidence for any purpose. It was a partition case, and the learned Judges held that the transaction was one and indivisible, so that the partition of the moveable property could not be separated from the partition of the rest. In *Thandavan* v. *Valliamma* (8), a partition of moveables effected by an unregistered instrument which dealt also with the immovable property was held to be valid, but it will be found that the one-third share claimed in the moveables was quite separable from and independent of the share in the immoveable property. The Court has, it is said, to ascertain whether "the part which is void be in its own nature separable and divisible."

Another case dealing with separable moveable property, and citing the case last referred to with approval, is *Hanmant* v. *Ramabai* (9). So too where there is a lien or charge upon the property partly moveable and partly immovable, effected by an unregistered document, the charge may be enforced upon the moveable property: see *Pasupati Venkatapathiraju Garu* v. *Venkata Subhadrayyamma* (10). These cases are merely illustrations of contracts with separable terms. In *Vyravan Chetti* v. *Subramanian Chetti* (11), which related to an agreement to divide equally the proceeds of a first and second mortgage, all that their Lordships of the Privy Council decided was that, for the purpose of a claim to half the proceeds, the document although unregistered, could be given in evidence. No question of the inherent divisibility or indivisibility of a transaction into its component parts really arose. An instance of a document effecting partition of movables and immovables, which was considered not to be enforceable as regards moveables only, is afforded by a Full Bench case of this Court, *Pothi Naickan* v. *Naganna Naickan* (12). The principle accepted was that:

> "when there is an entire contract and part of it cannot be enforced, the whole goes, whereas it is otherwise when an instrument contains two or more distinct contracts, in which case they are severable."

This case was referred to as the law upon the point in *Perumal Ammal* v. *Perumal Naicker* (13), although the kind of transaction dealt with there, being a gift of moveable and immovable property stands upon a different footing and no question of upsetting the balance of a bilateral contract arises. Where a party relinquished his claim to property, comprising moveables and immovables, in consideration of a sum of Rs. 1,000, it was held in *Disheshar Lal* v. *Mt. Bhuri* (14), that as this consideration could not be apportioned between the real and personal estate the document could not be admitted for any purpose whatever.

The conclusion to be derived from these cases is that no hard and fast rule can be drawn as to the divisibility, and therefore the enforceability of some terms in a contract apart from the remainder. If justice can be done between the parties by a partial enforcement, the Court will enforce, and not otherwise. Turning now to the document before us, I think I am right in saying that Mr. Varadachariar for the appellants has not attempted to show that, on this principle, the suit amount can be separated from the other property dealt with. In the first place, the plaintiff takes over the defendant's interest in the V. S. R. S. firm and the defendant, the plaintiff's interest in the R. S. firm, with an indemnity clause in each case. Then the brothers owned an extent of wet land, of which the plaintiff was to receive 70 acres 60 cents, and the defendant the remainder (area not stated, but said to be considerably less). The plaintiff was to have all the outstandings and to meet the liabilities of another business, known as the Munnirpallam business, hitherto jointly owned. There were several other

(7) [1890] 13 Mad. 281.
(8) [1892] 15 Mad. 336=2 M.L.J. 130.
(9) [1919] 51 I.C. 954.
(10) [1918] 47 I.C. 563.
(11) A.I.R. 1920 P.C. 33=56 I. C. 642=47 I. A. 108=43 Mad. 660.
(12) [1916] 32 I.C. 48 (F.B.).
(13) A. I. R. 1921 Mad. 137=61 I. C. 461=44 Mad. 196.
(14) [1920] 56 I.C. 595=1 Lah. 436.

assignments of property, some of it immovable, which I need not particularise. It is evident therefore that if, on the footing of this agreement, the defendant is held solely liable for the suit item, as a liability of the R. S. firm assumed by him under it, it must be in entire disregard of the consideration which led him to assume that liability. In the case of such a contract as this, the terms of which are inextricably united, the only course, in my view, is to regard it as a single transaction affecting immovable property, within the meaning of S. 49, Registration Act, and to decline to receive the document as evidenoe of any of its terms.

The final ground taken by the appellants upon the question of registration is that there was no occasion to adduce evidence of the terms of the contract, as they had been admitted by the defendant. It is true that the defendant admitted that he had executed Ex. K but he set up a further agreement, copy of which he filed as Ex. 25, which would have had the effect of very substantially modifying the terms of Ex. K. It cannot be said therefore that the parties were ad idem as to the terms of the contract between them.

Since the inadmissibility of Ex. K is fatal to the plaintiff's claim, the question of the validity of the assignment of the debt to him by the V. S. R. S. firm does not arise. The appeal is dismissed with costs.

Cornish, J.—I have come to the same conclusion, and will briefly state my reasons.

The plaintiff's evidence is that Ex. K was intended to embody the agreement between him and the defendant. He says:

"Even when the division was effected on 11th Vykasi 1098 (corresponding to 24th May 1923) it was decided that an agreement should be drawn up and executed in duplicate and each should keep one as a voucher to evidence the arrangements come to."

He adds that a draft of an agreement was prepared a few days later; that two fair copies were prepared from the draft each being executed by plaintiff and defendant; and that Ex. K. is the agreement executed by both and kept by the plaintiff. Further Ex. K is in form an agreement, and does not purport to be a memorandum of an agreement previously made by the parties. It begins "agreement entered into on 4th June 1923 by both of us". In these circumstances, it appears to me that Ex. K constitutes the contract between the parties; and consequently, under S. 91, Evidence Act, no other evidence of its terms can be given except the document itself: *Subramanian* v. *Lutchman* (1).

It is plain from a perusal of Ex. K Cls. 2, 5, 15 and 16 that immovable properties exceeding Rs. 100 in value were being assigned; and it would follow by reason of Ss. 17 and 49, Registration Act, that the document would require registration, if that which was being assigned on the dissolution of the partnership was an interest in immovable property. I think it clear upon the authorities that it was an interest in immovable property. The plaintiff and defendant as partners were joint owners of the partnership assets, moveable and immovable: see S. 253, Contract Act. A partner however, has no right to any specific items of the partnership property as representing his share. But he has in respect of the amount which falls due to him when an account is taken upon a dissolution of partnership, a charge upon the immovable property of the quondam partnership, (when the assets comprise such property) and this charge is an interest in land: see *Ashworth* v. *Munn* (4). There it was held that a gift to charity by a testator, a partner in a mercantile firm, of the proceeds of the sale of his share in certain land held as partnership property, was a gift of an interest in land, and therefore void under the Mortmain Act. So, too in *Gray* v. *Smith* (6) it was held by Kekewhich, J. and the Court of appeal expressed approval, that an agreement by one of the partners to retire from the partnership and to assign his interest in the partnership assets, which comprised land, was an agreement to assign an interest in land which required a memorandum in writing in pursuance of the Statute of Frauds. The ruling in *Venkataratnam* v. *Subba Rao* (3) is inconsistent with these authorities and I respectfully dissent from it. It appears that the learned Judges in the case reported in *Venkataratnam* v. *Subba Rao* (3) treated an ordinary partnership as standing on the same footing as a joint stock company with regard to the transfer of a partner's share, whereas, as is shown by the judgments of the Court

of appeal in *Ashworth* v. *Munn* (4), there is a great distinction between the two. Thus, at p. 372 Brett, L. J., observed :

"There are joint stock companies where by the agreement of the partners, that is to say, by the constitution of the company to which they have agreed, there are to be shares in the company, and there are to be shareholders, and by the agreed constitution of the company those shares may be transferred, and the company still continued. Now, in such a case, if the company is the owner of the land, in one sense it may be said that that land does not belong to a corporation, but does belong to the shareholder ; but by the agreement of the parties that matter is to be dealt with precisely as if there was a corporation, that is to say, the shares are to be allowed to be transferred, so that the new shareholders may come into the partnership without the partnership ceasing at all. . . . . But when you come to the case of an ordinary partnership not so constituted, which holds land, one partner cannot dispose of his interest without the consent of the others, and supposing he dies, the partnership is at an end, and it may not be possible to ascertain his interest in the partnership without dealing with the land which is the property of the partnership in which therefore he has an interest."

In view of these authorities, the interest in the partnership assets which the parties to Ex. K purported to assign was, in my judgment, an interest in immovable property ; and that being so, the document being unregistered is not receivable as evidence of any transaction affecting that property : see *James Skinner* v. *R. H. Skinner* (2).

Nor can I discover in Ex. K an agreement to pay the money claimed by the plaintiff which is severable from the agreement transferring the immovable property. If there were two distinct provisions, the one relating to rights to the immovable property, and the other to the realization and payment of money, proof of the latter provision could be given without the document requiring registration : see *Vyravan Chetti* v. *V. Subramanian Chetti* (11) and the judgment of Sir John Wallis, C. J , in *Pothi Naicker* v. *Naganna Naiker* (12). In my opinion it is impossible to say that the part of the agreement upon which the plaintiff founds his claims to be Rs. 18,000 is independent of the agreement relating to the transfer of the immovable property. It is part and parcel of the same transaction and indivisible from it.

It has also been contended for the plaintiff that he is entitled to invoke the doctrine of part performance in aid of his claim. In *Arseculeratne* v. *Perera* (15) it was held that this doctrine had no application to the stringent provisions of a Ceylon Ordinance which rendered "of no force or avail in law" any agreement as to land not duly attested by a notary and two witnesses. It seems to me that the doctrine must be equally unavailing against the not less stringent provision of S. 49, Registration Act. Reference however has been made to S. 53-A of the amended Transfer of Property Act. But the conditions which make that provision applicable have not been fulfilled in this case.

Upon these grounds, I think the plaintiff's suit failed and his appeal must be dismissed with costs.

P.R.S /R.M. *Appeal dismissed.*

(15) [1928] A. C. 173.

A. I. R. 1931 Madras 586

WALLACE AND STONE, JJ.

Bagavathi Doss Bavaji (Dharmakartha of Sri Venkatasaperumal Devasthanam) —Appellant.

v.

M. Sarangaraja Iyengar and *others*— Respondents.

Appeals Nos. 395 and 396 of 1928, Decided on 22nd January 1931, against decrees of Small Cause Court Judge, Madras, in Land Acquisition Cases Nos. 19 and 20 of 1925.

Land Acquisition Act (1894), Ss. 3 (d) and 54—No appeal lies to High Court from decree of Land Acquisition Court when constituted by appointment of Special Judicial Officer.

The High Court has no power to hear appeals from the decrees of a Land Acquisition Court when constituted as a Special Court by the appointment of a Special Judicial Officer, though a restricted right of appeal has been given under S. 54, in cases of awards of such a Court. Such a Court is not a principal civil Court of original jurisdiction from the decrees of which the High Court can hear appeals: *A. I. R.* 1922 *P. C* 80; 40 *Cal.* 21 (*P. C.*); *Sandback Charity Trustees* v. *North Staffordshire Ry. Co.* (1878) 3 *Q. B.* 1, *Ref.* [P 588 C 1]

T. C. A. Anandalvan, T. C. A. Bhashyam and *M. E. Rajagopalachari* — for Appellants.

C. Narasimhachariar and *R. Rangaswami Iyengar*—for Respondents.

Judgment.—On this appeal being called on, a preliminary objection was taken on behalf of the respondent that the appeal was incompetent as no appeal lay from the Land Acquisition Court when that Court, as in this case, was

constituted by the appointment of a Special Judicial Officer. The objection is founded upon alternative arguments, viz: (1) either the Chief Judge of the Small Cause Court who was the Special Judicial Officer appointed in this case (see Local Rules and Orders p. 84) is a persona designata so as to make the Court he constitutes fall within no general class from which appeal to the High Court lies; or (2) by virtue of the fact that the "Special Judicial Officer" appointed was in this case the Chief Judge of the Small Cause Court the Court he constitutes falls within the class of Small Cause Courts and accordingly in that case also no appeal lies to the High Court.

In our view in this case "the Court" within the meaning of the Land Acquisition Act was constituted by the Local Government appointing a Special Judicial Officer to perform the functions of the Court. It follows therefore that this was a special Court and was not "a principal civil Court of original jurisdiction" within the meaning of S. 3 (d), Land Acquisition Act. The question then arises whether when the matter in dispute and litigated before such a Court leads not to the making of an award but to the pronouncement of a decree, any appeal lies to the High Court from the decree of such a Court.

Before however we consider this matter it is necessary to advert to the meaning of the term "award" as used in the Land Acquisition Act and to consider whether the trial Court in this matter made an award or issued a decree.

There is clearly a distinction between an "award" within the meaning of that Act, and a decree: see *T. B. Ramachandra Row* v. *A. N. S. Ramachandra Row* (1) at p. 329 (of 45 *Mad.*) and *Rangoon Botatoung Co.* v. *Collector of Rangoon* (2). Many decisions which can be made under this Act are not "awards." For example, an order made under S. 32 is not an "award." S. 54 also clearly distinguishes between "decrees" and "awards."

When one comes to define the term "award" so as to see where the functions of an award end, one finds that the matter has already been fully considered by the Judicial Committee, for in *T. B. Ramachandra Row* v. *A. N. S. Ramachandra Row* (1) at p. 330 (of 45 *Mad.*) their Lordships observed:

"The award as constituted by statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under S. 31, sub-S. (2), the functions of the award have ceased; and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award."

It is thus apparent that the judgment now appealed from was not an "award" but was a decree and is so termed in the memorandum of appeal.

As was pointed out by Lord Bramwell in *Sandback Charity Trustees* v. *North Staffordshire Ry. Co.* (3), cited with approval by the Judicial Committee in *Rangoon Botatoung Co.* v. *Collector of Rangoon* (2) at p. 200 (of 39 *I. A.*):

"an appeal does not exist in the nature of things. A right of appeal from any decision of any tribunal must be given by express enactment."

Their Lordships of the Judicial Committee added at *Rangoon Botatoung Co.* v. *Collector of Rangoon* (2) loco citato:

"a special and limited appeal is given by the Land Acquisition Act from the award of the Court to the High Court. No further right of appeal is given. Nor can any such right be implied."

The express right of appeal is to be found in S. 54 which provides inter alia as follows:

"Subject to the provisions of the Civil Procedure Code 1908, applicable to appeals from original decrees, and notwithstanding anything to the contrary in any enactment for the time being in force, an appeal shall only lie in any proceedings under this Act to the High Court from the award, or from any part of the award of the Court. . . . . ."

Notwithstanding this express limitation and the pronouncement above referred to of the Judicial Committee to the effect that a limited right of appeal alone is given it is argued on behalf of the appellant that because S. 53 applies the provisions of the Civil Procedure Code (and although such application is "save in so far as they may be inconsistent with" the provisions of the Land Acquisition Act) therefore we must apply S. 96, Civil P. C., and say that as "the

(1) A. I. R. 1922 P. C. 80=67 I C. 408=49 I. A. 129=45 Mad. 320 (P. C.).
(2) [1912] 40 Cal. 21=16 I. C. 188=39 I. A. 197 (P. C.).
(3) [1878] 3 Q. B. 1=47 L. J. Q. B. 10=37 L. T. 391=26 W. R. 229.

Court" within the meaning of the Land Acquisition Act falls within the term "any Court" within the meaning of S. 96 (1), Civil P. C., therefore an appeal lies not only from awards but from decrees of "the Court" to the High Court. Whatever weight there may be in this argument when one is considering the position where the appeal is from "the Court" where such Court is "a principal civil Court of original jurisdiction" within the meaning of S. 3 (d), Land Acquisition Act, the point raised by the present objection is not touched unless one can find the authority which makes the High Court "the Court authorized to hear appeals from the decisions of such Court" within the meaning of S. 96, Civil P. C., for in the absence of such authority there is no competent appellate Court, or if there be it is not the High Court.

We invited the appellant's counsel to indicate where such authority is to be found and the only authority he could suggest was the authority conferred by S. 54, Land Acquisition Act. That is to say, as that section says that, subject to the provisions of the Civil Procedure Code applicable to appeals from original decrees, appeals shall only lie to the High Court from awards, therefore appeals lie to the High Court from the Court, and therefore the High Court is authorized to hear appeals from "the Court" and therefore the High Court is a Court authorized to hear appeals within the meaning of S. 96, Civil P. C., not only from awards but also from decrees. We cannot so construe the authority conferred by S. 54. The authority by that section conferred is an authority to hear appeals from awards. We can find no other authority conferring upon the High Court the power to act as a Court of appeal from the specially constituted Court from whose decision this appeal is brought. It is urged that this results in an anomaly because an appeal would have lain had the Court been a "principal civil Court of original jurisdiction." As to whether an appeal would lie in such a case we express no opinion. But in the present case it is clear that the Court in question was not a "principal civil Court of original jurisdiction." It was a special Court specially constituted. It has its own statutory status and does not follow the status of the Court ordinarily presided over by the person who happens to be appointed as its Judge. No authority has been conferred upon the High Court to hear appeals from such special Court except in the case of an award and if this results in an anomaly the remedy is in an alteration of the law, not in construction of the existing Act which would do violence to the most elementary rules of construction.

It follows that the preliminary objection is upheld, and the appeals are dismissed with costs.

P.R.S./B.V. *Appeals dismissed.*

A. I. R. 1931 Madras 588

PANDALAI, J.

Rasu Pillai—Defendant—Appellant.

v.

Vaithilinga Muthirian and *others*—Plaintiffs—Respondents.

Second Appeal No. 1051 of 1929, Decided on 18th February 1931, against decree of Sub-Judge, Trichinopoly, in A. S. No. 247 of 1928.

Civil P. C. (1908) S. 47 (2)—In execution of decree obtained against *Y*, *X* getting possession of house property No. 1 — Decree reversed on appeal—Restitution applied for —*X* building wall on property No. 2 thereby obstructing passage to house—Court ordering possession of house to be secured to *Y* but making no order as regards wall—*Y* suing to recovery of both properties 1 and 2 —Suit as regards property No. 1 held incompetent—But Court should treat suit as proceeding so far as it related to house.

X obtained possession of a house property No. 1 in execution of a decree passed against *Y*, while appeal against the decree was pending. On appeal the decree was reversed and *Y* applied for restitution by redelivery of possession of the house. After getting possession but before *Y*'s application for restitution, *X* had built a wall on property No. 2 thereby blocking passage to the house. Court ordered possession to be secured to *Y* but made no order as regards the wall or property No. 2 on which the wall stood. *Y* instead of asking the Court to carry out its own order brought a suit for recovery of both properties Nos. 1 and 2. It was argued that so far as property No. 1, the house, was concerned *Y* had no right to bring this suit.

Held: that the construction of the wall did not give a new cause of action and the suit was incompetent.

Held further: that under the circumstances the Court should under S. 47 (2) treat the suit as a proceeding so far as it related to house property No. 1: 24 *I. C.* 484, *Disc.* and *Dist.* [P 590 C 1]

C. Rangaswami Ayyangar and *T. Aravamuda Ayyangar*—for Appellant.

N. Swaminatha Ayyar — for Respondents.

Judgment.—Defendant 2 is the appellant in this second appeal and the only point that is capable of being raised in second appeal is whether this suit was competent in respect of property No. 1, in other words, whether the plaintiff's remedy in respect of that property was not by way of execution. To understand this point the following facts are necessary to be known. In a former suit, No. 445 of 1918 brought by the present appellant against the present respondent 1 and his mother who was then alive the appellant sued for possession of this self-same property, item 1 and obtained a decree. He got possession of it in execution pending an appeal.

In the appeal the decree of the first Court was reversed. After the reversal the present respondent 1's mother who was a co-defendant in the suit applied for restitution by redelivery of the property. After he had got possession through Court the appellant had before the application for restitution walled up the opening of property No. 2 in the present suit which is used as a passage from the street to property No. 1 which is a house. The result of this was that no one could get access to property No. 1 except by scaling over the wall or knocking it down. On the restitution petition the present appellant pleaded that the wall which was obstructing the passage to property No. 1 house was erected on his own property which was not included in this suit and therefore no order could be made with respect to it. As a consequence the Court ordered possession of house property No. 1 to be restored to respondent's 1 mother but dismissed the application so far as it related to the wall or the property on which it stood. Then instead of asking the Court to carry out its own order, respondent 1 after his mother's death filed this suit for recovery of both items 1 and 2, claiming property No. 1 as already decreed by the former suit and property No. 2 as a portion of the premises attached to the house by which approach to the house was secured from the street. It has now been found that property No. 2 belongs to respondent 1 and this second appeal is so far as that matter is concerned, incompetent. But it is urged that so far as property No. 1 is concerned the respondent had no right to bring this suit.

The lower Courts have dealt with this question on the footing that a new cause of action arose when the appellant built a wall preventing access to the house and on that ground held that the suit was competent in respect of the house also. I do not see how any cause of action arises for carrying out the order of the Court. The only new cause was not one of action but one of removing the obstruction to executing the Court's own order. What the appellant did was to place an obstruction in the way of the order being carried out. That is not a new cause of action so far as the carrying out the order itself is concerned and I think the lower Courts were not right in their view about a new cause of action so far as executing the order for restitution was concerned.

This however is not sufficient to dispose of the matter. I am asked to exercise the power of the Court under S. 47 (2) and in view of the circumstances to treat the suit so far as it relates to property No. 1 as a proceeding. There is no doubt that this power may be exercised by this Court and the only question is whether it should be so exercised in this case. Having regard to the facts which I have mentioned, it would be extremely unjust to deprive the successful party of the fruits of his decree because the defeated party has run up a wall or placed some kind of an obstacle in the way of execution. The appellant has absolutely no merits. The suit was brought on 9th November 1926 and the order for delivery, Ex. Q was passed on 9th September 1924. The suit treated as a proceeding under S. 47 was in time. But reference has been made to decisions which take the view that under S. 47 (2) a proceeding can only be treated either as a petition or as a suit, not as both. There is no doubt an observation to that effect in a decision reported in *Venkata Kumara Mahipati Surya Rao Bahadur* v. *Subbayamma Rao Bahadur* (1) (at p. 445 of 1 *M. L. W.*) but after examining that decision and the facts on which it was pronounced it appears to me that that was not the ground of the decision nor was it necessary for it. In that case a de-

(1) [1914] 24 I. C. 484.

cree-holder who was entitled under the decree only to mesne profits for three years applied for mesne profits for a year (fasli 1317) which was beyond the three years. In such a case, as their Lordships points out when the Court allowed the mesne profits up to fasli 1316 the latest year within the period of three years, the Court had awarded all that the decree legally provided for and anything that was prayed for beyond that period .was something for which there was no decree at all and therefore was not a proceeding in execution. As their Lordships put it there was no further question relating to the execution of the decree which could be determined under S. 47. But having so decided the lower Court in that case proceeded to convert the application so far as it related to fasli 1317 into a suit. This their Lordships said was not provided by S. 47 (2). That was the ground of the decision namely that a prayer for a relief for which the decree did not provide and would not provide cannot be converted from an execution proceeding to a suit.

Those are not the facts here. The relief in this suit so far as the recovery of item 1 is concerned is fully provided for by the order for restitution and only remains to be carried out. As their Lordships say in the judgment referred to, S. 47 was intended to obviate the injustice caused to parties by a mistake in the initiation of proceedings and enables a Court to treat an application as a suit or a suit as an application. Applying those words the suit so far as it related to property No. 1 was wrongly initiated as a suit and the Court is bound to obviate the injustice which would result from a refusal to apply the salutary provision of S. 47 (2). No question of jurisdiction or of limitation can possibly arise because the suit was in the same Court to which the application for carrying out the order for restitution should have been made and as I have pointed out the date of the suit was well within time. The order therefore is that the decree of the lower Courts .so far as item 1 is concerned is reversed and an order is made under S. 47 (2) and that the order Ex. Q for delivery of possession of item 1 be carried out by the Court of first instance. The second appeal is otherwise dismissed. There will be no order as to costs in this second.appeal,

P.R.S./S.N. *Appeal dismissed.*

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* A. I. R. 1931 Madras 590

SUNDARAM CHETTY, J.

Mahomed Kanni Rowther—Petitioner.

v.

Naina Mahomed Rowther and *another*—Respondents.

Civil Revn. Petn. No. 1633 of 1929, Decided on 17th February 1931, against order of Dist. Munsif, Madura, D/- 5th September 1929.

(a) Civil P. C. (1908), O. 22, R. 1—Representative suit does not abate by plaintiff's death.

There is no abatement in the case of a representative suit by reason of the plaintiff's death. [P 591 C 1]

(b) Civil P. C. (1908), O. 1, R. 8—Representative suit—Plaintiff dying—Any of those persons on whose behalf suit was filed can apply to be made plaintiff—His application will be governed by Limitation Act (1908), Art. 181.

On the death of the plaintiff who filed the suit on behalf of himself and others having the same interests as members of the community, any person on whose behalf also that suit was filed can apply to the Court to be added as a plaintiff for continuing the suit. But even in such a representative suit it is necessary for the person seeking to be made a party to make an application to the Court for that purpose. As there is no special period provided for such an application, Art. 181 may be applied to it : 15 *I. C.* 399, *Cons.* ; 4 *I. C.* 268, *Rel. on.* [P 591 C 1]

Such a suit should not therefore be dismissed for default for a period of three years : *A. I. R.* 1927 *Cal.* 76, *Foll.* [P 591 C 2]

*** (c) Civil P. C. (1908), O. 9, R. 8—Representative suit on behalf of plaintiff and other members of community—Plaintiff dying—Other members are not plaintiffs eo nomine—Suit cannot be dismissed for their nonappearance.**

Where a person sues on behalf of himself and other members of his community but dies during the pendency of the suit, though the suit is a representative suit for the purpose of making the whole community bound by the decision given in it, other members of the community cannot be said to be eo nomine plaintiffs .on record. Court cannot therefore dismiss the suit for default on account of the nonappearance of them: 1 *Lah.* 582, *Rel. on.* [P 591 C 2]

Watrap S. Subramania Ayyar and *T. P. Gopalakrishnan*—for Petitioner.

A. V. Narayanaswami — for Respondent.

Judgment. — This is a revision petition filed by the defendant against the order of the District Munsif of Madura Town, directing the addition of respondents 1 and 2 as plaintiffs, and permitting them to continue the suit. The suit

was instituted by one Musafar Rowther, on behalf of himself and other members of the community of Malagar Uraimuraigars of Ghoripalayam, and the necessary permission of the Court under O. 1, R. 8, Civil P. C., was also obtained. The suit is therefore a representative suit. The proper cause title for such a suit is :

Musafar Rowther, on behalf of himself and all the other members of the community—Plaintiff v. Muhammad Kanni Rowther—Defendant.

The aforesaid Musafar Rowther died at the end of May 1928. His son intervened with two applications to be added as a plaintiff, but both of them were dismissed, the first, on the ground, that in a representative suit of this kind, the son of the deceased who filed such a suit could not claim that the right to sue survived to him, and the second on the ground, that he was not a member of the community on whose behalf the suit was filed. On the very day on which the Court dismissed his second petition, the District Munsif dismissed the suit itself, stating that he would not wait for another application by some other person, and that there was no plaintiff on record. This dismissal was on 20th November 1928. The present application was filed by the respondents on 3rd January 1929, under O. 1, Rr. 8 and 10 and S. 151 of the Code. This was granted by the lower Court, and the propriety of that order is now questioned in this revision petition.

It is rightly conceded, that in view of the suit being a representative suit, there could be no abatement under O. 22, Civil P. C., by reason of the death of Musafar Rowther. If the Court had held that the suit abated, that order would be ultra vires. On the death of Musafar Rowther who filed the suit on behalf of himself and others having the same interest as members of the community, any person on whose behalf also that suit was filed, can apply to the Court to be added as a plaintiff for continuing the suit. There is no article in the Limitation Act, specifically providing the period of time within which that application should be put in. The opinion expressed by Abdur Rahim, J., in the case reported in *Sivagurunatha Chettiar* v. *Ramaswamy Iyengar* (1), seems to be that there is no limit of time for an application under O. 1, R. 8, Civil P. C., to be made a party to the suit. But in the decision of a Division Bench reported in *Krishnaswami Iyer* v. *Seethalakshmi Ammal* (2), Sadasiva Iyer, J. is of opinion, that the residuary Art. 181, Lim. Act, fixing a period of three years would apply to such an application. It is clear, that even in a representative suit under O. 1, R. 8, Civil P. C., any person seeking to be added as a party, on the ground that the person who filed the suit is dead, or has rendered himself unfit to be entrusted with the conduct of the suit, must make an application to the Court for that purpose. If he is so brought on record, he will be eo nomine the plaintiff, who can continue and conduct the suit.

This being an application for which no special period is provided for, Art. 181 should reasonably apply to it, and I prefer to follow the opinion of Sadasiva Iyer, J. It is an elementary principle, that a suit should not be dismissed, on the death of a sole plaintiff, till the expiration of the period fixed for his legal representative to come in : vide also *Kissen Gopal Karnani* v. *Sukhal Karnani* (3), for the application of this principle in a case where the plaintiff was adjudged an insolvent. In the present case, after the death of Musafar Rowther, any other member of the community could apply to be added as plaintiff within three years under Art. 181.

Before the expiration of that period, it seems to me, the Court had no jurisdiction to dismiss the suit for default. Though the suit is a representative suit for the purpose of making the whole community bound by the decision given in the suit, it cannot be said that the other members of that community were eo nomine plaintiffs on record, so that the Court could dismiss the suit on 20th November 1928, for default, on account of the nonappearance of any of them. It has been held in *Udmi* v. *Hira* (4) that the suit or appeal would not abate if one of such persons should die, and there is no need to bring in his legal representative. The order of the lower Court, dismissing the suit on 20th November 1928, must be deemed to be one passed without jurisdiction, and there is no need to set it aside. If it is an order of dismissal

(1) [1912] 15 I.C. 399.

(2) [1919] 49 I.C 268.

(3) A.I.R. 1927 Cal. 76=93 I.C. 781=53 Cal. 844.

(4) [1920] 1 Lah. 582=60 I.C. 111.

for default under O. 9, Civil P. C., which is not a nullity, it has got to be set aside, within 30 days. Otherwise, it is no bar to the present application which has been filed within three years of the death of Musafar Rowther. The order in question is right, and this civil revision is dismissed with costs.

P.R.S./S.N. *Revision dismissed.*

A. I. R. 1931 Madras 592

BEASLEY, C. J. AND WALSH, J.

Adari Sanyasi — Defendant — Appellant.

v.

Vaddadi Nookalamma and *another*—Plaintiffs—Respondents.

Appeal No. 386 of 1929, Decided on 19th November 1930, against order of Sub-Judge, Vizagapatam, in Appeal Suit No. 62 of 1927.

(a) Transfer of Property Act (1882), S. 55 (6) (b)—Part-payment — Whether purchaser obtains charge on property depends on who made default in completing contract.

The question whether a purchaser by part-payment can obtain a charge on the property depends on whether the default in completing the contract rests with him or with the vendor. This is a matter of fact to be found in each case: 23 *Bom.* 56; *A. I. R.* 1927 *Mad.* 204; *A. I. R.* 1926 *P. C.* 94; and *A. I. R.* 1923 *Mad.* 284; *Ref.* [P 593 C 2]

*** (b) Civil P. C. (1908), O. 34, R. 8 — Preliminary decree in redemption suit—Adjustment out of Court cannot be pleaded in passing final decree.**

After the passing of the preliminary decree in a mortgage suit, payment of the mortgage money made out of Court cannot be recognized in and pleaded against passing of final decree: *A. I. R.* 1925 *Mad.* 80, *held overruled by A. I. R.* 1930 *Mad.* 105. [P 594 C 2]

(c) Civil P. C. (1908), O. 34, R. 8 and S. 2 (3)—In redemption suit mortgagee is decree-holder and can transfer his decree.

It is obvious that in a redemption suit the mortgagee is a decree-holder under the definition of "decree-holder" in S. 2 (3). He can therefore transfer his decree and on the transfer being recognized the transferee has the same right to apply for the passing of a final decree. [P 595 C 1]

(d) Transfer of Property Act (1882), S. 74 —Subrogation — Mere volunteer paying off mortgage money cannot be subrogated to mortgagee's rights.

No volunteer is entitled to pay the mortgage-debt of another person without his consent and claim to be subrogated to the rights of the mortgagee: *A. I. R.* 1921 *Mad.* 51, *Expl.*; *A. I. R.* 1926 *Cal.* 231. *Diss. from* and *A. I. R.* 1928 *Mad.* 541, *Rel. on.* [P 596 C 1]

Y. Suryanarayana—for Appellant.

V. Krishnamachari—for Respondents.

Walsh, J.—This is an appeal against the order of remand made by the Subordinate Judge of Vizagapatam in A. S. No. 62 of 1927. The learned Subordinate Judge had passed this order of remand previously on 10th November 1927, but he was directed by the High Court to dispose of a petition, I. A. No. 1925 of 1927, which was for security for costs in the appeal, before disposing of the appeal. A preliminary point is taken by the appellant that he has not done so and that this order of remand must be set aside on that ground alone. We find, however that in para. 4 of his order the learned Subordinate Judge says:

"If it is to be deemed that no definite order was passed one way or the other on I. A. 1295, it must be presumed that the order recording the petition was an order declining to call on the appellant to furnish security. In this view of the matter the petition. I. A. 1295, must be deemed to have been dismissed. The petition is therefore dismissed."

As the learned Subordinate Judge has passed a specific order in accordance with the directions of the High Court dismissing the petition, there is no substance in this preliminary point.

Turning now to the main subject-matter of the appeal which relates to the reversal of the finding of the Court of first instance on issue 2, which issue had been disposed of by the said Court as a preliminary point, it is necessary shortly to describe the events which led to the institution of the suit, O. S. 316 of 1925. The properties in suit were usufructuarily mortgaged for Rs. 600 on 14th May 1913, in favour of one M. Sankariah by the original owners. The mortgagee filed a suit to recover the money and got a decree for sale of the property which was put up for sale and purchased by the plaintiffs' father on 17th December 1914, subject to the usufructuary mortgage. On 12th February 1917, the plaintiffs' father entered into an agreement with the defendant, (the present appellant) to sell him this property, and under this agreement an advance of Rs. 50 was paid on the date of the agreement. The plaintiffs' father as auction-purchaser filed a suit against the mortgagee for redemption of the suit lands. He died during the pendency of the suit and the present plaintiffs who are his daughters were brought on record as his legal representatives. There was a preliminary decree passed on 31st July 1918 and three months were allowed for redemption. After the passing of this

preliminary decree on 19th August 1918, defendant 1 paid the mortgage amount, Rs. 765, to the mortgagee and got a transfer of the mortgage under Ex. 1. In 1920 defendant 1 filed a suit, O. S. 117, for specific performance and a decree was given in his favour subject to the condition that he should pay Rs. 330 to the present plaintiffs and take a sale deed. This was confirmed in A. S. 236 of 1921. The defendant did not pay and neither party took further action in this matter. In 1922 the defendant filed two petitions in the redemption suit, one that he should be brought on record as transferee of the mortgagee's interest; and the other that the final decree should be passed. These are C. M. Ps. 1340 and 1350 of 1921. These two petitions were dismissed by the District Munsif. The present plaintiffs as legal representatives of the original auction-purchaser, filed this suit to eject the defendant from 2/3rds of the property which their father purchased and to recover past mesne profits from him.

The following issues were framed:

1. Whether the plaintiffs have a subsisting title to the suit land.
2. Whether the defendant is in the position of trespasser in the suit land.
3. Whether the plaintiffs have a right to take possession of the suit land; if so whether they cannot get possession without paying the amount mentioned in para. 9 of the written statement of the defendant.
4. Whether the plaintiffs are entitled to any and what amount of profits.
5. To what relief are plaintiffs entitled.

On issue 2 the learned District Munsif found that the defendant was not a trespasser. He therefore held that the suit as brought was not maintainable and dismissed it with costs. On appeal the learned Subordinate Judge held that the defendant was a traspasser. He reversed the finding of the trial Court on this issue and remanded the suit for further disposal on the other issues. Against this order the present appeal has been preferred.

We shall, as far as possible, not refer in any way to the other issues in the suit, which have not been tried, though, owing to the peculiar nature of issue 2, it is somewhat difficult to avoid conclusions which might affect those issues. The question is whether the defendant has any interest in the property. He claims this under two heads: (1) that by payment of the earnest money, Rs. 50, at the time of the agreement to sell by the plaintiffs' father he acquired a charge on the property; and (2) that he having paid the mortgagee should be subrogated to the rights of the latter.

Taking first, the charge which he alleges he has acquired by payment of Rs. 50 as earnest money to the plaintiffs' father, it is argued for the defendant that, as soon as the money was paid he acquired a charge on the property. *Balvanta* v. *Bira* (1) at p. 61 is quoted in this connexion. The learned Subordinate Judge relied on *Ponnammal* v. *Pichai* (2). But it was contended for the appellant that this was opposed to the ruling of the Privy Council in *Dayal Singh* v. *Indar Singh* (3). The question whether a purchaser by part-payment can obtain a charge on the property depends on whether the default in completing the contract rests with him or with the vendor. This is a matter of fact to be found in each case. In *Ponnammal* v. *Pichai* (2) the purchaser redeemed a mortgage which was a part consideration for the sale, but he failed to go on with the contract and pay the remainder of the purchase money. Ramesam, J., held that he had no charge on the property even though he had discharged the mortgage. We find nothing in the judgment of the Privy Council which conflicts with this decision. Their Lordships mention S. 55 (6) (b), T. P. Act, and say:

"Their Lordships are of opinion that the section applied to the agreement in this case, where the buyer had paid earnest money, and so far from refusing to accept delivery, was pressing for specific performance, and that the agreement did in itself create an interest."

No authority has been shown to us for the proposition that a purchaser paying earnest money and then refusing to complete the purchase has a charge on the property for the earnest money, and any such proposition is on its face quite untenable. It is therefore a question of fact in each particular case as to who is in default. The facts of the present case are somewhat peculiar because no argument can be advanced that the defendant was willing to carry out the contract from the fact that he sued for specific performance. The purchase price under the contract was Rs. 1,000 and when he brought his suit for specific

(1) [1899] 23 Bom. 56.
(2) A. I. R. 1927 Mad. 204=99 I. C. 687.
(3) A. I. R. 1926 P. C. 94=98 I. C. 503=53 I. A. 214.

performance his case was that in this the charge for redeeming the mortgage was included. Not only did he claim that the Rs. 765, which he paid to the mortgagee, was in part-payment of the Rs. 1,000, but he claimed to have paid the vendor direct a sum of Rs. 315, which both the trial Court and the lower appellate Court found that he had not paid him. It was also held by both the Courts that the purchase price of Rs. 1,000 was only for the equity of redemption and did not include the mortgage. The finding of the trial Court was confirmed on appeal so that the present defendant had only paid Rs. 470 towards the consideration under the contract of sale, Ex. A. It was also found on issue 3 (To what relief is the plaintiff entitled) ? as follows :

"In view of the false allegations of plaintiff that he paid Rs. 315 in excess of what he actually paid it is not possible for defendants to execute a sale deed in plaintiff's favour in accordance with Ex. A."

It is clear that on this finding the suit for specific performance was liable to be dismissed. The present appellant had brought that suit to enforce the contract of sale of the property to himself for Rs. 1,000 which was to include his payment of the mortgage. The finding was that Rs. 1,000 was only for the equity of redemption and that the mortgage had separately to be redeemed. No argument therefore can be founded that the present appellant was willing to carry out the contract as found by the Court merely because he sought to sue on the contract as he considered it. Although this decree was confirmed on appeal in 1922, the present appellant took no steps to pay up the remainder of the purchase money and he has not up to this date offered to do so. In fact he has got possession of the land from the mortgagee and is resisting the plaintiffs' claim to the property. It is true that the decree in the suit for specific performance fixed no time in which the money had to be paid. In this connexion our attention has been drawn to certain remarks made in *Abdul Sahaker Sahib* v. *Abdul Rahiman Sahib* (4). It was there decided that even if time was fixed in the decree the Court may extend it. It was remarked that there is no form for a decree for specific performance provided by statute or rule and that in Courts of Chancery in England the appropriate forms of judgment, which have been approved, do not contain in the first instance a limit of time for payment of the purchase money. In that case there was evidence that the vendor was asked by the wendee to take the amount of purchase money and he refused. We are clear on the facts of this case that the present appellant is the party obviously in default, and even now he is clearly not ready to complete the purchase by paying Rs. 530 which the decree directed him to pay. The principle on which *Ponnammal* v. *Pichai* (2) has been decided is exactly the same so far as this is concerned and in our opinion it makes no difference that the redemption of the mortgage in that case was part of the purchase money, and in this case it is not part of the purchase money. We hold therefore that the appellant has not acquired a charge on the property for the Rs. 50 as earnest money for the contract of sale.

We now come to his claim to be subrogated to the rights of the mortgagee. The first point to be noted is that he got the transfer of the mortgage after the latter had become merged in the preliminary decree in the redemption suit. The decision in *Parvati Ammal* v. *Venkatarama Ayyar* (5) by Wallace, J., sitting as a single Judge, is quoted by the appellant in this connexion. If, by that decision, it is meant that after the passing of the preliminary decree in a mortgage suit, payment of the mortgage money not into Court can be recognized in passing the final decree, it must be held to have been overruled by the later decision in *Rasan Chettiar* v. *Rangayan Chettiar* (6), in which Wallace, J., and one of us laid down that such adjustment made out of Court cannot be pleaded against the passing of the final decree since the Code distinctly lays down that the payment must be made into Court. There is no difference in this respect between the decree in a foreclosure suit and the decree in a redemption suit : vide O. 34, R. 8, which governs redemption suits. The application of the appellant to be made a party to the redemption suit was rightly dismissed by the Court and, whether right or wrong, it has not been appealed against and has become final. The second

(4) A. I. R. 1923 Mad. 284=72 I. C. 868=46 Mad. 148.

(5) A. I. R. 1925 Mad.80=81 I. C. 771.

(6) A. I. R. 1930 Mad. 105=120 I. C. 72.

counter-petitioner in that matter opposed the petition on the ground that the mortgage had been superseded by the preliminary decree. This is mentioned in full in the order of the District Munsif who concludes by saying: "Final decree cannot be made as mortgage debt was discharged." If he means by that that the mortgage deed was superseded by the preliminary decree, we quite agree. But if he means that the mortgage debt could be discharged by payment out of Court, then it is opposed to the ruling quoted above in *Rasan Chettiar* v. *Rangayan Chettiar* (6). It is immaterial whether the reason given by the learned District Munsif was right or wrong; the order passed against the appellant has become final.

The appellant had two courses open to him. He might have paid up the remainder of the purchase money and then, having got the land assigned to him by the plaintiffs, might have had himself brought on record as plaintiff and asked for the final decree paying the mortgage amount into Court, or he might have purchased the mortgagee's interest in the preliminary decree, got the decree transferred, and applied in the capacity of mortgagee for a final decree to sell the property. It is obvious that in a redemption suit the mortgagee is a decree-holder under the definition of "decree-holder" in S. 2 (3), Civil P. C. He can therefore transfer his decree and, on the transfer being recognized the transferee has the same right to apply for the passing of a final decree. The appellant pursued neither of these courses. Instead, he chose to pay the mortgage debt out of Court, to get possession from the mortgagee, and then to resist the plaintiffs' claim to the property without even offering to pay the plaintiffs the balance of the purchase money.

It has been argued that this taking of possession from the mortgage instead of from the plaintiffs is really a breach of the original contract to sell which would by itself be sufficient to destroy any charge which the appellant had got by payment of the earnest money on the property. We are not sure that this contention also is not well founded. No doubt the property was in the possession of the usufructuary mortgagee at the time it was purchased by the plaintiff's father and the latter was given only symbolical possession; still it was that symbolical possession that was to be transferred to the appellant under the contract Ex. A which he failed to complete, and till he had completed the contract he could not get it. However that may be, as stated above, we are satisfied that the default in completing the contract is on the part of the appellant. But it is argued for the appellant that as he paid the mortgage money under the agreement to purchase the property, he should be subrogated to the rights of the mortgagee. In this connexion the cases quoted to us before, *Parvati Ammal* v. *Venkatarama Ayyar* (5), *Butler* v. *Rice* (7) which was followed in *Tangya Fala* v. *Trimbak Daga* (8) *Govinda Chandra* v. *Parsa Nath*, *A.I.R.* 1926 *Cal.* 231, and *Narayana Kutti Goundan* v. *Pechiammal* (9) at p. 435, have been relied on. The learned advocate for the appellant however concedes that the Madras decisions except that first quoted are against him: vide *Gobinda Padayachi* v. *Lokanatha Ayyar* (10) a decision by Oldfield and Hughes, JJ., and *Velayudhan* v. *Nallathambi*, *A. I. R.* 1928 *Mad.* 541. There is a very full discussion of the question in *Gobinda Padayachi* v. *Lokanatha Ayyar* (10). The English cases as well as the case in *Narayana Kutti Goundan* v. *Pechiammal* (9), have been distinguished. We may notice that in *Narayana Kutti Goundan* v. *Pechiammal* (9) Sundara Ayyar, J., at p. 432 observes as follows:

"The principle governing the right of subrogation in cases where it is claimed by a person, who, without any previous interest, in the property discharges a mortgage on it, is expressed in Jones on Mortgages (S. 874) thus: Under the equitable principle of subrogation, one who pays a mortgage debt under an agreement for an assignment or for a new mortgage, for his own protection or for the benefit of another, acquires a right to the security held by the other."

He then proceeds to state that in India the scope of the rule appears to be narrower still. The learned Judges in *Gobinda Padayachi* v. *Lokanatha Ayyar* (10) distinguish the English cases *Neesom* v. *Clarkson* (11), *Kinnard* v. *Tollope* (12)

(7) [1910] 2 Ch. 277 = 103 L. T. 94 = 79 L. J. Ch. 652.
(8) [1916] 40 Bom. 646=35 I. C. 794.
(9) [1913] 36 Mad. 426=15 I. C. 206.
(10) A. I. R. 1921 Mad. 51=62 I. C. 291.
(11) [1845] 4 Hare 97=9 Jur. 82.
(12) [1888] 42 Ch. D. 610=58 L. J. Ch. 556= 60 L. T. 892=39 Ch. D. 636.

Palmer v. *Hendrie* (13) and *Butler* v. *Rice* (7), as well as *Tangya Fala* v. *Trimbak Daga* (8) which followed *Butler* v. *Rice* (7). In all these cases payment had been made by a transferee of property under a mistake as to the ownership of his transferor. The case in *A.I.R.* 1926 *Cal.* 231 appears to go far beyond anything laid down even in the English cases. With due respect, we are unable to agree with what appears to have been laid down there that a stranger notwithstanding the provisions of S. 74, Contract Act, is entitled to subrogation to the rights of the mortgagee to the extent of the money paid by him if he pays off the mortgage debt, even if not asked to do so by the mortgagor. This case came up for consideration before the Madras High Court in *A. I. R.* 1928 *Mad.* 541 and Devadoss, J., refused to follow it. In the Madras case the plaintiff was a vendee under a sham transaction and it was argued that his position could not be worse than that of a pure volunteer and that a pure volunteer was entitled to be subrogated to the rights of the mortgagee. Devadoss, J., says :

"This is a startling proposition of law. No volunteer is entitled to pay the debt of another person and claim to charge the amount against him."

Refering to the Calcutta case he says :

"The learned Judge, after observing that there is no direct authority for the position, seems to draw support for his position from two English decisions. With very great respect I am unable to agree with the learned Judge in holding that a mere volunteer is entitled to the benefit of any payment that he might make on behalf of a debt whether it be to redeem a mortgage or whether it be to pay off a simple money debt ; and the cases upon which the learned Judge relies do not warrant such a wide proposition as he has laid down."

He then proceeds to distinguish these cases on very much the same lines as they had been already distinguished in *Gobinda Padayachi* v. *Lokanatha Ayyar* (10) quoted above. We entirely agree with him that it is a startling proposition that an entire stranger can go round paying mortgage debts without the consent and even against the wishes of the mortgagor and claim to be subrogated to the rights of the mortgagee. In the present case even by the terms of the contract the appellant did not enter into any obligation to pay off the mortgagee, and was not bound to do so even had he completed the purchase of the equity of redemption. In *Gobinda Padayachi* v. *Lokanatha Ayyar* (10), a case almost exactly similar to the present case, the facts were as follows :

Properties which were subject to a hypothecation and to a mortgage with possession were sold in execution of a money decree against the mortgagors and purchased by a third person. Subsequent to the execution sale those properties were purported to be sold by the mortgagors to the predecessors-in-title of the appellants, the consideration for the sale being the discharge of the hypothecation and the mortgage with possession and of a payment of a sum to the mortgagors for payment to the third person as consideration for the purchase from him of the properties. Appellants discharged only the hypothecation and the usufructuary mortgage amounts and obtained possession from the usufructuary mortgagee ; but they did not pay the third person and did not therefore complete their title as owners of the properties. In a suit brought against the appellants by the successor-in-interest of the third person for possession of the properties it was held that the plaintiff was entitled to obtain possession and that the appellants were not entitled to insist on (1) their being paid the amounts of the hypothecation and the usufructuary mortgage before being ejected, or (2) the plaintiff paying to the usufructuary mortgagee the amount of his mortgage to complete the plaintiff's right to immediate possession. There was no doubt this difference in that case that at the time of the sale purported to be made by the mortgagors the latter had no title to the property. But it was held that the appellants could not also rely upon the equitable principle of subrogation because there was no authority for extending the principle to a case such as that of a payment made under a mistaken belief in the future acquisition of an interest in property.

In the present case it is clear that the defendant got the mortgage transferred to him before he had purchased the equity of redemption. Taking his conduct at its best, it may be said that he thought that the sum he had paid was part of the Rs. 1,000 the purchase money of the land. But when the Court held that this was not so, he evidently declined to go on with the contract of pur-

(13) [1859] 26 Beav 349=(1860) 28 Beave 341.

chase. Besides as noted above, there is an important fact in the present case. If he meant to purchase the mortgagee's rights, he should have got the transfer not of the mortgage but of the preliminary decree which had superseded it. If on the other hand, he wanted to put himself in the shoes of the plaintiff and redeem the mortgage, he had to go on with the contract, purchase the property from the plaintiffs and get himself substituted for the plaintiffs in the suit. He adopted neither of these courses.

In the result we hold that the appellant acquired no charge on the property either by his payment of the earnest money of Rs. 50 at the time of the contract for sale which he failed to carry out or by subrogation to the rights of the mortgagee. That being so we consider that the Court of first appeal was right in holding that he was a trespasser, and the suit as framed was maintainable. We are not here concerned with the other issues which have been remanded by the learned Subordinate Judge for trial.

The appeal therefore fails and is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

A. I. R. 1931 Madras 597 (1)

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Ramabrahmam—Appellant.

v.

Gudimalla Andalamma—Respondent.

Appeal No. 292 of 1926, Decided on 28th November 1930, against order of Dist. Judge, Nellore, D/- 31st March 1926.

Provincial Insolvency Act (1920), S. 53—Court sale.

A transfer by a Court sale in execution is not entirely outside the scope of S. 53: *A. I. R.* 1928 *Mad.* 889 and 29 *I. C.* 217, *Rel. on.* [P 597 C 1]

B. Somayya—for Appellant.

K. Kuppuswamy—for Respondent.

Judgment.—We do not agree with the learned District Judge that a transfer by a Court sale in execution is entirely outside the scope of S. 53, Provincial Insolvency Act. It is possible that, as alleged in this case, such a sale may be collusive and in execution of a collusive decree. In *Thiruvengada Mudaliar, In the matter of* (1), it was held that a charge made by a decree in pursuance of collusive arbitration proceedings was within the section. In *Puran Nath* v. *Atwargir* (2), a Bench of the Allahabad High Court held that for debtor to put immovable property out of the reach of his creditors by bringing a collusive suit against a third party as if for recovery of possession and then to compromise it so as to leave that party in possession would be a transfer within S. 4 (b) (now S. 6 (b), Provincial Insolvency Act, and if so, it would clearly be liable to attack under S. 53.

Nor has the learned District Judge considered the applicability of S. 4 of the Act, under which also the Official Receiver's petition was preferred. This appeal is allowed, and the order of the District Judge is set aside. The petition is remanded to him for fresh disposal after further inquiry. The costs of this appeal will abide and follow the result.

P.R.S./S.N. *Appeal allowed.*

(1) A. I. R. 1928 Mad. 889=110 I. C. 742.

(2) [1915] 29 I. C. 217.

A. I. R. 1931 Madras 597 (2)

RAMESAM, J.

Purushotama Ratho — Plaintiff—Appellant.

v.

Brundavana Dass and *others*—Defendants—Respondents.

Second Appeal No. 2276 of 1927, Decided on 29th January 1931, against decree of Sub-Judge, Berhampore, in A. S. No. 91 of 1926.

(a) Limitation Act (1908), Art. 44—Art. 44 does not apply to suit by minor to set aside alienation by de facto guardian but Art. 44 applies in case of de jure guardian.

Suits brought by persons to set aside alienations by their de jure gurdians during the minority are governed by Art. 44: 44 *Bom.* 742, *Rel. on.* [P 598 C 2]

Article 44 does not however apply to suits by minor to set aside alienation made in minority by de facto guardian and the minor can bring a suit within the larger period, generally 12 years allowed by the general law. [P 598 C 2]

(b) Guardian and Ward—Alienation by de facto guardian is not void but only voidable—Voidability is analogous to that of widow's alienation by reversioners — "Voidable" is not used in same sense as in law of contracts—Lim. Act (1908), Art. 141.

The alienations made by a de facto guardian during the minority of a minor are not void but only voidable. The voidability is analogous to the voidability of widow's alienation by reversioners who can ignore the widow's alienations and bring a suit within 12 years under the general law, under Art. 141. The word "voidable" in such cases is not used in the same sense as it is used in the law of contracts. [P 598 C 2]

(c) Hindu Law—Guardian—Only parents and testamentary guardian can be de jure

guardians and no other persons unless appointed by Court.

Under the Hindu law the de jure guardian would be either the parents or a testamentary guardian and no other person can be de jure guardian unless appointed by the Court with the possible exception of male and female ancestors: 2 *C. W. N.* 191 and 2 *C. L. R.* 583, *Ref.* [P 599 C 1, 2]

(d) Guardian and Ward—De facto guardian acting for benefit of minor binds him by alienation made for necessity.

A de facto guardian acting bona fide for the minor's benefit and in his interests may bind him by his alienation when it is made for a justifiable necessity. [P 599 C 2]

(e) Limitation Act (1908), Art. 44—Natural mother of adopted son not appointed guardian by Court is not guardian de jure and Art. 44 does not apply to suit for setting aside alienation made by her.

The theory of Hindu law is that adoption amounts to civil death in the natural family and rebirth in the family of adoption. Although the relationship between the natural parents and the adopted boy remains for the purpose of prohibited relationship in connexion with the marriage, except for this purpose, all the natural relationship is at an end. However much it may be desirable for a Court to appoint one or other of the natural parents as guardian when the adoptive parents are not available, the natural parents until appointment by Court cannot be regarded as guardian de jure.

Article 44 does not therefore apply to suit to set aside alienation by a natural mother of an adopted son, who is only a de facto guardian unless appointed guardian de jure by the Court: *A. I. R.* 1928 *P. C.* 87 and *A. I. R.* 1927 *P. C.* 139, *Ref.*; (*Case law discussed*). [P 600 C 1]

B. Jagannadha Das—for Appellant.

C. Sambasiva Rao—for Respondents.

Judgment.—This second appeal arises out of a suit by the plaintiff to recover certain properties purported to have been sold by his guardian on 20th March 1919 under Ex. 1 for Rs. 800 to defendants 1 to 3 and 10. Defendants 4 to 9 are members of an undivided family along with defendants 1 to 3, and defendants 11 to 13 form one undivided family with defendant 10. The District Munsif found that the sale was not binding upon the plaintiff and gave a decree. On appeal the Subordinate Judge differing from the District Munsif found that the sale deed was executed for necessity and dismissed the plaintiff's suit. The plaintiff files this second appeal.

In second appeal plaintiff's advocate Mr. Jagannadha Das argues that there is no legal evidence in support of the necessity relied on by the defendants. But before I discuss this question it will be convenient to dispose of another point raised by Mr. Sambasiva Rao the learned advocate for the respondents as it arises first in logical order; it is that the suit is barred by limitation. This point was raised by issue 1. Both the lower Courts have found that the plaintiff's suit was brought more than three years after he attained majority. Mr. Sambasiva Rao contends that Art. 44 applies to the suit and the suit is therefore barred by limilation.

Now suits brought by persons to set aside alienations by their guardians during their minority may be divided into three categories: (1) Where guardians are de jure guardians. Such suits are obviously governed by Art. 44, This is not denied by the appellant's advocate: see *Fakirappa Limanna* v. *Lumanna Mahadu* (1) in which certain observations suggesting the opposite view in *Balappa* v. *Chanbasappa* (2) and *Anandappa* v. *Totappa* (3) were disapproved. (2) Alienations by de facto guardians. To this class Art. 44 does not apply: vide *Thayummal* v. *Kuppanna Koundan* (4) and *Ramaswami Pillai* v. *Kasinatha Ayyar*, *A. I. R.* 1928 *Mad.* 226. Such alienations by de facto guardians can be ignored by a minor and he can bring a suit within the larger period, generally 12 years allowed by the general law. The transactions are not void because, if the alienations were for justifiable necessity, they may be upheld wholly or partially. They are only voidable, but one has to use the term "voidable" carefully in respect of such cases. Voidability by minors of such alienation is analogous to the voidability of widows' alienations by the reversioners who can ignore the widow's alienations and bring a suit within 12 years under Art. 141: see my judgment in *Appavu Naicken, In re* (5). The word "voidable" in such cases is not used in the same sense in which it is used in the law of contracts: see also *In the matter of, Amrithalinga Tevan*, *A. I. R.* 1928 *Mad.* 986. (3) Where the alienation is made by a person who pretends to be a guardian though he is not the real guardian and is only an intermeddler just for the purpose of the transaction. It is unnecessary to discuss the incidents of

(1) [1920] 44 Bom. 742=58 I. C. 257.
(2) [1915] 33 I. C. 444.
(3) [1915] 17 Bom. L. R. 1137 (foot-note).
(4) [1915] 38 Mad. 1125=26 I. C. 179.
(5) A. I. R. 1931 Mad. 377=128 I. C. 685.

the third category as it is agreed on both sides that the present suit does not fall under that category.

The learned advocate for the respondents claims that the present suit falls under the first category whereas the learned advocate for the appellant claims that it falls under the second category. The question whether it falls under the first or second of the categories above mentioned really depends on the question whether the guardian who alienated the suit property should be regarded as de jure guardian or de facto guardian. For the purpose of deciding that question I have to state some further facts. The suit property belonged to one Baidharo an Oriya Brahmin who died in 1906 leaving a widow, a daughter, a mother and two sisters. Immediately after his death there were disputes about his property and the present plaintiff was alleged to be his adopted son. As he was then a minor his natural father put forward claims on his behalf. The disputes were settled by a partition between the various relations of Baidharo: Ex. A dated 5th February 1906. Soon after this a suit was filed by certain reversioners to set aside the adoption. The suit was resisted by the various persons who got Baidharo's property including the adopted son. The adopted son at first was represented by his natural father. Some time afterwards he died and the natural mother was appointed guardian ad litem by order dated 12th September 1912. The suit was disposed of in favour of the defendants and against the plaintiffs on 18th November 1912. At the time of Baidharo's death his widow was a young girl of 10 and even at the time of the suit she was a minor. She attained her majority only after the disposal of the suit. The adopted boy, the plaintiff being under the protection of his natural father and natural mother from 1906 to 1912 continued to be under the protection of the natural mother and it is she, acting as his guardian, that executed Ex. 1, the sale deed on which the defendants rely in this suit.

The question is whether under the circumstances stated above the natural mother can be regarded a de jure guardian.

In *Thayammal* v. *Kuppanna Koundan* (4), Sadasiva Ayyar, J., stated that under the Hindu law the de jure guardians would be either the parents or a testamentary guardian and that no other can be de jure guardian unless appointed by Court with the possible exception of male and female ancestors. In stating this proposition he relied on two cases: *Mt. Bhikuo Koer* v. *Mt. Chamela Koer* (6) and *Kristo Kissore Neogohy* v. *Kader Moye Dossee* (7). I agree with the proposition so laid down by Sadasiva Ayyar, J.

The distinction between natural and adoptive parents did not arise in that case. The question now is whether when a boy is adopted the natural parents can be regarded as de jure guardians within the meaning of that proposition. In *Lakshmi Bai* v. *Shridar Vasudev Takle* (8), it was held in a conflict between the natural father and the adoptive mother that the adoptive mother had a preferential right to guardianship. This does not help us in the present case. In *Tirapaya* v. *Ramaswami* (9), it was held that where a testamentary guardian and other relations are unwilling to act the natural mother of an adopted boy is a proper person to look after his interests. She can act for the benefit of the minor and bind his estate for necessary purposes and would be a lawful guardian within the meaning of S. 21, Limitation Act. As I have already stated, a de facto guardian acting bona fide for the minor's benefit and in his interests may bind him by an alienation when it is made for justifiable necessity. In that sense he would be a lawful guardian. The decision mentioned does not show that he would be a de jure guardian within the meaning of Art. 44. In *Gangaprasad Bhattacharjee* v. *Harankanta Chaudhuri* (10) it is pointed out that the affection of the natural parents for their child does not cease merely because he is given away in adoption. Where the adoptive parents are not available the natural parents may also be very proper guardians; it is perfectly true. But it does not follow from this that the natural parents can be regarded as guardians de jure. In *Anandappa* v. *Totappa* (3) the transaction was

(6) [1898] 2 C. W. N. 191.
(7) 2 C. L. R. 583.
(8) [1878] 3 Bom. 1.
(9) [1913] 19 I. C. 362.
(10) [1910] 7 I. C. 234.

between the adopted boy represented by his natural father and the natural grandfather in respect of the office of vattan. It does not appear whether either the adoptive father or mother was living. But it is remarked in *Fakirappa Lummanna* v. *Lummanna Upahadu* (1) that that being a case for alienation by one who is not the natural guardian the actual decision was correct though not the observations in it. This shows that the natural parent should not be regarded as the natural guardian of an adopted person. These are all the cases that are available on the matter. Now however much it may be true that the affection of the natural parents towards the adopted boy does not cease after the adoption it must be remembered that the theory of the Hindu law is that adoption amounts to civil death in the natural family and rebirth in the family of adoption : vide the remarks of the Judicial Committee in *Raghurajchandra* v. *Subhadra Kunwar* (11). In another decision of the Privy Council, *Krishnamurti Ayyar* v. *Krishnamurti Ayyar* (12), it was observed that a natural father about to give his boy in adoption could not be his guardian so as to bind him. It is true that the blood relationship between the natural parents and the adopted boy remains for the purpose of prohibited relations in connexion with marriage but, except for this purpose, all natural relationship must be regarded as at an end. However much it may be desirable for a Court to appoint one or the other of the natural parents as the guardian when the adoptive parents are not available, it cannot be said that until appointment by Court the natural parents can be regarded as guardians de jure. I am therefore of opinion that Art. 44 does not apply to this case. The plea of limitation does not avail the defendants and they must succeed if at all on the merits. This takes me to the question raised by the appellant.

The sale deed in this case is Ex. 1. It was for Rs. 800, consisting of : (1) an amount required to pay off Rs. 400 due on a usufructuary mortgage dated 25th March 1914 Ex. 3 (2) ; the amount required to pay off Rs. 124 due on a promissory note (Ex. 2-B) dated 24th June 1917 ; (3) Rs. 200 due on a promissory note dated 27th June 1916 (Ex. 2-A); and (4) Rs. 76 required for Upanayanam of the plaintiff. The mortgagee in Ex. 3 and the payee in Ex. 2-B is the same person, namely, Narasimha Das, the father-in-law of the plaintiff's natural brother. Of these three documents Ex. 2 purports to be for the purpose of discharging the debts borrowed from Mavudi Devo Bondu and others by the late Gangadhara Ratho, the natural father and the previous guardian of plaintiff for the litigation expenses of the said minor. No purpose is mentioned in the next document Ex. 2-A. In Ex. 2-B the purpose mentioned is discharging a prior debt due to Padmanabha Ratho on behalf of the minor. Padmanabha Ratho has not been examined. There is no evidence in the whole record to show why that debt to Padmanabha Ratho was incurred. The document itself does not contain even a recital as to why it was incurred. It is impossible to regard this last debt as binding on the minor. The same remarks apply to Ex. 2-A. The lower appellate Court seems to have thought that all the three debts may be regarded as having been incurred for the litigation expenses of the minor, the litigation being the suit by the reversioners disposed of in 1912. It is impossible to connect the promissory notes Ex. 2-A and Ex. 2-B of 1916 and 1917 with the suit which was disposed of in 1912, not to mention that there is no legal evidence in proof of such a connexion.

I am therefore clear that Exs. 2-A and 2-B are not binding on the minor. We now come to Ex. 2, the usufructuary mortgage. It contains a recital that it was for the payment of a prior debt to one Mavudi Devo Bondu which was incurred for litigation expenses. The document itself being in February 1914 the prior debt would have been incurred in 1912 or 1913 and as a matter of probability there is nothing unreasonable in the recital. It must however be remembered that the recital itself is no evidence of the existence of the debt and an alienee who relies upon the fact of prior debts would be prudent if he adduces evidence to prove the existence of snch debts by evidence de hors the document. In the present

(11) A. I. R. 1928 P. C. 87 =108 I. C. 673 =55 I. A. 139=3 Luck. 76.
(12) A. I. R. 1927 P. C. 139 =101 I. C. 779=54 I. A. 248=50 Mad. 509.

case all the evidence we have got is this: P. W. 1 the plaintiff says, "In the sub-Court I bore half the expenses." What was meant was that the defendants in the suit made common cause and half the expenses were borne by the other relations and half were debited to the minor, not that the minor himself found the money. P. W. 3 says: "Plaintiff's natural father bore half the expenses for litigation." D. W. 1, defendant 1, says "To meet expenses for litigation Gangadhar borrowed Rs. 400 from Delibandhu and others." But in cross-examination he says that he does not know why money was borrowed from Delibhandu and what was done with the Rs. 400 borrowed from Delibhandu and others. The judgment in the suit of 1911 is Ex. B. It shows that Rs. 150 were allowed for pleader's fee for the defendants. The defendants examined 11 witnesses in the case and they would have had to pay process fees for those witnesses. It is true that the plaintiffs are ordered to pay the costs to the defendants, but we do not know whether they were recovered or not.

It is therefore clear, apart from the fact that the defendants have not adduced evidence tracing the mortgage, Ex. 2, to prior debts, that some expenses must have been incurred on behalf of the minor by his natural father and mother. The recital is evidence of a representation to the creditor in Ex. 2 that prior debts were incurred in favour of Delibhandu for litigation expenses. But the question arises whether all the Rs. 400 borrowed under Ex. 2 should be regarded as justified on account of such representation. Having regard to the fact that the defendants have not cared to trace the debt further beyond Ex. 2 and having regard to the fact that the creditor in Ex. 2 was content with the representation of a very general nature that Rs. 400 was required for litigation expenses without making further inquiries but on the other hand having regard to the fact that some expenses must have been incurred seeing that there was a prior litigation and also having regard to the fact that half only of the expenses were debited to the minor, I think I will be giving effect to the equities in the case by holding that about Rs. 160 is all that is binding on the minor for litigation expenses, and adding this to the small item required for performing the Upanayanam which is also mentioned in the sale deed, I would say that on the whole about Rs. 200 is all that is binding on the minor. The amount required for the Upanayanam is stated as Rs. 76 in the sale deed. But D. W. 1 states that it is Rs. 43, 48 being a mistake for Rs. 43. Adding this Rs. 43 to Rs. 160 the sum which in my opinion was likely to have been incurred in the litigation on behalf of the minor, i. e., as I said, Rs. 200 is all that would be binding on the minor. But the sale was for Rs. 800. The result is that the whole sale deed is not binding on the plaintiff. If the plaintiff pays down Rs. 200 to defendant 1 he would be entitled to recover the whole property.

As the plaintiff is succeeding to the extent of three-fourths and losing to the extent of one-fourth, strictly he would be entitled to get half of his costs without paying any. But as half his costs come to about Rs. 200 and more, I think it is best to set off the amount of costs towards the amount that the plaintiff should pay. The result will be that he is entitled to recover the suit land paying no amount and receiving no costs. There will be therefore a decree to this effect with future mesne profits from this date up to date of delivery or three years according to O. 20, R. 12.

P.R.S./R.M. *Order accordingly.*

A. I. R. 1931 Madras 601

MADHAVAN NAIR, J.

Krishnaswami Pathar and *others*—Defendants—Appellants.

v.

Ramachandra Ayyar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1655 of 1927, Decided on 7th November 1930, against decree of Dist. Judge, South Arcot, in Appeal Suit No. 221 of 1926.

(a) **Evidence— Admissibility — Omission to object does not make irrelevant evidence relevant.**

When a piece of evidence is irrelevant, the erroneous omission before the lower Courts to object to the admission of that evidence does not make that evidence relevant: 19 *All.* 76; *A. I. R.* 1928 *P. C.* 127 and 44 *Bom.* 192, *Foll.* [P 602 C 1]

(b) **Registration Act (1908), S. 17 (b)— Document described as receipt— Executant (mortgagee) remitting certain amount and agreeing to receive balance in satisfaction of all claims—He acknowledging receipt**

of Rs. 100 and agreeing to hand over documents along with title-deed on receipt of balance—Document held required registration.

A document which was described as a receipt mentioned that a certain sum was remitted by the mortgagee, the executant, and that he agreed to receive a certain amount in satisfaction of all claims. It then said that towards that amount he had received Rs. 100 and ended with saying: "After receiving the balance I shall credit the same on the said documents and hand them over to you along with the title-deed"

Held: that the document, though described as receipt, came within the scope of Cl. (b), S. 17, and required, registration. [P 603 C 1]

T. M. Krishnaswami Iyer—for Appellants.

S. Panchapagesa Iyer—for Respondents.

Judgment.—Defendants 3, 4 and 5 are the appellants. This second appeal arises out of a suit instituted by the plaintiff to recover a sum of Rupees 612-14-0 alleged to be due under two registered mortgage bonds assigned to him under Ex. C by the original mortgagee. The contesting defendants set up Ex. 1 to prove that the mortgagee agreed to receive only Rs. 425 in discharge of the mortgage bonds and a promissory note for Rs. 20. The District Munsif admitted Ex. 1 in evidence and gave a decree to the plaintiff for Rupees 156 only on the strength of this agreement. In appeal it was argued that Ex. 2 was inadmissible for want of registration under Cl. (b), S. 17, Registration Act.

This argument was accepted by the learned District Judge and the decree of the lower Court was accordingly modified with the result that the plaintiff was given a decree for Rs. 405-14-0 with costs aud subsequent interest, a larger amount than what was awarded to him by the District Munsif.

In second appeal it is argued that the lower Court was wrong in allowing the appellant to argue that Ex. 1 was inadmissible in evidence inasmuch as that objection was not taken before the District Munsif and that the District Judge's decision that Ex. I is inadmissible is wrong. There are decisions of the Privy Council to show that, when a piece of evidence is irrelevant, the erroneous omission before the lower Courts to object to the admission of that evidence does not make that evidence relevant: see *A. B. Miller Official Assignee of the Estate of Ramkishen Das* v. *Babu Madho Das* (1) and *Lim Yam Hong* v. *Lam Choon & Co.* (2); see also *Marahari* v. *Ambabai* (3). It therefore follows that the learned District Judge did not act wrongly when he allowed the appellant before him to raise the objection regarding the admission of Ex. 1 though it was not raised in the first Court.

The next question is whether Ex. 1 is inadmissible for want of registration. It is described as a receipt. It mentions that a certain amount of principal and interest was remitted by the executant, the mortgagee and that he has agreed to receive Rs. 425 in satisfaction of all claims. Then it says that towards that amount he has received Rs. 100 and ends with saying:

"after receiving the balance of Rs. 325 (three hundred and twenty-five), I shall credit the same on the said three documents and hand them over to you along with the title-deed. This is the receipt therefor."

Mr. Krishnaswami Ayyar argues that this is a receipt and nothing more and that in no way it "declares," "limits" or "extinguishes" the executant's right or interest of the value of more than Rs. 100 in the mortgage security (the immovable property) within the meaning of S. 17, Cl. (b), Registration Act. My attention was drawn to various decisions both by the appellant and the respondent; but I do not think it is necessary to discuss these cases as it is clear that the determination of the question must depend upon the construction of the particular document in the case. The words of S. 17, Cl. (b), are very wide. As observed by Napier, J. in *Lakshmana Chetti* v. *Chenchuramayya* (4) at (p. 82 of 34 *M L J.*):

"It would hardly be possible to find words of wider import than we have in Cl. (b), S. 17, sub-S. (2), Registration Act" which purport or operate to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest."

It is true that Ex. I describes itself as a receipt but reading the document as a whole there can be no doubt that it limits the right or interest of the mortgagee to Rs. 325 only in the mortgage security. That is clear from the last part of the document which I have quoted. As it thus limits his right in

(1) [1897] 19 All. 76=23 I. A. 106 (P.C.).
(2) A. I. R. 1928 P. C. 127=107 I. C. 457.
(3) [1920] 44 Bom. 192=55 I. C. 316.
(4) [1918] 44 I. C. 132.

the mortgage security to a sum which is more than Rs. 100 it clearly comes within the scope of Cl. (b), S. 17, Registration Act. In my opinion Ex. 1 either declares or limits the right or interest of the mortgagee of the value of more than Rs. 100 in the mortgage security and therefore requires registration. I agree with the opinion of the lower Court on this question. No other question arises for decision in this second appeal. In the result, this second appeal is dismissed with costs.

P.R.S./S.N. *Appeal dismissed.*

A. I. R. 1931 Madras 603(1)

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Edupuganti Buchayya and *another*—Appellants.

v.

Edupuganti Sriramamma — Respondent.

Appeal No. 170 of 1930, Decided on 12th December 1930, against order of Sub-Judge, Bezwada, D/- 20th November 1929.

Decree — Execution — Decree creating charge—Sale can be held without fresh suit or attachment of property charged.

Where a decree creates a charge on property in favour of a person, such person is entitled to execute the decree without any further suit for sale of the property covered by the charge, nor need the charged property be first attached before it can be brought to sale: 10 *Mad.* 283 and 24 *Mad.* 689, *Ref.* 42 *I. C.* 975, *Foll.* [P 603 C 1]

G. Lakshmanna and *G. Chandrasakara Sastri*—for Appellants.

Ch. Raghava Rao—for Respondent.

Judgment.—So far as the amount covered by this execution petition is concerned, the question whether payment should be in money or kind is res judicata by reason of the order in E. P. No. 32 of 1928.

For the judgment-debtors Mr. Lakshmanna contends that the decree, so far as it creates a charge, is not executable but can only be the basis of a further suit for sale. That is against the decision in *Sowbagia Ammal* v. *Manicka Mudaliar* (1), where the decree was in similar terms to that in this suit: see also *Muttia* v. *Veerammal* (2) at p. 287 and *Minakshi* v. *Chinnappa* (3) at p. 694 Mr. Lakshmanna has a further contention that, even if the charge can be executed by sale without a fresh suit, the land charged must first be attached. No authority for that proposition can be cited and to require attachment of the property to be sold is inconsistent with the sale in execution of property mortgaged or charged. The mention of attachment in the head-note to the report of *Sowbagia Ammal* v. *Manicka Mudaliar* (1) is a mistake. Apparently the decree-holder wished to attach the property, but the learned Judges did not suggest anywhere in their judgment that it was necessary.

This appeal is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

(1) [1917] 42 I. C. 975.
(2) [1887] 10 Mad. 283.
(3) [1901] 24 Mad. 689.

A. I. R. 1931 Madras 603(2)

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

A. R. S. P. Subramanian Chetti—Appellant.

v.

Official Assignee of Madras—Respondent.

Original Side Appeal No. 16 of 1929, Decided on 21st August 1930, against order of Kumaraswami Sastri, J., D/- 29th October 1928.

Contract Act (1872), S. 17—Purchaser of decree in favour of insolvent from Official Assignee for 20 per cent of its face value representing that decree was almost unrealizable with knowledge that it was fully secured has committed fraud.

Where a person purchases a decree obtained in favour of an insolvent from the Official Assignee for 20 per cent of its face value by representing that the decree was practically unrealizable although he knew that satisfactory security had been given for the full amount of the decree, he is guilty of fraud as his statement constituted "the active concealment of a fact by one having knowledge or belief of the fact," and the vendor under such circumstances can sue for setting aside the purchase on the ground of fraud. [P 605 C 1, 2]

K. S. Krishnaswami Iyengar — for Appellant.

V. Thyagarajan—for Respondent.

Curgenven, J.—This appeal is filed against an order passed by Kumaraswami Sastri, J., in insolvency, setting aside a deed of transfer executed by the Official Assignee in respect of five decrees, part of the assets of the insolvent, in Petition No. 127 of 1925. The first of these decrees, in O. S. No. 318 of 1924, was, with costs and interest up to 1924, for a sum of Rs. 771-13-0 and, with appellate costs and further interest,

would amount in face value at the time of the transaction to some eight or nine hundred rupees. The remaining four decrees were nominally worth in all about Rs. 170, but it is only with the decree in O. S. No. 318 of 1924 that we are substantially concerned. The insolvent was a widow and had two brothers, Subramania Chetti and Palaniappa Chetti. The latter of these, it is admitted, was managing her estate; it was to the former, Subramania Chetti, that the deed of transfer was executed by the Official Assignee, Mr. Wilson, on 25th April 1928. The notice of motion to set aside the transfer was filed by Mr. Albuquerque, who was the acting Official Assignee, during Mr. Wilson's absence, on 27th July 1928. But as this gentleman does not seem to have been conversant at first hand with the facts, we may turn to Mr. Wilson's own report dated 6th October 1928 for a statement of his case. According to this, in March 1928, Mr. P. V. Sudarsana Raju, an advocate, came and represented to him on behalf of his client that the decrees were "unrealizable" and were not worth even 20 per cent of their face value but that his client was willing to give that proportion of their nominal value for them. It was not disclosed to him that the intending purchaser was a brother of Palaniappa Chetti who was managing the properties, nor was the fact disclosed that in respect of the decree in O. S. No. 318 of 1924 the whole amount was secured. After recording some depositions and admitting some documentary evidence, the learned Judge, starting with the admission that security for the full amount had in fact been given for the decree in question, found that that circumstance had been withheld from Mr. Wilson in the negotiations before the purchase, that on the other hand representation had been made that the decrees were not recoverable, except to a small extent, and that in these circumstances the transfer must be set aside.

Although some attempt has been made before us to suggest doubt as to the completeness of the security, we must, I think, accept the very clear admission recorded on this point by the learned Judge. It has not been contested that the security was required and given as a condition of setting aside an ex parte decree previously passed in O. S. 318 and the presumption, which remained unrebutted, is that the Court satisfied itself that the security offered was sufficient. Accordingly, the full value of this decree would be recoverable in execution. Did the transferee know of this circumstance? It has been said that he is a brother of the insolvent herself, who was the decree-holder, and of Palaniappa Chetti, who was managing her affairs. An attempt was made, by filing two documents, Exs. A and B, to show that the transferee himself had taken a hand in the management, but nothing very definite can be gleaned from these records, and the learned Judge does not seem to have relied upon them. There are two witnesses who say that the transferee Subramania Chetty and Palaniappa Chetty are undivided. Palaniappa Chetty himself, although he asserts a divided status, admits that there is no partition document and that there are still some properties to be divided. Even accepting his evidence as true, the inference appears to us legitimate that this brother must have known the true facts about this decree, and since he himself abstained from entering the box this conclusion becomes irresistible. Moreover, it is the appellant's own case that Mr. Sudarsana Raju, as this gentleman states in his evidence, informed Mr. Wilson that there was "some security" for this decree. Guarded though this admission is, it shows clearly enough that the existence of the security was known.

This brings us to the next point: What were the representations made? The learned Judge has found himself unable to accept Mr. Sudarsana Raju's assertion that he mentioned the fact of security, in face of Mr. Wilion's denial that any such disclosure was made. On 9th March Mr. Wilson wrote a letter (Ex. C-2) to the vakil at Sivaganga who was acting as his local agent in the insolvency, informing him of the offer of 20 per cent, and asking what was the exact amount due under the decrees to date. It seems improbable that, had this matter of security been brought to his notice, he would not have referred to it in this letter or in a later letter Ex. C-1, to the same vakil. Further, if he had been aware of the fact, he would not have sold all the

decrees for Rs. 250. On this point therefore we think that the learned Judge's conclusion is plainly right. Mr. Sudarsana Raju admits that the offer was made of only 20 per cent of the face value of the decrees, and it is only compatible with the nature of this offer that he should have represented, as Mr. Wilson says that he did, that the decrees were "unrealizable," or "worth practically nothing." We have then to see whether these statements, made with the knowledge which must be imputed to the advocate, and his client, amounted to "fraud" as defined in S. 17, Contract Act, whether they constituted :

" the active concealment of a fact by one having knowledge or belief of the fact."

To the section is appended an explanation which says :

" Mere silence as to the facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to sppech."

Now it cannot we think be successfully maintained that the transferee was so placed, as the brother of the insolvent and her manager, as to be under a duty to reveal the truth. His relationship no doubt gave him access to inside knowledge, but he occupied no fiduciary position towards the Official Assignee, and in the application of this explanation he must be regarded as no more than a third party. Even so regarding him, however, it seems impossible to hold that what passed at the interview between Mr. Wilson and Mr. Sudarsana Raju amounted to no more than "mere silence" about the existence of the security. The law has been thus stated by Lord Selbourne in *Coaks* v. *Boswell* (1). We take the quotations from Kerr on Fraud and Mistake, Edn. 6, p. 77 :

" Inasmuch as a purchaser, generally speaking, is under no antecedent obligation to communicate to his vendor facts which may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence, unless he undertakes or professes to communicate them. This however he may be held to do if he makes some other communication which, without the addition of those facts, would be necessarily or naturally or probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead on any material point, that is fraud, and it is a sufficient ground for setting aside a contract if the vendor was in fact so misled."

Accepting the evidence that, coupled with the offer of 20 per cent of the face value, a statement was made to the effect that the amounts due under these decrees were largely irrecoverable what can that be called other than a communication which would be necessarily or naturally or probably misleading ? True, a mere assertion of value, or disparagement of the property is not necessarily fraud (Kerr, p. 57), but here we are inclined to think that even the offer of 20 per cent carried with it an implication that was necessarily misleading. The value of many kinds of property may be no more than a matter of opinion, but a secured decree has a fixed value, and an offer of one-fifth of its value could only be on the implied footing that it was unsecured :

" It is often fallaciously assumed that a statement of opinion cannot involve a statement of fact. But if the facts are not equally known to both sides, a statement of opinion by the one who knows the facts best often involves a statement of a material fact, for he implicitly states that he knows facts which justify his opinion" Kerr, p. 52.

We have been referred by Mr. K. S. Krishnaswami Iyengar for the appellant to a passage in the judgment of Lord Brougham in *Attwood* v. *Small* (2) for another statement of the principles which should govern a case of this nature. After observing that general fraudulent conduct and attempts to overreach may go for nothing, His Lordship goes on :

" It must be shown that the attempt was made, and made with success, cum fructu. The party must not only have been minded to overreach, but he must actually have overreached. He must not only have given instructions to the agent to deceive, but the agent must, in fulfilment of his directions, have made a misrepresentation ; and moreover, the representation so made must have had the effect of deceiving the purchaser ; and moreover, the purchaser must have trusted to that representation, and not to his own acumen, not to his own perspicuity, not to inquiries of his own. I will not say that the two might not be mixed up together, the false representation of the seller and the inquiries of the buyer, in such a way as even then to give a right to relief . . . ."

We do not find anything in these observations to lead us to reconsider the view that in the present case there was a deliberate and successful attempt to mislead, which materially affected the bargain ; and that therefore there was "fraud" within the meaning of S. 17, Contract Act.

(1) [1866] 11 A.C. 235.

(2) [1835] 7 E.R. 684.

The closing words of Lord Brougham's remarks have a bearing upon the last point argued. It is said that Mr. Wilson, after the interview, made his own inquiries into the value of these decrees, a circumstance which acquits the appellant of all responsibility. The position is thus stated in Kerr (p. 49) :

"A misrepresentation to be of any avail whatever must enure to the date of the transaction in question. If a man to whom a representation has been made knows at the time or discovers before entering into the transaction that the representation is false, or resorts to other means of knowledge open to him, and chooses to judge for himself in the matter, he cannot avail himself of the fact that there has been a misrepresentation, or say that he has acted on the faith of the representation."

The learned author goes on to exemplify this principle by summarizing the case of *Attwood* v. *Small* (2), above referred to, where an iron company contemplating the purchase of a property including mines and iron works received certain representations from the vendor and deputed some of the directors to verify them. These directors reported after a local investigation that the statements were correct, and the purchase was effected. It was afterwards found that the statements were untrue, though the inquiry had failed to expose them. The House of Lords held, on the principle already explained, that the contract could not be rescinded. It will be clear however from a perusal of the judgments that the mere circumstance of some inquiry, or attempt at inquiry, having been made will not necessarily bar rescission, so that we turn now to see what did occur in the present case.

On 9th March Mr. Wilson wrote to the vakil at Sivaganga, informing him of the offer made, and asking what was the exact amount due under the decrees up to date, and what was likely to be recovered on them. The vakil replied on 30th March, but, so far as the decree in O. S. 318 was concerned, only answered the former of these two questions, and made no allusion to the prospects of recovering the amount due under it. There is another letter from the Official Assignee, dated 11th April (Ex. C-1), and in this, in reply to a request from the vakil for further particulars required if the decrees were to be executed, he asks for the names of the parties to the decrees, so that he may get the information and adds :

"Or you can yourself correspond with my agent Mr. M. G. Govindavarada Ayyangar at Muraiyur for these particulars."

It seems that there was no further exchange of letters probably because the vakil's proposal was to execute, whereas a fortnight after Mr. Wilson wrote his second letter he sold the decrees to the appellant. Not much further light is thrown upon this part of the case by Mr. Wilson's evidence. The letters must speak for themselves. He acknowledges that he thought it necessary to write to the vakil and says that he asked him whether the price offered was fair, though the correspondence shows that in this form the question was not put. We may take it therefore we think, that nothing was done to answer the original question, "What is likely to be recovered ?" It seems plain that Mr. Wilson abandoned the inquiry, and decided to dispose of the decree as property of purely speculative value.

It will thus be seen that not only was there no enquiry into the real value of the decrees, which distinguishes this case from *Attwood* v. *Small* (2), but there is no reason to suppose that if inquiry had been made it could reasonably be expected to have gone further than an investigation into the substance of the judgment-debtors. There was no ground to suspect that the decree in O. S. 318, which was on the face of it an unsecured decree for money, was in fact secured ; and, as the learned trial Judge says, there was nothing to put the Official Assignee or his vakil on notice, or to prompt a search of the records. It was a fact so latent as to be beyond the scope of such an inquiry as Mr. Wilson must have intended by his question to set on foot. That being so, and it being clear that the transfer was completed upon the representations made on behalf of the appellant, we cannot find that what took place avails to relieve him of the consequences of these representations.

We accordingly dismiss the appeal with costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 607

PANDALAI, J.

Secy. of State—Defendant—Appellant.

v.

Gorantla Raghavulu and *another* —Plaintiffs—Respondents.

Second Appeals Nos. 19 and 602 of 1928, Decided on 25th February 1931, against decree of Sub-Judge, Bapatla, in A. S. No. 7 of 1927.

Madras Hereditary Village Offices Act (3 of 1895), S. 10 (4)—Appointment of person under S. 10 (4), being one to do duties of office only, and is not appointed to office.

A person appointed under S. 10 (4) is a person appointed only to do the duties of the office; and is not appointed to the office governed by the Act. He can therefore be dismissed by the Sub-Collector who appointed him or even by his superior (e. g. the District Collector) : 14 *M. L. J.* 433 and 50 *I. C.* 185, *Dist.* [P 608 C 1]

P. Venkataramana Rao and *A. Venkatasubba Rao*—for Appellant.

B. Somayya—for Respondents.

Judgment.—These are two second appeals respectively by the Secretary of State for India in Council who was defendant 2 in the suit and defendant 1 who was appointed by the Collector of Guntur in the place of the respondent to do the duty of Village Munsif of Chimakurti village in that district. The facts are not disputed. The office of village Munsif of that village is hereditary and is one governed by the Madras Hereditary Village Offices Act 3 of 1895. The holder of that office, a member of the family was dismissed by the Collector and it became necessary to appoint some one to execute the duties of the office. The Sub-Collector of Ongole who is the Collector empowered under the Act being of opinion that any member of the undivided family of the last holder should not be appointed purported to act under S. 10 (4) and appointed the respondent who was the Village Munsif of some neighbouring village on the recommendation of the Tahsildar in December 1922. The form of this order which was defective in the first instance was subsequently amended so as to bring it into conformity with the language of the subsection by the Sub-Collector on 10th April 1923. Meanwhile the Collector had on 30th March 1923 removed the respondent from the appointment and put in the appellant in Second Appeal 602 in his stead on the ground that the respondent was not a resident of the village of Chimakurti. The respondent vainly pleaded before the revenue authorities that he had been improperly removed and in the end brought this suit for a declaration that his removal was illegal. The case made by the respondent in the first instance was that he had been appointed under S. 10 (6) and had thereby become entitled to the hereditary office. The District Munsif found that the respondent was not appointed under that subsection but under sub-S. (4). The respondent then contended that even under that subsection he could not be removed. This contention the District Munsif rejected and dismissed the suit. In appeal to the learned Subordinate Judge the contention based on sub-S. (6) was abandoned but that based on sub-S. (4) was pressed. The learned Subordinate Judge has held that even if the appointment was one under that subsection, the respondent became entitled to hold the office until the death or return to duty of the dismissed Village Munsif and that the District Collector though superior administratively to the Sub-Collector had no power under the Act to remove the respondent. He relied upon two decisions, *Ghan Sambanda Pandara Sannadhi* v. *David Nadar* (1) and *Krishnaswami Naidu* v. *Akkulammal Avergal* (2).

In these second appeals it is admitted that the two decisions relied upon by the learned Judge have no application, the former one relating to proceedings under the Rent Recovery Act and the latter to proceedings under the Proprietary Estate Village Services Act. The question remains whether the respondent by his appointment under S. 10 (4) got a tenure in the office terminable only by the death or return to duty of the dismissed officer and whether the District Collector had any power to remove the respondent.

The learned Subordinate Judge seems to have misunderstood the character of the appointment uuder S. 10 (4). The person put in to do the duties of the dismissed officer is not appointed to an office governed by the Act. He is put in to do the duties of the office which is a different thing. The Act does not provide for a subsidiary class of hereditary officers other than those for whom the Act is intended, consisting of their substi-

(1) [1904] 14 M. L. J. 433.
(2) [1919] 50 I. C. 185.

tutes and their heirs. I enquired of the learned advocate for the respondent what was to happen if the substituted man who was put in to do the duties of the dismissed officer happened to die before that officer. He answered by referring to the Board's Standing O. 148, para. 5 where it is stated that when the vacancy is caused by the suspension or dismissal of a village officer, the Divisional Officer has discretionary power to appoint a divided member of the dismissed or suspended officer's family during the lifetime of the dismissed or suspended officer or until the dismissed or suspended officer returns to duty and at the end of that paragraph it is stated that where a stranger is appointed under S. 10 (4) to succeed a dismissed village officer, the heirs of the dismissed officer cannot sue for office till the dismissed officer dies and that if he leaves no qualified or minor heir, the hereditary right to the office will then vest in the stranger and his heirs. It is argued from these extracts that a person appointed under S. 10 (4) has a qualified hereditary right defeasible no doubt by the return of the suspended officer or by the death of the dismissed officer and existence of heirs on his death but not otherwise. I do not agree with this at all. A person appointed under S. 10 (4) is a person appointed only to do the duties of the office and when the section says that the Collector may direct that until the death or return to duty of such last holder the duties of the holder shall be performed by some person, it only prescribes the period of time during which that provision has to be made but does not mean that the person who is appointed is to hold for that period. Such a person is in no better position than any one else who is put in temporarily to do some one else's work and it will be presumed that the authority which appointed him has the authority to remove him. The respondent therefore had no right to the office as such and was liable to be sent away when those who appointed him thought that a better substitute could be found.

But it was said that although the Sub-Collector might have removed the respondent the District Collector had no authority to do so. There is no substance in this point when the nature of the appointment is remembered. If he is not, as I am confident he is not, a person whose rights are governed by the Hereditary Villages Offices Act, his is a case of an appointment made by the Sub-Collector which was cancelled by his superior. The Act does not govern the case and the respondent has no grievance. The second appeals thus succeed. The decree of the lower appellate Court is reversed and that of the District Munsif restored with costs throughout.

P.R.S./S.N. *Decree reversed.*

A. I. R. 1931 Madras 608

JACKSON, J.

Syed Muhammad Rowther—Petitioner.

v.

Sundara Mudaliar—Respondent.

Civil Revn. Petn. No. 1108 of 1929, Decided on 30th March 1931, against order of Sub-Judge, Dindigal, D/- 26th February 1929.

Civil P. C (1908), O. 47, R. 1—Error on face of record illustrated.

An error which lay in the Court departing from the pleadings in a petition under S. 48, and allowing the petitioner to prove a fraud that he had not pleaded is not an error on the face of the record. [P 608 C 2]

P. N. Appuswami Ayyar—for Petitioner.

S. R. Muthuswami Ayyar—for Respondent.

Judgment.—The short point in this petition is whether the lower Court acted irregularly in refusing to review its predecessor's order which is alleged to have contained an error on the face of its record. This error was never perceived by the petitioner, until the actual hearing which in itself goes to belie that it was "on the face of the record." It lay in the Court departing from the pleadings in a petition under S. 48, and allowing the petitioner to prove a fraud that he had not pleaded. This in my opinion would be an error, but not an error on the face of the record. It was a matter which might have been taken up on appeal ; but no appeal was preferred. Review is not exactly a substitute for appeal. I therefore decline to interfere. The Civil Revision Petition is dismissed with costs.

P.R.S./S.N. *Petition dismissed.*

A. I. R. 1931 Madras 609

PANDALAI, J.

(*B. Rajarajeswara Sethupathi*) *Rajah of Ramnad* and *another*— Defendants—Appellants.

v.

Chona Ramanatha Pillai—Plaintiff—Respondent.

Second Appeal No. 112 of 1928, Decided on 6th March 1931, against decree of Dist. Judge, Ramnad, in A. S. No. 251 of 1924.

Madras Estates Land Act (1908), S. 213—Landlord collecting excessive rent by using procedure laid down for recovery of rent—Suit to recover such rent is suit for damages—Cause of action arises on date of payment under protest.

A suit for recovery of excessive amount of money collected under compulsion of law as laid down for recovery of rent in the Estates Land Act but which amount was really not due to the landholder as rent should be included in the category of suits for damages falling under S. 213. The cause of action for such a suit arises on the date of payment under protest; 39 *Mad.* 239 (*F.B.*), *Rel. on.*; 28 *Mad.* 655, *Dist.* [P 610 C 1]

S. Soundararaja Ayyangar—for Appellants.

M. S. Krishnaswami Ayyangar — for Respondent.

Judgment.— The defendant appeals from a decree by which the lower Court has ordered him to pay damages to the extent of Rs. 14-11-3 to the respondent. The suit was brought under S. 213, Estates Land Act, for damages for recovery, by compulsion of legal process, of arrears of rent which were not due. The facts are not disputed. The respondent is the present ryot in possession of a piece of land, No. 63, Annadhana Maniam in the appellant's zamindari, which is registered as 'fysal nanja' or ancient wet, but which has subsequently been planted with fruit trees, palmyrah, etc., According to the custom of the appellant's zamindari, where wet land is allowed to remain uncultivated or where it is used for the cultivation of less remunerative crops, such as dry crops or plantain, or fruit trees, it is open to the zamindar to claim what is known as 'sarasari,' namely rent calculated on the average yield of wet lands in the village. In short he is not bound to suffer by the use to which the ryot puts his holding. As a consequence of this, when it is worth the while of the zamindar to do so, he may demand the rent according to the tree-tax method of assessment, that is, at so much per tree. Naturally, this method will only be adopted when the resulting rent would be more than the 'sarasari' rent. The respondent's complaint in this case was that it was open to the appellant to claim the one or the other but not both. On 3rd October 1922 the appellant caused a notice to be affixed which was then unknown to the respondent, that unless payment of both the 'sarasari' and the tree-tax was made the holding would be put up for sale. The respondent on coming to know of this, deposited the amount claimed, Rs. 23 and odd on 7th March 1923 under protest and brought this suit for damages on 6th April 1923.

Both the lower Courts have held that the appellant was entitled to choose in the circumstances which method of calculating rent he would elect to adopt but that he was not entitled to use both. The Special Deputy Collector found that the appellant had elected to adopt the tree-tax method and awarded the respondent the difference between the amount paid and the rent that would be payable on that basis. In appeal the learned District Judge held that, though the appellant had given receipts mentioning the amount paid as tree-tax, it could not be said that he irrevocably adopted the method of tree-tax assessment and allowed him to adopt the 'sarasari' method of arriving at the rent. On this footing the amount due to the respondent became reduced to Rs. 14-11-3. In this second appeal by the zamindar three points have been urged.

The first point is that the land was planted up with trees only at the edges and that the middle portion was vacant and cultivable with wet crops and therefore the zamindar was entitled to levy both tree-tax and 'sarasari.' There is no indication of any such point being made in the lower Courts. On the other hand the Special Deputy Collector speaks of the land as having been uncultivable and of its being fully planted up. This point therefore does not arise.

The second point is that the suit was barred by limitation because it was brought more than three months after the affixture of the notice under S. 112, Estates Land Act. The argument is that the cause of action accrued when the land was notified to be sold and the three months prescribed by Art. 21, Part. A

of the Schedule to the Estates Land Act, must be computed from that date. I cannot agree with this contention. The notice of sale was not the cause of action on which the suit was brought. In an appropriate case it may or may not be that such a notice can constitute a cause of action. It certainly was not the cause of action in this case, because the respondent, as he was entitled to do, deposited the money under S. 114 under protest to avoid the sale of property. That was the cause of action, namely the deprivation by process of law of money which the respondent was not bound to pay but was compelled to pay to avoid wrongful sale of property. The decision in *Venkataramier* v. *Vaithilinga Thambiran* (1) which was cited in support of the argument is not applicable, because that suit was for damages for wrongful distraint and it was held that the cause of action arose on the date of the distraint. Here the cause of action was the payment of money under the compulsion of law and the cause of action accrued only on the date of payment.

The third and the last argument is that a suit for the return of money paid under compulsion of process for recovery of rent is not a suit for damages. No authority for this proposition has been cited. The decisions which were referred to have no bearing on this case. On the other hand, the decision in *Narayanaswamy* v. *Venkataramana* (2) goes far to show that the intention of the legislature was to provide a cheap and swift remedy for recovery of damages arising from improper use of the facilities provided by the Act, and that S. 189 bars the jurisdiction of civil Courts in cases in which resort to S. 213 is possible. I see no ground to say that a suit for recovery of excessive amount of money collected by the use of the procedure laid down for recovery of rent in the Estates Land Act, but which amount was really not due to the landholder as rent, should not be included in the category of suits for damages falling under S. 213. The second appeal fails and is dismissed with costs. The memorandum of objections is not pressed and is dismissed.

P.R.S./S.N. *Appeal dismissed.*

(1) [1915] 38 Mad. 655=24 I. C. 754.
(2) [1916] 39 Mad. 239=31 I. C. 326 (F.B.).

A. I. R. 1931 Madras 610

REILLY AND ANANTAKRISHNA AYYAR, JJ.

(*Kammara*) *Chinna Nagiah* and *another*—Plaintiffs—Appellants.

v.

Yerraguntla Pullayya and *others*—Defendants—Respondents.

Appeal No. 109 of 1929, Decided on 11th December 1930, against order of Dist. Judge, Cuddapah, in A. S. No. 38 of 1927.

Madras Hereditary Village Officers Act (3 of 1895), Ss. 13 and 21—Service inam—Suit in which question is whether land constitutes emolument of village is cognizable by revenue Court—Jurisdiction.

Suits where the substantial question for decision is whether the lands in question do constitute the emoluments of the village officer, are suits which are cognizable by revenue Court only and not by civil Court: 30 *Mad.* 126; *A.I.R.* 1927 *Mad.* 433 and 41 *Mad.* 418, *Ref.*; *A. I. R.* 1925 *Mad.* 749, *Diss. from.* [P 612 C 1]

A suit to recover possession of inam lands on the ground that they were leased to a tenant and the term of the lease was over but that the tenant was holding over would be cognizable by a civil Court. (*Obiter.*) [P 612 C 1]

Kasturi Seshagiri Rao—for Appellants.

T. K. Srinivasa Thathachariar—for Respondent 4.

Reilly, J.—In this case the suit was instituted in the Court of the District Munsif of Proddatur. The District Munsif found that it was a suit exclusively within the jurisdiction of the revenue Court and dismissed it. On appeal the District Judge of Cuddapah agreed with the District Munsif on the question of jurisdiction but altered the decree of dismissal into an order for the return of the plaint to the plaintiffs for presentation to the Court having jurisdiction. The present appeal is against that order.

The plaintiffs and defendant 3 are brothers, and defendant 4 is their uncle. In 1925 they executed a sale deed in respect of the land concerned in favour of defendant 1, and it is admitted that defendant 1 is in possession of the land. The prayers in the plaint were for the cancellation of the sale deed and for the recovery of possession from defendants 1 and 2 or for the recovery of two-thirds of the land by the plaintiffs. In the plaint the plaintiffs stated that they owned the land as inam, and their case is that it formed part of the blacksmith inam of the village concerned. In para. 9 of the plaint they stated "according to law any sale in respect of service inam land is not valid." Defendants 1 and 2 in their writ-

ten statements did not say anything specific upon that point; but they denied the allegations in the plaint generally. It appears however that something more definite must have been alleged at the time the issues were framed, because issue 2 runs: "Whether the suit lands are service inam lands and inalienable." It is clear that the plaintiffs, when the issues were framed, were intending to go to trial partly on the question whether the sale to defendant 1 was void because the inam land was by law inalienable. Now of the two prayers in the plaint, which I have mentioned, I do not think there can be any doubt the substantial relief prayed for was the recovery of possession. In such a case, when the plaintiffs describe the land as village service inam land, an artisan inam in this case, and sue for recovery, Ss. 13 and 21, Madras Act 3 of 1895 exclude the jurisdiction of the civil Courts and make the suit one to be tried by a revenue Court. *Kesaram Narasimhalu* v. *Narasimhalu Patnaidu* (1) and *Kandappa Achari* v. *Singarachari* (2) are clear on that point.

But it will be remembered that the plaintiffs in this case prayed also for the cancellation of the sale deed. That was not a relief which could be granted by the revenue Court. However in spite of the arguments of the learned counsel for the plaintiffs, I think there is no doubt that in this case it is unnecessary for the plaintiffs to pray for any cancellation of that sale deed in order to get recovery of the land. S. 5, Act 3 of 1895, prohibits any transfer whatsoever of such inam land. Mr. Seshagiri Rao has contended, though it does not appear to be of immediate advantage to his clients to do so, that the decision of Devadoss, J., in *Venkamma* v. *Chinna Appalaswamy* (3), shows that the sale of such land by an artisan inamdar is not void but holds good for the period of his tenure of office. Certainly Devadoss, J. was of that opinion. But with the greatest respect I am unable to agree with him in that interpretation of the section. He did not discuss the wording of the section nor give any reason for his view, which is opposed to the opinion indicated by Miller, J., in *Kesaram Narasimhalu* v. *Narasimhalu Patnaidu* (1) and what is of more importance, is directly contrary to the opinion of the Full Bench in *Sannamma* v. *Radhaboyi* (4). It is true that the Full Bench in the latter case were dealing with an inam in a proprietary estate. But they arrived at their conclusion by interpreting S. 5, Act 3 of 1895 and expressed the opinion that a mortgage by an inamdar, who would come within that section, as the blacksmith inamdars did in this case, was null and void from the beginning. I have no doubt that, if that opinion of the Full Bench had been brought to Devadoss, J.'s notice, he would have followed it, as we are bound to do. Therefore in order to obtain recovery of this land the plaintiffs need not get this sale deed cancelled. As Mr. Seshagiri Rao has pointed out, recovery alone will not give them exactly what they have asked for in the suit. He represents that his clients for some reason—apparently because they are afraid that, if the land is recovered from defendant 1, he may demand compensation from them—will not feel safe until they have got this deed cancelled. In regard to that I may suggest that, if the plaintiffs succeed in the revenue Court in recovering possession—and it is only in the revenue Court, so far as I can see, that they can recover possession of the land—they may either find it unnecessary to trouble themselves any more about this deed or, if they still wish to have it cancelled, there will be nothing to prevent them from instituting another suit in a civil Court for its cancellation.

That will be a matter for them to decide, as they may then be advised. But, so far as this suit is concerned, it appears to me quite clear that the substantial relief prayed for is recovery of the land, and that must be sought in the revenue Court. Cases have been mentioned to us in which inamdars within the scope of Act 3 of 1895 have sued their tenants for recovery after the expiry of a lease and have been allowed to do that in the civil Court. Indeed the civil Court appears to be the proper place for such a suit, because such a suit would not be in any way based upon the lessor's title as inamdar and his title in such a case could not be disputed by his lessee. Those cases are of no help in showing that the present case, clearly one for re-

(1) [1907] 30 Mad. 126=16 M.L.J. 514 (F.B.).
(2) A. I. R. 1927 Mad. 433=99 I. C. 972.
(3) A. I. R. 1925 Mad. 749=86 I. C. 755.
(4) [1918] 41 Mad. 418=43 I. C. 935 (F.B.).

covery of the land on the basis that it is blacksmith inam land, can be brought any where but in the revenue Court.

In my opinion therefore the order of the learned District Judge, that the plaint should be returned for presentation to the Court having jurisdiction, was right, and this appeal should be dismissed with costs.

Anantakrishna Ayyar, J.—I agree. The question whether the present plaint is cognizable by the civil Court or by the revenue Court has to be decided mainly on the allegations contained in the plaint. In the plaint which the appellants filed in the Court of the District Munsif of Proddattur, they alleged that on 29th April 1925 they and defendants 3 and 4 executed a sale deed of the lands in dispute in favour of defendant 1. They also alleged that the same was brought about by misrepresentation of defendants 1 and 2. They however proceeded to state in their plaint that the lands constituted service inam lands, and in para. 9 they specifically mention the following: "According to law any sale in respect of service inam land is not valid." On these allegations they prayed: (1) for the cancellation of the sale deed; and (2) for possession of the land from defendants 1 and 2, or for partition and delivery of 2/3rd share of the lands so far as defendants other than defendants 1 and 2 are concerned. I have not got before me the written statement filed by defendants 1 and 2. Issue 2 framed by the learned District Munsif runs as follows: Whether the suit lands are service inam lands and inalienable?" It was not the case of the plaintiffs that that issue did not arise in the case, but as I see from the grounds of appeal raised in the lower appellate Court by the plaintiffs, their case was that some additional issue also should have been raised. Now, on my reading of the plaint, the substantial point in dispute in the present case is whether the suit lands constitute the emoluments of the office of the village blacksmith; and such a question, when it arises in a suit, can only be decided by the revenue Court. No doubt a suit filed to recover possession of such lands on the ground that the lands were leased to a tenant and that the term of the lease was over but that the tenant was holding over, and seeking to recover possession from him in those circumstances, would be cognizable by a civil Court. In such a case the question whether the lands constitute the emoluments of the office would not properly arise. But in the present case one of the main questions arising in the suit is whether the lands in dispute constitute service inam lands. That being so, I think that the lower Courts were right in holding that the suit as framed is not cognizable by the civil Court.

It was argued by the learned counsel for the appellants that the first prayer in the plaint should not be lost sight of. If the lands did constitute service inam lands, then any sale of such lands by the plaintiffs would be null and void; and that being so, it would not be a case where the executants of such sale deed would have to set aside such a document. The learned advocate however drew our attention to the decision in *Venkanna* v. *Chinna Appalaswami* (3), where a learned Judge of this Court held that the sale of such lands is voidable only, and not void, and that the same will hold good so long as the alienor is alive. That learned Judge's attention was not drawn to the decision in *Kesaram Narasimhalu* v. *Narasimhalu Patnaidu* (1) and also to the decision of the Full Bench in *Sannamma* v. *Radhaboyi* (4) where the Full Bench had to consider the effect of the prohibition contained in S. 5, Madras Hereditary Village Offices Act 3 of 1895, with which we are now concerned. In these circumstances we are bound to follow the decision of the Full Bench and hold that, if it be proved that the lands in suit constitute emoluments of the office of the village blacksmith, then the alienation thereof is null and void, and in such circumstances it would not be necessary to seek any cancellation of the sale deed. The decisions in *Kesaram Narasimhalu* v. *Narasimhalu Patnaidu* (1) and *Kandappa Achari* v. *Singara Chari* (2) make it clear that suits, where the substantial question for decision is whether the lands in question do constitute the emoluments of such village officer, are suits which are cognizable by revenue Court only and not by a civil Court; and construing the plaint before us, it is clear that the lower Courts were right in holding that the present suit is not a suit cognizable by the civil Court.

I agree with my learned brother that the appeal must be dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 613

ANANTAKRISHNA AYYAR, J.

(*Mandala*) *Donganna* and *another*—Plaintiffs—Appellants.

v.

Mandala Jammanna and *another*—Defendants—Respondents.

Second Appeal No. 26 of 1928, Decided on 3rd February 1931, against decree of Dist. Judge, Ganjam, in Appeal Suit No. 137 of 1926.

Landlord and Tenant—Patta in itself is not title-deed but is evidence of title—What weight as regards title should be attached to patta depends on circumstances of particular case.

A patta is not in itself a deed of title but is evidence of title. The main object of the tender of pattas is to give information of the amount of revenue payable. Patta granted under a final order passed by a duly authorized agent of the Government may confer title on the person in whose favour it is passed, and is indicative of his title when there are no other contrary conditions in the patta. The exact weight due to a patta would depend upon all the circumstances of a case. In case of pattas in respect of land in a zamindari, if the land be at the disposal of the landlord at the time of granting the patta, prima facie such patta would not be a mere bill of rent but something more. If it is not so, it would not create any rights in the pattadar in derogation of the rights of a person who would be entitled to the land subject to the proper and regular payment of rent: *A. I. R.* 1923 *P. C.* 217; 12 *Beng. L. R.* 229 (*P. C.*); 11 *M. I. A.* 345 (*P. C.*) and 1 *M. I. A.* 305; (*P. C.*), *Rel. on*; *A. I. R.* 1926 *P. C.* 18, *Expl.*; 28 *Mad.* 505; 29 *Mad.* 461; *A. I. R.* 1924 *Mad.* 913; *A. I. R.* 1925 *Mad.* 859 and 26 *Mad.* 268, *Ref.*

B. Jagannadha Das—for Appellant.

S. Subramania Sastri—for Respondent.

Judgment.—The plaintiffs sued in 1925 to recover possession of certain lands alleging that defendant 1 trespassed upon the same in 1923. The defendants denied the plaintiff's title and possession and also the trespass alleged in the plaint. The plaintiffs filed Ex. A, a patta No. 19 granted to them by the Raja of Parlakimedi in respect of the suit lands, and they also filed Exs. B to B-25, cist receipts in respect of the rent paid in respect of patta No. 19, Ex. A. Plaintiff 1 was also examined as the plaintiff's sole witness. On the side of the defendants, no documents were filed, but defendant 1 was examined as the sole witness for the defendants. The trial Court found that the plaintiffs had proved title and possession within 12 years prior to the suit, and accordingly decreed the suit in their favour. On appeal, the learned District Judge reversed the decision of the District Munsif and dismissed the suit, remarking that the patta, Ex. A,

"is not evidence of title, it is a mere bill for rent and on no showing can a revenue patta be considered as a title-deed."

After referring to an alleged admission of plaintiff's rights said to have been made by defendant 1, the learned District Judge stated that the plaintiffs had entirely failed to prove their title to the suit lands, and accordingly reversed the District Munsif's decision. The plaintiffs have preferred this second appeal.

No doubt the onus of proof in this case is on the plaintiffs. The learned District Judge referred to Ex. A as a "mere bill for rent" and observed that "on no showing can a revenue patta be considered as a title-deed." Whether a patta should be considered as a mere bill or whether more weight should be given to it in any particular case would depend largely upon the circumstances on which a patta was issued. The remarks of Bhashyam Ayyangar, J., in *Secy. of State* v. *Kasturi Reddi* (1) at p. 272, show that pattas issued by Government in respect of ryotwari lands are mainly intended to give information of the amount of revenue payable and the instalments by which it is to be paid. The observations of that learned Judge have been followed in *Muthuveeravandayan* v. *Secy. of State* (2) at p. 467, *Secy. of State* v. *Raghavachariar* (3) and *Secy. of State* v. *Janaki Tammayya Pantulu* (4). The observations were made with reference to pattas issued in pursuance of orders passed in darkhast proceedings regarding lands at the disposal of the Government, the said orders being subject to appeal to higher revenue authorities as prescribed by rules framed by the Government.

The learned Judge pointed out that if a valid order was passed by a duly authorized agent of the Government granting lands at the disposal of Government to a particular person, then that order, or the

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(1) [1903] 26 Mad. 268=12 M. L. J. 453.
(2) [1906] 29 Mad. 461.
(3) A. I. R. 1924 Mad. 913=83 I. C. 1009=47 Mad. 861.
(4) A. I. R. 1925 Mad. 859=87 I. C. 644.

final order duly passed by the proper appellate authority, would confer title on the person in whose favour the same was passed; and in such cases delivery of possession or even the actual issue of a patta would not be necessary to complete title in that person. Similarly, if a patta be issued in pursuance of an order thus passed by an officer, the said patta could not be said to confer title on the pattadar by the mere fact of the patta having been issued, if the order in pursuance of which the patta was issued, be subsequently reversed by the proper appellate authority. Where however no orders of the Government or of any officer are available (a case not likely to arise ordinarily), a patta granted by the Government in the usual course with reference to lands at its disposal would nevertheless be indicative of the right of the pattadar to the land, if there be no other conditions in the patta or in the surrounding circumstances to indicate the contrary. As observed by Subramania Ayyar and Davies, JJ., in *Pullanapally Sankaran Nambudri* v. *Vittil Thalakat Muhamod* (5), the pattadar would be

"entitled to hold the land as long as he paid the revenue properly leviable from him, and in default he could be ousted only on legal process taken under the Revenue Recovery Act."

It is probably in this sense that we have to understand the observations of the Privy Council in the case reported in *Pushvati Alakh Narayan* v. *Secy. of State* (6), at p. 258 (of 49 *Mad.*) relied on for the appellants, where the following passages occur in their Lordship's judgment:

"The submerged land was likewise struck out of the *pattas which constitute the evidence of title* given to the holders in a ryotwari tenure. These pattas are subject to revision from time to time when changes of circumstances occur."

(The italics are mine). I may here remark that as observed at p. 256 of the report, it was conceded on behalf of the Secretary of State for India in that case that

"after a darkhast is made and a patta granted by Government, the interest of the ryot holding under this form of tenure is permanent, hereditary and transferable, but that no ejectment at the instance of the Government is competent for arrears of rent and that such arrears can only be recovered as in the case of all Government revenue by sale of the property held under this tenure."

It was observed in 29 *Mad.* that

"it is just as necessary to issue patta in the case of temporary or conditional grants in order that all concerned may know the amount of the assessment that is payable, and the instalments by which it is to be paid."

The Court held having regard to the circumstances of that case

"that the patta issued by the Deputy Collector in that case could not be understood as evidencing a grant by him. He could not in fact make any valid grant while the appeal in respect of the matter was still pending before him."

It is also well known that pattas in respect of lands sometimes happen to stand in the names of deceased persons, and real owners of land do not always take care to have pattas transferred to their names; and it should be remembered that the main object of the tender of pattas or amending the pattas (whenever the same happen), at the annual jamabandi is with a view to finally settle the amounts due to the Government in respect of the lands, and to give information about the person responsible to the Government for the revenue, the extent of the holding, the revenue due and the instalments by which the same is payable. The person in whose favour a patta is so issued should not by that circumstance alone, be taken to be the real owner of the properties, though no doubt as between the person who accepts the pattas and the Government certain liabilities are undertaken by and imposed upon the pattadar which could be enforced under the Revenue Recovery Act.

The exact weight due to a patta would depend upon all the circumstances of the case. It has been held and it is not denied that patta is evidence of possession. Even in the aspect of a patta being only a mere bill, the possession of a bill coupled with the possession of the article covered by it would prima facie be cogent evidence of the right of the person concerned in the absence of other circumstances.

In the case of lands in a zamindari, it could not be said that orders granting lands at the disposal of the zamindar to a person are invariably passed by all landholders prior to the actual issue of pattas. It would seem that in several cases pattas constitute the only evidence of the transaction. If the land be at the disposal of the zamindar or landholder, and a patta be issued by him to a person in respect of such

(5) [1905] 28 Mad. 505=15 M. L. J. 416.
(6) A. I. R. 1926 P. C. 18=94 I. C. 501=53 I. A. 64=49 Mad. 249.

land, prima facie such patta would in such a case be not merely a bill but something more. But, if the land be not at that time at the disposal of the landholder but held by some other person who would be entitled to hold the same subject only to payment of the proper rent due thereon, the mere circumstance that the landholder happened to issue a patta in the name of a stranger would not create any right to the land in that stranger in derogation of the rights of the prior person entitled to the same. As already remarked, grants of lands at the disposal of the landholder are also frequently made by the issue of pattas to the persons concerned. The issue of periodical pattas by landholders with a view to give information as regards the extent, rent, etc., payable in respect of the land, and to enable the landholders to take special proceedings under the Estates Land Act, might stand upon a different footing from the case of pattas granted to persons in respect of lands at the disposal of the land holder where nobody else had any rights in the same.

One will have to remember who the parties to the controversy are, whether the question arises between the Government or landholder on the one hand, and ryot on the other, or between two rival ryots.

Pattas are evidence of possession; and the weight otherwise due to pattas would depend on the circumstances of each case. This is probably what is to be inferred from the cases decided by this Court read with the passage in the Privy Council judgment in the case reported in *Pushwati Alakh Narayan* v. *Secy. of State* (6) at p. 252, and the passages occurring in the earlier rulings of the Privy Council. By a reference to the early Privy Council rulings, we gather the following:

Patta proves no part of the title; it is the conveyance that gives parties a right to claim the patta: *Freeman* v. *Fairlie* (7).

The patta proves no part of the title; it is the conveyance that gives parties a right to claim the patta. The patta is evidence of title. The patta is not the title, but the evidence of title.

(7) [1836] 1 M. I. A. 305=1 Sar. 123 (P. C.).

Gunga Gobind Mundul v. *Collector of the Twenty-four Pergannahs* (8), pp. 359 and 363.

A patta may be a confirmatory grant only, and there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed: *Ramchunder Dutt* v. *Jughes Chunder Dutt* (9).

A patta is granted by the zamindar as a title-deed to the tenant: *Srinath Rai* v. *Pratap Udai Nath Sahi Deo* (10), (at p. 153 of 28 *C. W. N.*)

Further, in the case before me, the learned District Judge has not considered the effect of the patta in relation to plaintiffs' alleged possession of the land; he has not referred to Exs. B-1, to B-25, cist receipts, nor to the oral evidence on the plaintiffs' side.

The defendants also seem to have complained that they had no proper opportunity to let in their evidence in the trial Court; the lower appellate Court has not recorded any definite opinion on that point. I think the judgment of the lower appellate Court, as it stands, should not be upheld. I reverse the decision of the lower appellate Court and remand the appeal for fresh disposal in accordance with law. Cost of this second appeal will abide and follow the result. Court-fee paid on the second appeal memorandum will be refunded to the appellants.

P.R.S./B.V. *Case remanded.*

(8) [1866] 11 M. I. A. 345=7 W. R. 21 (P. C.).
(9) [1873] 12 B. L. R. 229=19 W. R. 353 (P. C.).
(10) A. I. R. 1923 P. C. 217=82 I. C. 879.

A. I. R. 1931 Madras 615

WALLACE, J.

Subbarayulu Chettiar — Defendant—Appellant.

v.

Ratnam Ayyar and *others* — Plaintiffs —Respondents.

Second Appeal No. 1263 of 1925, Decided on 28th October 1929, against decree of Addl. Sub-Judge, Trichinopoly, in A. S. No. 61 of 1925.

(a) Hindu Law—Alienation by father for paying off antecedent debt—Debt not for immoral or illegal purposes — For applying the doctrine that property thus alienated cannot be recovered it is not essential that the debt should have become payable and should have been paid by the alienee.

Where the father of a joint family has alienated joint family property for an antecedent

debt, i. e., a debt dissociated in time and fact from the sale itself, and the property has passed to the alienees, the joint family cannot recover except upon proof that the debt was for immoral or illegal purposes. It is not essential for the application of this doctrine that the debt should have become payable and should have been paid by the alienee, i. e., the alienee in order to succeed need not have paid the full consideration and discharged the antecedent debt : *A. I. R.* 1924 *P. C.* 50 ; *A. I. R.* 1917 *P. C.* 61 ; *A. I. R.* 1922 *P. C.* 247 and 42 *Mad.* 711, *Cons.*

[P 616 C 2]

(b) Hindu Law — Alienation by father— Necessity not impeachable by minors suing to recover property alienated—It is not open to plead that family necessity could have been relieved in some other way.

Where minors suing to recover property alienated by father of joint family cannot impeach the necessity for, or the nature of the alienation, it is not open to them to plead that the family necessity might have been relieved in some other way and that it was neither a prudent nor necessary act of the father to alienate: 31 *All.* 176 ; 5 *Cal.* 148 and 13 *Cal.* 21, *Rel. on.*

[P 618 C 2]

M. S. Vaidyanatha Iyer — for Appellant.

Watrap S. Subramanya Iyer and *C. Sankararama Sastri*—for Respondent.

Judgment. — This appeal is against the decision of the lower appellate Court in a suit by three minor sons in a Hindu joint family to set aside a sale of joint family property by their father and to recover the property. The original Court dismissed the suit holding that the sale was binding on the plaintiffs. The lower appellate Court held that it was not binding on the plaintiffs' share, and decreed them possession under certain conditions. Defendant 1, the alienee, appeals and the plaintiffs have put in a memorandum of objections.

The sale-deed is Ex. 1 dated 11th May 1922 and is for Rs. 2,500. It was executed by the father and two adult brothers of the plaintiffs, all the members of the family who were then majors, for themselves and on behalf of their minor brothers, the plaintiffs. The main consideration recited in it is a mortgage debt evidenced by Ex. 3, executed on 2nd July 1920 by the above members of the joint family in favour of their maternal uncles for a principal sum of Rs. 1,800 with interest payable monthly at nine annas per Rs. 100 per mensem. The period for redemption was fixed as 1st July 1924. The amount due on Ex. 3 on the date of Ex. 1 was Rs. 2,038-5-9. It is admitted that this mortgage debt has not yet been paid off. In view chiefly of the fact that the mortgage had not become payable on the date of Ex. 1 and that it was at a very low rate of interest which he finds to be less than the income of the lands sold to discharge it, the Subordinate Judge held that the sale was not a prudent and justifiable act and therefore did not bind the minor plaintiffs.

This finding is attacked by the appellant as involving fundamental errors of law on two main grounds: first, that apart from the question of justification, the mortgage was an "antecedent debt" by the plaintiffs' father and manager, which the plaintiffs are bound to discharge, and secondly, that if justification is necessary, there is sufficient justification. I have so far heard argument on the first point, a point which the lower appellate Court has omitted to consider although it was raised in the first Court. It is now settled law that when the father of a joint family has alienated joint family property for an antecedent debt, that is, a debt dissociated in time and fact from the sale itself, and the property has passed to the alienees, the joint family cannot recover except upon proof that the debt was for immoral or illegal purposes. The plaintiffs insist that it is essential for the application of this doctrine that the debt should have become payable and have been paid by the alienee, that is, that the alienee cannot succeed unless he has paid the full consideration and discharged the antecedent debt. The plaintiffs contend that the above proposition of law has been reached by the Courts in an endeavour to do justice to a bona fide alienee for value who has parted with his cash and has perhaps for a long time enjoyed the property, on the consideration that he should not be incontinently turned out because certain minor members of the family who have presumably received and benefited by the value received choose to attack the transaction. They therefore argue that this legal principle cannot apply to a case where the so-called antecedent debt had not even become payable and the alienee has not parted with cash, and urge that unless such an interpretation is given to the principle, the father could sell the joint family properties for merely nominal debts, receiving no consideration at all from the alienee and leaving the joint family as before still under liability to the creditors for the

debts. The family, they urge, must have had its quid proque and must have been in fact relieved of its debt. That seems not an unreasonable proposition, but as the proposition of law which I am considering is deduced from the Mitakshara law, which is not always such as to commend itself to one's reason, I have rather to consider whether the respondents' contentions find any support in the law as expounded by the Courts.

Before considering this, I shall state the case of the appellant regarding the nonpayment of the mortgage debt. He claims that the debt became ripe in 1922 and that he tendered the amount due to the mortgagees in 1922 on 5th October 1922, but that they refused to receive it. He contends that he has always had the money ready for them and is even now ready to pay. Now, I cannot accept his contention that the money was due in 1922. The date given in the document for redemption is 1st July 1924. It is remarkable that the appellant does not seem to have again tendered the amount after 1st July 1924. Possibly the reason was that this suit had been filed before that, the plaint having been put in on 4th December 1922, and that the mortgagees, who admit they are conducting this suit on behalf of the plaintiffs, would in any case have refused the tender. The fact therefore is that on the date of the plaint, the mortgage debt had not become payable or been paid and that therefore the liability for the mortgage still rested and still does rest on the joint family, except so far as they have an implied covenant of indemnity from the appellant for all expenses they may be put to in connexion with it.

The main question of law is the appellant's contention that it is sufficient defence to the suit that his alienation was in discharge of an antecedent debt by the father. It is not disputed that the debt, Ex. 3, was dissociated in time and fact from the alienation, and it is not pleaded that it was for immoral or illegal purposes. Prima facie then, Ex. 1, being an alienation of joint family property by the father in order to discharge an antecedent debt of his own, is binding on the joint family. The respondent urges, as I have said, that "antecedent debt" must mean either a debt that has become payable or a debt which has actually been discharged by the alienee, and not one in which money was payable in the future or one which has not been discharged. This is obviously an important qualification of the usual meaning of "debt" which is

"a sum of money which is now payable or will become payable in the future by reason of a present obligation : see *Webb* v. *Stenton* (1) at p. 527."

A debt which has not matured is all the same a debt in ordinary legal parlance. Therefore prima facie, the phrase "antecedent debt" includes a mortgage debt which is not yet payable, unless the law has somehow declared that it does not. It follows a fortiori that the word "debt" does not ordinarily mean actual discharge of a debt and that it will not mean so here unless there is authoritative legal pronouncement to that effect. The legal doctrine of antecedent debt is, as has been repeatedly pointed out, the result of an endeavour to reconcile the Mitakshara prohibition of alienation of joint family property by a single member except for necessity with the pious obligation of the sons of the joint family to pay the debts of their father which are not illegal or immoral. The latest pronouncement by a specially Full Board of the Privy Council on the subject is in *Brij Narain* v. *Mangla Prasad* (2), which in its guarded declaration of disagreement with the previous ruling of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (3), which was followed in *Chet Ram* v. *Ram Singh* (4), and in its categorical announcement of propositions at p. 104 was evidently intended to be definitive and final. The first question therefore is : Can I gather from this ruling any support for the respondents' interpretation of "antecedent debt ?" On the contrary it appears to me to repel it.

Their Lordships, while differing from some of the observations in *Sahu Ram Chandra* v. *Bhup Singh* (3), approved of that decision generally if it is taken to decide not more than what was necessary for the case, namely :

"that the incurring of the debt was there the creation of the mortgage itself."

(1) [1883] 11 Q.B.D. 518=52 L.J. Q.B. 584=49 L.T. 432.
(2) A.I.R. 1924 P.C. 50=77 I.C. 689=51 I.A. 129=46 All. 95.
(3) A.I.R. 1917 P.C. 61=39 I.C. 280=44 I.A. 126=39 All. 437.
(4) A.I.R. 1922 P.C. 247=67 I.C. 569=49 I.A. 228=44 All. 368.

There is no suggestion here that a mortgage is not an antecedent debt until it becomes payable or has actually been paid off. On the contrary, the creation of the mortgage amounted to an incurring of the debt. The same principle is embodied in No. 2 of the propositions laid down at p. 104, which states that a father may by incurring the debt, so long as it is not for any immoral purpose, lay the estate open to the payment of the debt itself. Therefore, it is the incurring of the debt which lays the estate open and brings the obligation for the debt to bear on the joint family estate. Similarly in proposition No. 3, there is no hint that the debt must have become payable or must have been paid. The ruling in *Brij Narain* v. *Mangla Prasad* (2) approves entirely the opinion of the learned Chief Justice of this Court in *Arumugham Chetty* v. *Muthu Koundan* (5), and there again there is no suggestion that the word "incurred" has anything beyond its ordinary meaning, namely that the debt has been contracted. There are no doubt stray expressions or facts in other cases which may be used to support the respondents' contention. In *Brij Narain* v. *Mangla Prasad* (2) a mortgage decree had in fact been obtained, but that circumstance is never relied on by the Privy Council for supporting the general proposition laid down at p. 104. In *Lal Bahadur* v. *Ambika Prasad* (6) another Privy Council decision which follows *Brij Narain* v. *Mangla Prasad* (2), the debts for which the alienation was made had as a matter of fact been paid, but again this circumstance is not relied on for the purpose of proving that these were antecedent debts. In *Sahu Ramchandra* v. *Bhup Singh* (3), at p. 144 (of 39 *All.*) the Privy Council says:

> "They desire, in the first place, to make it clear that much if not all of the law upon this subject has arisen from the necessity of protecting the right of third persons, say, the purchasers of the property, who have taken their title for onerous consideration and in good faith."

To my mind this does not necessarily imply that the consideration must have already been paid. The rulings in *Narasingh Misra* v. *Lalhi Misra* (7) and *Peda Venkanna* v. *Srinivasa Deekshatulu* (8) are cited for the proposition that the son's pious obligation does not begin until the father has failed to satisfy the debt. Of these one can only say that no such distinction appears in the statement of the law on this point laid down at p. 103 (of 46 *All.*) *Brij Narain* v. *Mangla Prasad* (2). So far therefore as I can see, the test of an antecedent debt has never been declared by the Privy Council to be its payability or actual payment, and no case has been cited to me in which it was directly decided that it is necessary to prove that an antecedent debt must become payable or have been paid. In *Bandhu Ram* v. *Ram Kishum Senar* (9) a decision of the Allahabad High Court no allusion was made to the Privy Council cases in *Chet Ram* v. *Ram Singh* (4) and *Brij Narain* v. *Mangla Prasad* (2), and the question of antecedent debt was never raised at all. It cannot be argued that that question could not have been raised when *Brij Narain* v. *Mangla Prasad* (2) itself recognizes the strong current of authority allowing it to be raised. The Privy Council case in *Ramsundar Lal* v. *Lachmi Narain* (10) has been quoted. But there again the plea of antecedent debt was never raised or considered, and the minors were non-suited on other grounds which were sufficient to dispose of the case. There seems to me therefore no substance in this contention raised by the respondents.

The second contention advanced by them is that though the minors cannot impeach the necessity for or the nature of the alienation, that is, though they cannot plead that the alienation was not for family necessity, it is open to them to plead that the family necessity might have been relieved in some other way, and that it was neither a prudent nor a necessary act of the father to alienate. This appears to me equally untenable on the authorities. It is in effect saying that the alienee has in all cases of alienation to prove either necessity or prudence. That I have no doubt, is not the law. It is wholly opposed to the dictum of Sir John Stanley in *Chandradeo Singh* v.

(5) [1919] 42 Mad. 711=52 I.C. 525 (F.B.).
(6) A. I. R. 1925 P. C. 264=91 I. C. 472=52 I. A. 448=28 O. C. 371=47 All. 795 (P.C.).
(7) [1901] 23 All. 206=(1901) A. W. N. 34.
(8) [1918] 41 Mad. 136=43 I. C. 225.
(9) A. I. R. 1923 All. 535=73 I. C. 1010.
(10) A. I. R. 1929 P. C. 143=116 I. C. 605=51 All. 430.

Mata Prasad (11), which has been approved of by the Privy Council in the case in 39 *All.* already cited, where he says (p. 189) that

"the son cannot impeach an alienation of ancestral joint family property made by a father . . . . the object of which is to pay"

an antecedent debt of the father not tainted with immorality. This is also the language of the Privy Council in two early cases *Suraj Bunsi Koer* v. *Sheo Persad Singh* (12) and *Namuni Babusin* v. *Madhum Mohun* (13) cited with approval in the *Brij Narain* v. *Mangla Prasad* (2) case. The statement of the law is put in *Suraj Bansi Koer* v. *Sheo Persad Singh* (12) as

"where joint ancestral property has passed out of the joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt, his sons cannot recover that property unless they show that the debts were contracted for immoral purposes."

What the sons cannot impeach is the alienation if the consideration was an antecedent debt. Here the consideration undoubtedly was an antecedent debt. Therefore the alienation cannot be impeached except on the ground that the debt was contracted for immoral purposes, which has not been pleaded.

The respondents attempted to erect this contention into an attack on the alienation as being mala fide, and to call in aid the dictum from 39 *All.* already cited, that the law on this subject was designed to protect alienees "for onerous consideration and in good faith;" but this is however an aspect of the case which was never put forward in the Courts below, nor is there any issue or finding on the question of good faith. I am not prepared to allow such a point to be raised in second appeal, even if I assume that it could, after the decision in *Brij Narain* v. *Mangla Prasad* (2) be taken as a point of law at all.

The result is that the alienation is not open to attack and must stand. It is admitted that the sums due under Exs. 4 and 6, also antecedent debts of the father and the cash payment of Rs. 200 have been paid and that the sums of Rs. 115 and Rs. 21-5-6 were not paid. The sums not paid are so trifling that their non-payment does not affect the general purposes of the alienation which was to pay off antecedent debts. The alienation must therefore stand. It is a matter of equity to ensure now that defendant 1 do now pay off and get discharged the mortgage Ex. 3 with interest up to date at 10 annas per cent per month according to the stipulation in the deed and do pay also to the vendor these two sums of Rs. 115 and Rs. 21-5-6. This decision is sufficient to decide the appeal and I do not go into the other points raised but not argued.

I direct that if the amount so due on the mortgage and those other two sums are paid into the trial Court, the District Munsif's Court, Kulitalai, within two months from date of receipt of this Court's decree by the trial Court the appeal is allowed and the suit will stand dismissed with costs throughout. The memo of cross-objections (not argued) is dismissed without costs.

P.R.S./S.N. *Appeal allowed.*

(11) [1909] 31 All. 176=1 I. C. 479.
(12) [1880] 5 Cal. 148=4 C. L. R. 226=6 I. A. 88=4 Sar. 1 (P.C.).
(13) [1836] 13 Cal. 21=13 I. A. 1 (P.C.).

A. I. R. 1931 Madras 619

CURGENVEN AND CORNISH, JJ.

S. C. T. Al. Alagappa Chettiar—Defendant—Appellant.

v.

S. S. C. T. Chidambaram Chettiar —Plaintiff—Respondent.

Appeals Nos. 14 of 1929 and 12 of 1929, Decided on 16th December 1930, against order of Temporary Sub-Judge, Devakotta, D/- 5th November 1928.

(a) Civil P. C. (1908), Sch. 2, Para. 15 — Misconduct by arbitrators would justify setting aside of award—By waiver right of objecting is lost—What amounts to waiver depends on circumstances.

Where the arbitrators examine the witnesses in private without the hearing of the parties, their procedure is irregular and such misconduct would justify the setting aside of such award. It is not necessary to prove prejudice. But irregularities of this kind may be cured by waiver.

A mere signature to an award does not necessarily remove all objections to any irregularity. It must be clear that when the party attached his signature he was aware that the irregularity had been committed and then this act is prima facie evidence that he waives his objection which presumption can be rebutted only by adducing special circumstances. What amounts to waiver must be decided on circumstances of each case : (*Case law referred.*)

[P 621 C 2; P 622 C 1, 2]

(b) Civil P. C. (1908), Sch. 2, Para. 15 — Award not through Court and containing mistake—Court will not interfere to rectify.

Where an award not made through a Court contains some mistakes the Court will not set it aside, or interfere to rectify it: *A. I. R.* 1929 *P. C.* 103 and 42 *All.* 277, *Ref.*; *Re. Hall and Hints*, 133 *E. R.* 887, *Diss. from.*; *Phillips* v. *Evans*, 152 *E. R.* 1216, *Rel. on.*

[P 623 C 2]

S. Varadachariar and *K. S. Venkataraama Iyer*—for Appellants.

Advocate-General, *M. Patanjali Sastriar*, *V. Rajagopala Iyer* and *T. V. Ramiah*—for Respondents.

Curgenven, J.—The plaintiff and the defendant are brothers by blood, being the sons of one Subramaniam Chettiar, and first cousins by adoption, the defendant having been adopted by his senior paternal uncle, Chidambaram Chetty. Chidambaram Chetty and Subramaniam Chetty had a third brother Alagappa Chetty. Disputes arose between the two parties in regard to various matters including the division of three items of immovable property, a house and two vacant sites in the village of Pallattur. On 21st February 1925 they referred their disputes by means of muchilika, Ex. C, to three arbitrators residing in Devakotta and on 29th April the arbitrators presented their award. Under this the plaintiff was to have one of the sites (item 1) and the defendant the house and the other site (items 2 and 3). The defendant had acquired the interest of the third branch, that of Alagappa Chetty, in the property so that he held a two-thirds share to the plaintiff's one-third share. The value of the property assigned to him was however in proportion greater than this two-thirds share and, further, a sum of Rs. 4,000 was found due from him as principal and interest of a debt incurred for his marriage.

Consequently the arbitrators provided that he should pay to the plaintiff a sum of Rs. 23,000, the award permitting this payment to take the shape of a hundi. Both parties signed this award on the evening of 29th April and at the same time the defendant executed a hundi for the sum abovementioned. Very shortly afterwards, on 2nd May, the defendant sent a lawyer's notice to the plaintiff impugning the award for various reasons, one in particular being that he had signed it under compulsion and in ignorance of its purport. At the same time he stopped the hundi which was accordingly dishonoured. The plaintiff then filed a suit upon the hundi and an application under paras. 20 and 21, Sch. 2, Civil P. C., for an order that the award be filed in Court and a decree passed accordingly. He has succeeded in both these proceedings and the two appeals now before us are accordingly presented by the defendant.

The defendant attacks the award upon several grounds. The circumstance that he signed it must necessarily tell heavily against the acceptance of any contentions based upon irregularity of procedure and I will accordingly deal first with his allegation that his signature both to the award and to the hundi was obtained fraudulently and under coercion, and affixed with no knowledge of what the documents contained. The evidence shows that the three arbitrators some time after they had conducted an enquiry at Pallattur arrived at their conclusions at Devakotta on the forenoon of 29th April. One of them, Swaminatham Chetty, had then to leave the place. Later in the day the other two drew up the award according to what had been decided and obtained the signatures of the parties to it. Then after Swaminatham Chetty returned on the following day all the three arbitrators signed it. The defendant's version of how he came to sign these documents has not always been the same. In his first notice, Ex. 4 already referred to, he said that the two arbitrators compelled him to sign two sheets "without giving any particulars," which would seem to suggest that the sheets were blank. In a subsequent notice Ex. 4, sent on 1st July 1925 the arbitrators are accused of having :

"pressed our client much and keeping the sheets covered, asked him to sign two sheets."

In his written statement he said that the arbitrators by coercion and undue influence made him sign certain incomplete papers without revealing their contents. He also alleged that the arbitrators had antedated the award. There is here no reference to the papers having been covered, but the allegation reappears in his evidence, where he says that both papers were covered and that though he pressed the arbitrators for about an hour to read them to him, they did not do so. An inspection of the

award, Ex. A, will show that on the side on which the signatures occur there was in fact nothing material to conceal. So that this story that the papers were covered up, which appears in this intermittent manner, is not very plausible. There are two features about the hundi which go to show that the defendant was acquainted with its contents. One is that it is drawn upon his firm in Rangoon, the particulars of which according to the one arbitrator who has been examined were given by the defendant himself. The other is that payment and interest are deferred for one month, which can hardly have been otherwise than at the defendant's own instance. The evidence strongly supports the view that the assignment of the one site to the plaintiff and the two other properties to the defendant must have been in accordance with the wishes of the parties, the defendant in particular having spent a good deal of money in erecting structures on or near the site allotted to him. That being so, it is probable, apart from any other consideration, that he knew the purport of the award and that he would have to pay a sum of money to the plaintiff. There seems to be this modicum of truth in the defendant's story, that the formal reading over of the award to the parties was deferred until Swaminatham Chetty returned. This is admitted by the plaintiff, but it does not go far to prove that the actual terms of the award, which had been settled by the three arbitrators earlier in the day, had not been communicated to the parties before they signed.

The learned Advocate-General for the respondent, has drawn our attention to certain English cases: *Howatson* v. *Webb* (1), *Howatson* v. *Webb* (2) and *Blay* v. *Pollard and Morris* (3), in support of the proposition that a plea of 'non est factum' is not open to a party who has knowledge of the nature of the document which he is signing. But I think that in the present case the defendant must be taken to have known not only its nature but its actual effect. It may be added in general that the defendant is a Nattukottai Chetty aged about 66 and for all that appears was perfectly well able to take care of himself. He has given us no reason to suppose that the two arbitrators either desired or were able to coerce him by such means as he alleges into a settlement. I agree with the learned Subordinate Judge in finding against the truth of the story.

It is then said that the arbitrators examined each party in the absence of the other and examined the witnesses cited by the plaintiff in the absence of the defendant. Upon the former of these points, the plaintiff, examined as P. W. 1, stated in chief that they discussed the matter with each of them in the absence of the other, a version which he retracted later in his deposition. As regards the examination of the witnesses the plaintiff says that when the arbitrators were examining them he and the defendant remained aloof and did not hear what was spoken, and this is borne out by the arbitrator, who says that the procedure was to take the witnesses in private and question them privately without the hearing of the parties. These methods of proceeding were admittedly irregular, so that it is unnecessary to adduce authority in support of the contention. It may only be noted that, as has been held in *Dobson* v. *Groves* (4), the Court will in such circumstances set the award aside without taking into consideration the nature of the statements made or the probability of their having influenced the decision. In other words, it is not necessary to prove prejudice. There is no doubt too, however that irregularities of this description, and indeed of any description, may be cured by waiver.

On the question of waiver, there is good ground to suppose that the defendant knew at the time of the enquiry in what manner the arbitrators were conducting it. The local enquiry took place at Pallattur, and included an inspection of the properties and an examination of three witnesses cited by the plaintiff. The defendant states that the arbitrators omitted to examine his witnesses, but the arbitrator himself, whose word is at least as good as that of the defendant, denies that he named anyone for examination. The plaintiff says that when the arbitrators examined his witnesses

(1) [1907] 1 Ch. 537=76 L. J. Ch. 346.
(2) [1908] 1 Ch. 1=77 L. J. Ch. 32=97 L. T. 730.
(3) [1930] 1 K. B. 628.
(4) [1844] 6 Q. B. 637=14 L. J. Q. B. 17=9 Jur. 86.

he and his younger brother, (i. e., the defendant) were present though as I have already said he admits that they did not hear what was said. The defendant himself confesses to having been present at Pallattur upon this occasion, although he minimizes the admission by asserting that he saw the arbitrators only when they were starting back to Devakotta. It seems pretty clear therefore that he was present at the time of the enquiry and must have known how it was being conducted. Apart altogether from this evidence however there is the circumstance that he signed the award and, as I believe, voluntarily signed it. Now it may well be that the mere signature to an award, as was held in *Gunnu Meah* v. *Rahman* (5), does not necessarily remove all objection to any irregularity which may characterize it. It must be clear that when the party attached his signature he was aware that the irregularity had been committed. I think that the terms of the notice, Ex. 4, set this point at rest. It contains clear proof that the defendant knew that the arbitrators had examined witnesses for the plaintiff, and there is no ground to suppose that in the short interval between the award and this notice the defendant acquired this information. He must have known it when he signed the award and known too of course that the witnesses were not examined in his presence.

It must be presumed that he was aware that this was an irregularity, notwithstanding which he attached his signature. Mr. Varadachariar has endeavoured to argue that even in these circumstances it does not necessarily follow that the defendant condoned the irregularity and waived his right to object to it. He wishes us to infer from all the circumstances of the case, the fact that the award was unfavourable to the defendant and the plaintiff's admission that before signing it he raised many objections that the defendant was an unwilling signatory, and was in fact made to sign by some unfair kind of pressure. I do not think, that in view of the attitude which the defendant himself has taken up this plea can be accepted. When a man signs a document with knowledge that he might have objected to it on the score of some irregularity, his act is prima facie evidence that he waives the objection. It lies on the defendant to displace this general presumption by adducing special circumstances. But in order to do this it is essential I think that he should give to the Court a perfectly open, true and candid account of what took .place. Instead of adopting that course he has given a false version of the facts and in the face of that version I do not think that we can be asked to substitute some other version not established by the evidence as a ground to hold that he was coerced or overpersuaded into signing.

The conclusion must be therefore that with the knowledge of the procedure which had been adopted he voluntarily signed the award. It is worth noting that the specific objection that the witnesses were examined behind his back does not appear throughout the subsequent proceedings, neither in the two notices nor in his written statement nor in his examination as a witness. Even the grounds of appeal contain nothing more definite than will be found in the grounds 9, 10 and 11. It seems plain therefore that the defendant although aware of this irregularity from the beginning never complained of it until every possible means of attacking the award came to be pressed into service. His conduct appears to me to amount clearly to an implied waiver. What will amount to waiver must of course be decided on the circumstances of each case and the .numerous authorities brought to our attention are not of much assistance in reaching a decision. For the appellant reference has been made to *Dobson* v. *Groves* (4) already cited because in that case it was held that the failure of a party to protest before the award is made does not necessarily imply waiver if it appears that the occasion which should have given rise to protest has gone by and the opportunity of setting right what is irregular is past. I do not think that that case intends to lay down that a party cannot waive an irregularity on learning subsequently that it has been committed. But as I think that there is evidence here sufficient to show that the defendant knew at the time what was happening it is unnecessary to discuss this point further.

(5) A. I. R. 1929 Rang. 166=117 I. C. 574=7 Rang. 136.

"When it comes to the knowledge of a party that the arbitrator has examined witnesses in his absence he should at once either abandon the reference or apply in chambers to revoke the submission for if he continued to attend the subsequent proceedings this will be waiver: (Redman, Edn. 4, p. 155.)"

In *Ameer Begum* v. *Badruddin Hussain* (6) it was held by the Privy Council that "it is generally desirable that an arbitrator should make and retain for subsequent use notes of the proceedings before him but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties who must be held to have known the general course of procedure and who did not make any protest until after the making of the award with the terms of which she was not satisfied:"

See also *Mills* v. *The Master &c. of Society of Bowyers* (7) and *Parish of Rathwen* v. *Parish of Elgin* (8) for other instances of waiver.

I hold that the appellant's failure to make any protest coupled with his signature to the award amounted to a waiver of the right to object to such irregularities of procedure as the arbitrators may have committed.

The next objection has reference to a mistake in calculation made by the arbitrators. I think the learned Subordinate Judge is clearly right in rejecting the evidence of the arbitrator, P. W. 2, as to the circumstances in which he and his companions arrived at the figure Rs. 23,000 which the defendant was required to pay. The arbitrator says that they thought it necessary to show a false method of computation in order that the parties should not be staggered at the largeness of the amount. I think it is clear that what really happened was that they erroneously added the sum due by the plaintiff to the defendant in respect of the latter's two-thirds share in the first site. Instead therefore of amounting to Rs. 23,000 the award should have been for a sum of Rs. 16,000. The question is: What are the powers of the Court in the case of an award not made through Court which discloses an error of this kind? There is I think no doubt that even in England the law as stated in Russel (Edn. 11, p. 213) is that as the parties choose their own arbitrator to be the judge in the disputes between them they cannot when the award is good on its face object to his decision either upon the law or the facts. There is indeed one case, *In re Hall and Hinds* (9) where in the case of a gross mistake made by the arbitrators the Court interfered to rectify it. But this has not been followed where similar circumstances have arisen more recently as for instance in *Phillips* v. *Evans* (10). In that case Baron Parke observes, after commenting upon *In re Hall and Hinds* (9):

"I think it better to adhere to the principle of not allowing awards to be set aside for mistakes and not to open a door to enquire into the merits or we have to do so in almost every case."

Here in India authority for the same view is to be found in *Shiam Lal* v. *Parshottam Das* (11), and may further be derived I think from the language of Sch. 2, Civil P. C. The circumstances in which the Court should order an award made without the intervention of the Court to be filed are stated in para. 21 the course is to be adopted:

"where no ground such as is mentioned or referred to in para 14 or 15 is proved."

An error in calculation, to use the language of Walsh, J., in *Shiam Lal* v. *Purshotam Das* (11), may be so palpable and gross as to afford strong evidence of misconduct, as that word is to be understood in para 15. But I am unable to agree that, short of accepting a presumption of this kind, a mistake in calculation can be brought within that provision. In the case of arbitration in suits, para 12 enables the Court to correct a clerical mistake or an error arising from an accidental slip or omission, and it seems to me that what I must consider to be the intentional restriction of this provision to awards of that class shows that it was intended to assimilate the procedure with that which prevails in England and not to invest the Court with power either to correct such errors, or to reject an award which contains them, when the award is not upon a reference made through Court. I am unable therefore to accept this objection.

It is then objected that in awarding a sum of Rs. 4,000 against the defendant in respect of a debt of Rs. 1,000 incurred for his marriage, the arbitrators have acted in defiance of the law of limitation.

(6) A. I. R. 1914 P. C. 105=23 I. C. 625=36 All. 336=17 O. C. 120 (P. C.).
(7) 69 E. R. 1024.
(8) 2 H. L. Scott App. 535.
(9) 133 E. R. 887.
(10) 152 E. R. 1216.
(11) [1920] 42 All. 277=58 I. C. 585.

It has no doubt been laid down by the Privy Council in *Ramdutt Ramkissen Dass* v. *E. D. Sassoon & Co.* (12), that the Limitation Act applies to arbitration proceedings, but that is not to say that all awards which have not been decided in accordance with the terms of that Act are invalid. The evidence gives no reason to suppose that the defendant raised any such plea, and indeed the arbitrator states that he admitted orally that he had borrowed the money from the plaintiff and agreed to repay the principal. The point is not referred to either in Ex. 4 or in Ex. 6 or in the defendant's written statement. It is a well-established proposition of law, for which *Champsey Bharai & Co.* v. *Jivra Balloo Spinning and Weaving Co.* (13), may be cited, that an error of law will invalidate an award only if it appears upon the face of it, a condition not satisfied in the present case. I think that this objection also fails.

The only point remaining has to do with the absence of Swaminatham Chetty at the time when the award was drawn up. But Mr. Varadachariar concedes that if the evidence is accepted that he was present when the conclusions were actually arrived at earlier in the day, this objection will not stand. Upon this point I prefer the evidence of the plaintiff and the arbitrator (who however goes too far) to the assertion of the defendant that this arbitrator was not present at all upon that day.

My conclusion is accordingly that the order of the lower Court directing that the award be filed, and the decree upon the hundi, should both be confirmed and the appeals dismissed with costs (advocate's fee only in A. S. 14 of 1929).

Cornish, J.—I agree that the appeal fails. It is clear from the evidence that there has been misconduct, in the legal sense of the term, by the arbitrators and that this misconduct would, upon the authorities, justify the setting aside of the award. But it has been contended for the respondent-plaintiff that the appellant must be taken to have passed over the irregular conduct of the arbitrators and has therefore lost his right to object to the award. The principles governing the determination of this question are clear enough. In *Mills* v. *Bowyers* (14), Vice-Chancellor Page-Wood observed:

> "I accede to the view that it would be a great deal too dangerous to allow any arbitrator to have communications with some of the parties without the knowledge of the other parties to the reference and then to say that he was not influenced by anything that took place. But in this case it appears that the only thing which took place was one which every person knew of at the time, and they allowed the reference to proceed without making any objection."

And in *Dobson* v. *Groves* (4), there occurs this passage in the judgment:

> "It has been suggested that the complaining parties waived their right to object by not protesting before the award was made. Where an irregularity takes place at a meeting of all the parties and is passed over, that observation may apply. But where a party wishing to be present has been excluded from the meeting, the opportunity of setting right what was an irregularity is past."

The judgment in *W. Ramsden & Co.* v. *Jacobs* (15), proceeds upon the same grounds.

The particular act of misconduct took place at Pallattur when two of the arbitrators privately examined three of the plaintiff's witnesses. It is not clear how long this was before the parties signed the award and the appellant executed the hundi in pursuance of the award. But it is in evidence that the Pallattur incident took place some 10 or 15 days before the mother of the two parties was examined by the arbitrators, and this latter examination appears to have been made some days before the arbitrators gave their award. The plaintiff who was examined as P. W. 1 gave the following evidence upon the Pallattur incident:

> "When the arbitrators came here and examined, I accompanied them. I specified the persons whom they should examine. I know that they went to the persons whom I suggested and examined them. They were staying in A. M. P's house. We asked Arunachalam Chettiar, Somu Govindan Chettiar and his elder brother. The three arbitrators (that is, wrongly for only two were present) my younger brother (i.e., appellant) and myself were present .... When they were talking my younger brother and myself remained aloof. We did not hear what they spoke. I do not know whether or no my younger brother suggested any persons who should be asked."

P. W. 2, one of the arbitrators, in his evidence, says (p. 37):

> "I remember the persons examined (naming them). We merely asked them orally, as it

(12) A. I. R. 1929 P. C. 103=115 I. C. 713=56 I.A. 128=56 Cal. 1048 (P.C.).
(13) A. I. R. 1923 P.C. 66=73 I. C. 436=50 I.A. 324=47 Bom. 578.
(14) 3 K. & J. 66.
(15) [1922] 1 K.B. 640=91 L. J. K. B. 432=126 L. T. 409=26 Com. Cas. 287.

was the custom among Chettiars not to record in writing as it is done in Court. We used to take them in private and to ask them privately without the hearing of the parties. Except the said three persons we did not ask any other. . . . . It took us three hours to examine those three persons."

And then (p. 38) he explains the difference between that examination and the subsequent examination of the parties mother by saying: "Unlike in Pallattur, the mother was examined by us in the presence of the parties." This witness also said that the appellant did not ask the arbitrators to examine any particular witness, and that on the three or four occasions when the arbitrators met the parties were present and were heard in the presence of each other. According to the appellant's evidence he had no knowledge of the arbitrator's visit to Pallattur until they were on the point of departure. He says:

"I saw them only just when they were starting on their return journey. They had not informed me of their visit. I told them that I had witnesses and I asked them to examine them. They said they knew everything and went away."

And he says further that he did not know whether the arbitrators came to Pallattur at plaintiff's request or whether plaintiff brought them there.

Now the appellant was admittedly at Pallattur on this occasion, and I think it is a reasonable inference that he was present because he knew that the arbitrators were there on the business of the arbitration. It is impossible to believe that the appellant, who is a man of affairs and was obviously deeply interested in the arbitration, would not have made a point of being present when the arbitrators went to inspect the property which was the subject-matter of the reference. P. W. 2 says that both parties were present on all the occasions when the arbitrators met and I think that this evidence gives support to what the plaintiff has testified, that the appellant was present on the occasion of the examination of the plaintiff's witnesses. P. W. 2 denies the appellant's story that he asked the arbitrators to examine witnesses on his behalf, and as the appellant has been discredited by the learned Sub-Judge in other material parts of his story, I prefer to accept the evidence of P. W. 1 and P.W. 2 as to what took place at Pallattur. Then if he was present, as I think he was, during the examination of the plaintiff's witnesses by the arbitrators he must have known what was taking place, and he could have, had he wished, objected to the private examination of the witnesses and have insisted upon the witnesses being examined in his presence. That he raised no protest or objection suggests that the appellant passed over the irregularity of the arbitrators.

I am the more inclined to this view by his subsequent conduct. It is true that in Ex. 4, the lawyer's notice which he sent to the arbitrators on 2nd May, four days after he had signed the award, there is a complaint that the arbitrators "consulted only the direct opponents of the said Alagappa Chettiar and yield to their evil advice." This might conceivably be taken as a reference to the private examination of the plaintiff's witnesses at Pallattur, though in his cross-examination (p. 49) the appellant could only point to one of the three witnesses as having any ground for the enmity towards him. But in Ex. 6 the lawyer's notice which was sent to plaintiff on 1st July, and which may be regarded as the appellant's considered and deliberate case against the award, there is no mention whatever of misconduct by the arbitrators in examining witnesses for the plaintiff without the knowledge or presence of the appellant. Nor was it part of his case in his written statement, for it would be unreasonable to my mind to put any other construction upon para 4 (c) of the written statement than which the learned Sub-Judge put upon it.

In my opinion therefore the irregularity took place in the presence of the appellant and was passed over by him, and he cannot now be allowed to assail the award on that ground.

Upon the other matters raised in the appeal I agree with the conclusions of my learned brother, and do not wish to add anything to what he has said.

P.R.S./B.V. *Appeal dismissed.*

*A. I. R. 1931 Madras 626

MADHAVAN NAIR, J.

Venkata Kumara Mahipathi Surya Rao Bahadur Garu—Plaintiff.

v.

Gokuldoss Goverdhandass and *others*—Defendants.

Civil Suit No. 229 of 1924 (Applications Nos. 860 of 1930 and 244 of 1931), Decided on 3rd March 1931.

(a) Mortgage—Mortgagee procuring appointment of receiver in mortgage suit is entitled to income from mortgaged properties in receiver's hands in preference to assignee—Civil P. C. (1908), O. 40, R. 1.

A mortgagee who is not entitled to possession of the mortgaged properties is entitled to ask for the appointment of a receiver. Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver if the demands of justice require that the mortgagor should be deprived of possession: *A. I. R.* 1929 *Mad.* 138 ; 12 *I. C.* 165 and 47 *Cal.* 418, *Ref.* [P 627 C 2]

***(b) Civil P. C. (1908), O. 40, R. 1—Receiver in mortgage suit must make over income of the property towards mortgage dues in preference to assignee.**

The possession of a receiver in a mortgage suit is prima facie for the benefit of the party who obtained the appointment. On this principle a receiver who is appointed at the instance of the mortgagee holds the properties for his benefit alone and is bound to make over the entire income to the satisfaction of his dues in preference to the assignee: 47 *Cal.* 418, *Foll.* [P 628 C 1]

A. Krishnaswami Ayyar, Advocate-General, M. Subbaraya Ayyar and *T. V. Viswanatha Ayyar*—for Petitioner.

S. Doraiswami Ayyar and *V. Balaraman*—for Respondent 3.

C. Krishnaswamy Aiyar—for Official Assignee.

Judgment.—These two applications relate to the same subject-matter, that is, a sum of Rs. 6,218-14-3, standing to the credit of C. S No. 229 of 1924. representing the income from the mortgaged properties involved in that suit other than Misquith Buildings and Cathedral Gardens. In the one, the receiver is asked to deposit the amount in Court and in the other, that is, Application No. 244 of 1931, request is made that the same sum be paid over to the plaintiff in the suit, the Maharaja of Pithapuram who is the petitioner in both the applications. The Official Assignee of Madras and the plaintiff in C. S. No. 622 of 1923 oppose these applications.

The facts necessary for the disposal of these applications may be stated very briefly as follows: One Goculdoss, manager of a joint Hindu family, trading under the style of Murlidoss Ramdoss & Co., effected on behalf of the firm an equitable mortgage by depositing title-deeds of ten items of properties with the petitioner, the Maharaja of Pithapuram, and borrowed from him a sum of Rs. 3,85,000 in the year 1922. For the recovery of the principal and interest due under this mortgage the Maharaja filed a suit, C. S. No. 229 of 1924, on 27th March 1924. In the meanwhile defendant 3 in the suit, a minor, had already filed C. S. No. 622 of 1923 against the other members of the firm for partition of the joint family properties. For disposing of these applications it is not necessary to state anything about the contentions of the parties in these suits.

The suits were eventually decreed and appeals against the decrees are now pending in the appellate Court. In C. S. No. 622 of 1923, the partition suit, Mr. E. R. Krishnan, an advocate of this Court, was appointed on 31st August 1923 receiver of all the properties alleged to belong to the joint family of Messrs. Murlidoss Ramdoss & Co., including the properties mortgaged to the plaintiff in C. S. No. 229 of 1924. Subsequently the firm was adjudicated insolvents in 1924 and the Official Assignee was impleaded as its legal representative. The receiver appointed by the Court continued in possession of the properties. On 18th July 1927 the petitioner (plaintiff in C. S. No. 229 of 1924) made an application for the appointment of an independent receiver for the properties mortgaged to him ; but it would appear the learned Judge took the view that an independent receiver was unnecessary and that the plaintiff's interest could be safeguarded by directing the receiver in C. S. No. 622 of 1923 to keep a separate account of the income of the properties mortgaged to him and this was accordingly ordered on 25th July 1928. The receiver was also directed that none of the income from these properties should be spent in giving the maintenance allowed to the plaintiff in C. S. No. 622 of 1923. The petitioner again filed on 23rd April 1929 another application (Application No. 1524 of 1929) for the appointment of a receiver for the properties mortgaged to him. Both the

suits were tried together by Venkatasubba Rao, J. On 2nd May 1929 a mortgage decree was passed in favour of the petitioner (plaintiff in C. S. No. 229 of 1924) for Rs. 7,00,000 odd and for the sale of all the items of mortgaged properties except Cathedral Gardens and Misquith Buildings; and on the same date the learned Judge appointed Mr. E. R. Krishnan (the receiver in C. S. No. 622 of 1923) and Mr. P. Kameswara Rao, an advocate, as joint receivers of the mortgaged properties for the sale of which the petitioner had established his right in the suit. The sum now in the hands of the receiver is stated to be the income from those properties realized subsequent to the date of the decree. The mortgaged properties except Cathedral Gardens were sold and were purchased by the petitioner himself. The affidavits state that only a sum of three lakhs odd were realized by the sale.

The petitioner now claims that the income realized from the mortgaged properties should in law be treated as additional security for the amount found due to him under the mortgage inasmuch as the receiver was appointed at his instance in his mortgage suit, and as such the income from the said properties should be considered to be ear-marked for his own use, it now having been found that his title to those properties has been established by the decree. His argument is that the possession of a receiver in a mortgage suit is prima facie for the benefit of the party who obtained the appointment and on this principle he argues that the receiver who was appointed at his instance holds the property for his benefit and is bound to make over to him the entire income for the satisfaction of his dues. The Official Assignee on the other hand contends that with regard to this income the petitioner has no preferential rights and that his rights to it are only the same as those of the ordinary creditors. The question for decision is, which view is right. If the petitioner's contention is to be upheld he will be entitled to an order for the payment of the sum in question to him.

Admittedly the rights of the petitioner who is an equitable mortgagee are the same as those of a simple mortgagee, that is, he is not entitled to the possession of the properties under his mortgage; he can realize his dues only by getting a decree for selling them. In England it is well understood that an equitable mortgagee, though he is not entitled to take possession of the mortgaged properties, has the right to ask for the appointment of a receiver. In *In re Crompton & Co. Ltd.*, *Player* v. *Crompton & Co. Ltd.* (1). Warrington, J., observes at p. 967 :

"I think the right to the appointment of a receiver is one of the ordinary rights which accrue to a mortgagee, and especially to an equitable mortgagee who has no means of taking possession and to whom security has become realizable as one of the steps in such realization : see also Kerr. on "Receivers" p. 37."

For some time there was some doubt in this Court as to whether a simple mortgagee is entitled to ask for the appointment of a receiver in his mortgage suit. It was held in *Ethirajalu Chetty* v. *Raj Gopala Chari* (2) that the right to the appointment of a receiver which an equitable mortgagee has may be extended to a simple mortgagee also. The fact that he is not entitled to have possession of the properties which was urged as an objection against his claim to the appointment of a receiver cannot be considered as of any importance having regard to the reasons for the appointment of a receiver. As pointed out in *Khubsurat Koer* v. *Saroda Charan Guha* (3) :

"If the decree is for sale and if it is established that the security is not sufficient to satisfy the judgment-debt, a receiver will be appointed as a matter of course, specially if there has been default in the payment of interest."

In *Rameshwar Singh* v. *Chunni Lal* (4) Mukerjee and Panton, JJ., observed :

"There is no foundation for the contention that a mortgagee who is not entitled to possession of the mortgaged properties is not entitled to ask for the appointment of a receiver. Whether the mortgagee is or is not entitled to possession, he may invite the Court to appoint a receiver, if the demands of justice require that the mortgagor should be deprived of possession."

If the object of appointing a receiver in a mortgage suit is to look after the interests of the mortgagee, though he is only a simple mortgagee is he not entitled to claim that the profits of the

(1) [1914] 1 Ch. 954=83 L. J. Ch. 666=110 L. T. 759=21 Manson 200=58 S. J. 433.
(2) A. I. R. 1929 Mad. 138=115 I. C. 244=52 Mad. 979.
(3) [1911] 12 I. C. 165.
(4) [1920] 47 Cal. 418=56 I. C. 839.

mortgaged properties should be applied for his benefit when his security has become realizable, as one of the steps for such realization? This point was considered in *Rameshwar Singh* v. *Chunni Lal* (4) which I have already referred to. In that case a receiver was appointed in a mortgage suit instituted by a simple mortgagee. The second mortgagee of the same properties was a party to the suit. The first mortgagee obtained a decree for the amount claimed by him. Meanwhile the second mortgagee who had a mortgage of only half of the property had instituted a suit to enforce his security without joining the first mortgagee as a party. He obtained a decree and in execution of it he purchased the equity of redemption in relation to his mortgage. On an application made by him the income of the property purchased by him in the hands of the receiver was ordered in spite of the opposition of the first mortgagee to be handed over to him by the Subordinate Judge of Dacca. This order was set aside in appeal. In the course of the judgment Mukerjee and Panton, JJ., observed as follows:

"Our attention has been invited to the case of *Penny* v. *Todd* where it was ruled that the possession of a receiver in a mortgage suit was prima facie for the benefit of the party who had obtained the appointment. On this principle it has been argued that a receiver who was appointed at the instance of the first mortgagee holds the properties for his benefit alone and is bound to make over the entire income to the satisfaction of his dues. In our opinion this contention is clearly well founded."

This decision is a clear authority in support of the contention urged by the learned Advocate-General on behalf of the petitioner. If according to this decision the receivers in C. S. No. 229 of 1924 are to be considered as having been appointed for the benefit of the petitioner at whose instance they were appointed then it must follow that the income in their hands from the mortgaged properties should be devoted to the satisfaction of his dues. I may here refer to para 6 of the order of the learned Judge appointing the receivers which is somewhat significant. It states subject to certain expenses the receivers "shall pay the net receipts into Court to the credit of this suit." (i.e., C. S. No. 229 of 1924). In *Khubsurat Koer* v. *Saroda Charan* (3). Mukerjee, J. observes thus:

"If a receiver is appointed in a mortgage suit he is bound to apply the proceeds for the benefit of the mortgagee."

In High on "Receivers" in para 643 it is stated that a mortgagee who procures a receiver to be appointed in a mortgage suit is entitled to the income from the mortgaged properties in the hands of the receiver in preference to the Assignee. This statement of law is very relevant to the present proceedings as objection to the payment of the money is here raised by the Official Assignee. The passage in which the statement of law is made runs thus:

"When therefore a mortgagee, upon proceedings for a foreclosure, obtains a receiver of the rents and profits, if the amount obtained upon a sale of the premises proves insufficient to pay the mortgage indebtedness, he is entitled to so much of the rents in the receiver's hands as will make up the deficiency. And this is so, even though the mortgagor's rights in the premises have passed to his assignee in bankruptcy, and have been sold by him; since the mortgagee, who procures a receiver to be appointed for the protection of his lien, is entitled to the rents in preference to the assignee or purchaser at his sale."

These authorities would show that the learned Advocate-General's contention that the petitioner is entitled to the payment of the amount claimed should be accepted. Since the receiver in this case was appointed at the instance of the petitioner and since he was not able to realize his decree amount by the sale of the mortgaged properties it must be held that he is clearly entitled to proceed against the income in the hands of the Official Receivers as one of the steps for realization of his security.

Mr. Duraiswami Aiyar frankly concedes that the decision in *Rameshwar Singh* v. *Chunni Lal* (4) is against him, but he argues that the decision is wrong and the principle of the English decision which grants the right to an equitable mortgagee to proceed against the income of the mortgaged properties in the hands of the receiver for realizing his debt when the security is insufficient should not be extended to the case of a simple mortgagee in India who does not possess the right of foreclosure which an equitable mortgagee has in England. I do not think this is a sound contention. If this is the correct principle to be applied then it must also follow that a simple mortgagee is not entitled to the right of appointment of a receiver in a mortgage suit but this I have already shown is not the case. It is true that a simple mort-

gagee has no right of foreclosure; but in my opinion it has not been established that there is any connexion between the right of foreclosure and the right of getting a receiver appointed and the right of appropriating the income in the hands of the receiver, in the case of an equitable mortgagee. As already pointed out, a receiver will be appointed if the demands of justice require that the mortgagor should be deprived of possession. In this connexion it may be observed that the right of foreclosure, possessed by an equitable mortgagee, so much emphasized by Mr. Duraiswami Aiyar in his argument, is a right enforceable only by means of an action for the recovery of land; he cannot take actual possession of the land mortgaged to him as he is not entitled to it (see Coote, Vol. 2, p. 823) and in this respect he is exactly in the same position as a simple mortgagee. The right of an equitable mortgagee to get a receiver appointed in a mortgage suit having been extended to a simple mortgagee, neither of them having any right to possession of the properties, I think his admitted right to proceed against the income of the mortgaged property in the hands of the receiver for realizing his debt when the security is insufficient for that purpose may also be extended to the case of a simple mortgagee in India. In my opinion the authorities cited by Mr. Duraiswami Aiyar, *In re Potts Ex parte Taylor* (5), *In re Pearce, Ex parte the Official Receiver* (6) and *In re Gershon and Levy* (7), do not support the principle on which he has based his contention.

For the above reasons I order the receiver to deposit the sum of Rupees 6,218-14-3 in his hands to the credit of C. S. No. 229 of 1924 and I also order that the same amount may be paid over to the petitioner in these applications. The petitioner is entitled to his costs (taxed costs) from the estate of the insolvents.

P.R.S./K.N. *Order accordingly.*

(5) [1893] 1 Q.B. 648=62 L. J. Q. B. 392=4 R. 205=69 L.T. 74=41 W.R. 337=10 Morrel 52.
(6) [1919] 1 K. B. 354=88 L.J.K.B. 367=120 L. T. 334=(1918-19) B. & Cr. 131.
(7) [1915] 2 K. B. 527=84 L.J.K.B. 1668=1915 H. B. R. 146=59 S. J. 440.

* A. I. R. 1931 Madras 629

CURGENVEN AND BHASHYAM AYYANGAR, JJ.

C. Kannammal and *others*—Plaintiffs—Appellants.

v.

Kanakasabai Mudaliar and *another*—Defendants—Respondents.

Civil Appeals Nos. 30 and 31 of 1927, Decided on 13th November 1930, against decrees of City Civil Judge, Madras, in Original Suits Nos. 428 and 429 of 1926.

(a) Madras City Tenants' Protection Act (1922), S. 2—Shed for firewood is "building."

The sheds used for firewood business are comprised in the definition of building. [P 630 C 1]

*** (b) Interpretation of Statutes—Before restricting scope of Act by terms of preamble, Court must be satisfied that legislature intended that scope should be so restricted—Madras City Tenants' Protection Act cannot be thus restricted only to apply to tenants who can establish that they constructed buildings with hope that they would not be evicted so long as they pay fair rent—Madras City Tenants' Protection Act (1922), preamble.**

The terms of a preamble may be resorted to in two classes of cases. The first class is where the text of the statute is susceptible of different constructions and the second class is where very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply. But before restricting the scope of an Act by the terms of its preamble the Court must be satisfied that there was an intention on the part of the legislature that its scope should be so restricted, and in fact, that the legislature would have agreed, had the point been so put, that the passage relied upon in the preamble should form part of the text of the Act. The text of the City Tenants' Protection Act should not be construed subject to the preamble so as to restrict the scope of the Act only to the tenants who can establish that they constructed their buildings in the hope that they would not be evicted so long as they pay a fair rent: 7 *M. I. A.* 72; 14 *Bom.* 387 and 11 *All.* 262, *Rel. on.* [P 630 C 1, 2; P 631 C 1]

K. Bhashyam Ayyangar and *S. Ramachandra Ayyar* for *K. S. Krishnaswami Iyengar*—for Appellants.

S. Balasinga Satya Nadar—for Respondents.

Curgenven, J.—The plaintiffs are common to the two suits out of which these appeals arise, separate defendants being sued in ejectment. The defendants pleaded the provisions of the City Tenants' Protection Act and the learned City Civil Judge has accepted this plea and dismissed the suits. The plaintiffs therefore appeal. In each case a rental agreement was executed in 1921 for a term of five years, the lessee undertaking at the

expiry of that time to deliver vacant possession to the plaintiffs. The evidence shows that the sites were used as firewood depots and the case of each defendant is that there was a building on the suit land long before the date of the rental agreements. Whether or not therefore the undertaking to deliver up the land as received by the tenant be held to amount to such a stipulation as is provided for by S. 12 of the Act as to the erection of buildings, that provision, it is contended, cannot apply to the facts of the present cases. The evidence that there were buildings on the land before the execution of the leases is in our view quite incontestable, but it is unnecessary to discuss it because the plaintiffs' witnesses themselves speak of it. We agree with the lower Court in being unable to accept their story that the buildings were removed immediately before the agreements were executed and re-erected afterwards. The only reason suggested is that the Act was then in prospect, but the evidence itself is interested, uncorroborated and seems clearly designed to escape the provisions of the Act. So far as appears, the firewood business continued uninterruptedly and there is no reason therefore to suppose that the sheds used in connexion with it were taken down and put up again. S. 12 cannot therefore in our view have any application. Nor in view of the very wide definition of "building" which the Act contains are we able to say that the sheds are not comprised in that term.

The question has been raised whether in cases of this class, where the building is of so inexpensive a description, recourse may be had to the terms of the preamble to the Act in order to deprive the defendants of its protection. The preamble opens as follows:

"Whereas it is necessary to give protection to tenants who in many parts of the city of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land."

It is argued that it is only tenants who can establish that they constructed their buildings in the hope alluded to whom the legislature intended to protect by this special enactment. Now it is well settled that the terms of a preamble may be resorted to in two classes of cases. The first class is where the text of the statute is susceptible of different constructions, and it has not been suggested that any such difficulty arises here. Apart from such discrepancy as is to be found between the preamble and the text, the Act itself is perfectly clear and straightforward. The second class of cases is thus described by Craies, Edn. 3, p. 183:

"If very general language is used in an enactment, which it is clear must have been intended to have some limitation put upon it, the preamble may be used to indicate to what particular instances the enactment is intended to apply."

That is to say, that in some cases it may be permissible to control the scope of the enactment by the terms of the preamble. The text-writer goes on to cite two English cases in which such a course was adopted. The first was that of *L'Apostre* v. *Le Plaistrier* (1708) cited in *Copeman* v. *Gallant* (1), where the preamble showing that the statute related to the goods of bankrupts, a reference in the body of the Act to any goods or chattels was construed as restricted to the bankrupt's property. So in *Brett* v. *Brett* (2), where the preamble only professed to deal with "wills and codicils," devising real estate, the expression "any will or codicil," whenever used in the Act, was held to mean only a will or codicil which devised real estate. On the same principle, where the title of the Act showed that it related only to elementary schools, references to schools in the body of the Act were held in *Rex* v. *Cockirton* (3), to mean elementary schools. It may be said that cases such as these also depend upon the existence of an ambiguity, although it is not the meaning of the Act itself which is doubtful but of the Act when read with the title or preamble, and where the enactment is sufficiently explicit of itself it may not be permissible to look into the preamble in order to obtain a gloss upon it. There can be no doubt indeed that many instances could be found of the text of an Act going beyond its preamble. This was recognized in *Nga Hoog* v. *The Queen* (4). In *Ganesh Krishnaji* v. *Krishnaji* (5), it was held that the Dekkhan Agriculturists' Relief Act, although so styled, and although the

(1) [1716] 1 P. Wms. 314.
(2) 162 E. R. 456.
(3) [1901] 1 Q. B. 726=70 L. J. K. B. 441=84 L. T. 488=49 W. R. 433=65 J. P. 435=17 T. L. R. 402.
(4) [1857-59] 7 M. I. A. 72=4 W. R. 109.
(5) [1890] 14 Bom. 387.

preamble showed that the Act was intended only for the relief of agriculturists, yet made provision in S. 3 for certain suits not relating to agriculturists. Similarly, in *Queen-Empress* v. *Indarjit* (6), the Workmen's Breach of Contract Act (13 of 1859) was held to have a wider scope than the language of its preamble would show.

It is, I think, indisputable that before restricting the scope of an Act by the terms of its preamble the Court must be satisfied that there was an intention on the part of the legislature that its scope should be so restricted and, in fact, that the legislature would have agreed, had the point been so put, that the passage relied upon in the preamble should form part of the text of the Act. It is not open to the Court to speculate regarding the intentions of the legislature or to frame its decisions in conformity with what it would itself have done had it been legislating. Now in the present instance, if the preamble had declared it necessary to protect a certain clearly defined class of tenants, it might be reasonable to hold that, although the text is silent, there was an intention so to restrict it; though even then the meaning of the Act would not be so clear as if the restriction had appeared in the body of it. But the expression

"tenants who in many parts of the city of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land"

is as far as possible from defining a class, and I think it very doubtful whether any legislature can have intended to impose on the Courts the difficult, if not impossible, duty of deciding on the presence of such an attitude of mind. Nor would it be in any degree usual to make such an attitude of mind a test of the possession of legal rights. It seems to me more probable that the Act was passed in its wide terms because they were the only workable terms, and in the hope that it would approximately remedy the existing evils and hard cases would be few. While therefore it can hardly be doubted that the Act must sometimes work hardship upon landlords, I do not think it is permissible to give them relief by recourse to this method of construction. I must accordingly hold that the defendants could claim the benefit of the Act and that the plaintiffs failed to comply with its terms as regards notice. The appeals are accordingly dismissed with costs.

(6) [1889] 11 All. 262=(1889) A. W. N. 85.

Bhashyam Ayyangar, J.—I wish to add a few words on the Madras City Tenants' Protection Act, which has come in for construction in these cases. It is an exclusively retrospective enactment as it applies only to tenancies created before its commencement. Its preamble shows that the legislature set about it

"to give protection to tenants who in many parts of the city of Madras have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land."

But it is found that the actual provisions of the Act are far too wide and unqualified. Before proceeding to consider them the following definitions of building, land and tenant given in the interpretation clause, that is, S. 2 have to be stated:

"Building includes a house, outhouse, stable, latrine, shed, hut and any other such structure, whether of masonry, bricks, wood, mud, metal or any ether material whatsoever."

"Land does not include buildings";

"Tenant means tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy."

Now going to the body of the Act its important sections are only Ss. 3, 9 and 12. The other sections are either immaterial for our present purpose or are merely subsidiary. The effect of Ss. 3, 9 and 12 may be summarized thus: except in cases where a tenant of land has first bound himself by stipulations in writing registered as to the erection of buildings and then erected the building (S. 12), every tenant of land who has erected a building on it and whom the landlord seeks to eject from the land shall have the right to recover compensation equal to the value of the building (S. 3), or, at his option, the right to acquire the land from its owner for the lowest market value it bore within the next preceding seven years (S. 9). It is noteworthy that these provisions stand absolutely unqualified. The area of the land, the period or the avowed purpose of the lease, the size or character of the building put up by the tenant, none of these or similar considerations are made to count for anything. Even if the tenant had erected the building without or against the consent of the landlord the Act would

appear to permit the former to acquire the land through its instrumentality. The landlord might have himself paid much more for the land than its minimum market value during the next preceding seven years, still he could recover no more than that minimum from the tenant for parting with his property. I found it hard to believe that the provision in S. 9 which is capable of working so much injustice and hardship on the landlord and which so partakes of the nature of expropriation could have been intended to apply to all tenancies of land created before the Act. I was accordingly inclined during the hearing to the view that its application should be confined to the class of cases contemplated in the preamble, that is, to cases where the tenant put up his building under circumstances from which it may reasonably be inferred that he did so in the hope or expectation that he would not be evicted from the land so long as he paid a fair rent for it. But on subsequent consultation with my learned brother as to how far the preamble of an Act can be held to confine the scope of its express provisions and having regard to the vagueness of the preamble in question I am not sure that the view entertained by me is free from doubt. On the footing that the text of this Act cannot be read subject to its preamble the view taken by my learned brother in the judgment just pronounced is, if I may say so with respect, unexceptionable. I accordingly agree with the order made by him though still not without some hesitation.

P.R.S./S.N. *Appeals dismissed.*

A. I. R. 1931 Madras 632

RAMESAM, J.

Napu—Defendant—Appellant.

v.

San Bibi and *others*—Plaintiffs—Respondents.

Second Appeal No. 462 of 1929, Decided on 8th January 1931, against decree of Dist. Judge, Coimbatore, in A. S. No. 227 of 1926.

(a) Practice—Abandonment of plea—Pleader not arguing point but merely observing that he does not press it though he does not abandon it—If point involves question of fact, it cannot be re-argued in appellate Court.

Where the pleader does not seriously argue a point but contents himself with the observation that he does not press it though he does not abandon it, if the question is of law, it can be re-argued in the appellate Court, but if it involves a question of fact and one does not press it, merely saying that he does not abandon it is of no avail. [P 633 C 2]

(b) Limitation Act (1908), S. 14—Plaint returned once for amendment and again for presentation to proper Court—Time thus spent excluded while computing limitation—High Court did not interfere in second appeal—*Obiter*.

Obiter—Where plaint was returned firstly to have it amended and secondly for presentation to proper Court, and the trial Court while computing limitation period excluded both the periods, High Court did not interfere in second appeal with the discretion exercised by the trial Court: 23 *Mad.* 621;45 *I. C.* 460; *A. I. R.* 1922 *Mad.* 417 and *A. I. R.* 1929 *Mad.* 865 (*F. B.*), *Dist.* [P 634 C 1]

T. R. Ramachandra Ayyar and *S. Srinivasa Ayyar*—for Appellant.

M. Krishna Bharathi, *V. C. Seshachhariar* and *V. Balasundaram Ayyar*—for Respondents.

Judgment.—The facts out of which this second appeal arises may be thus stated. One Ali Saheb died on 20th February 1912 leaving him surviving his widow Kathi Bibi and three daughters, Rahimat Bibi, Asmath Bibi (defendant 1) and San Bibi (the plaintiff). The record does not show when Rahimat Bibi died, but it is immaterial. Her son is defendant 5. The plaintiff brought this suit for partition and recovery of her share of her father's properties alleging that defendant 2, husband of her sister Rahimat Bibi, trespassed upon the properties in 1917. The suit was originally filed in the District Munsif's Court of Udumalpet on 24th July 1918. On 20th October 1919 the Munsif returned the plaint for amendment on the ground that it was bad for partial partition. The plaint was re-presented in the same Munsif's Court on 20th February 1924, with the old court-fees plus some additional court-fees and with some amendments. The District Munsif again returned the plaint on 28th October 1924 for presentation to the proper Court. The next day, i. e., 29th October 1924, it was filed before the Subordinate Judge of Coimbatore by whom it was tried and decreed. There was an appeal by defendant 2 to the District Judge of Coimbatore who dismissed the appeal. The present appeal is by defendant 2.

The point argued before me is that the suit is barred by limitation. Before I deal with the argument on this question, a few further facts will have to be

stated. Defendant 2's plea on the merits was that Kathi Bibi took possession of all Ali Saheb's properties in satisfaction of the mahar of Rs. 7,500 due to her and was enjoying them as absolute owner from the time of Ali Saheb's death and that the properties were given by her to him in 1917. The plea of limitation was made the subject of issue 1. Issue 6 raises the question:

"Is the gift by Kathi Bibi valid and true and if so binding on the plaintiff ?"

The learned Subordinate Judge in dealing with issue 6 found that the gift relied on by defendant 2 is false, that the plaintiff has been living in item 5 after the death of her father and was getting the income from her mother and that all the daughters received their share in rent. He also found that there is no evidence that Kathi Bibi entered into possession as full owner or that she enjoyed the whole estate absolutely and adversely to the heirs. This finding amounts to saying that Kathi Bibi's possession was not adverse to the heirs but that that was only as co-owner. On issue 1, he also found that the time taken by the plaintiff between 24th July 1918 and 20th October 1919 in the District Munsif's Court of Udumalpet and again between 20th February 1924 and 20th October 1924 should be excluded and therefore the suit is not barred. He also observed that the suit being within 12 years of the death of the widow Kathi Bibi also no question of limitation arises. In para. 15 he says that the mother was in joint possession with the daughters of some property and leased it.

In appeal before the District Judge the learned advocate for defendant 2, Mr. C. S. Sambamurthi Iyer, again mentioned the question of limitation. It is now clear after the finding of the Subordinate Judge, that any advocate who wants seriously to argue the question of limitation before the appellate Court has to argue it on two grounds: first, that the time taken up on two occasions before the District Munsif's Court of Udumalpet ought not to be excluded and secondly, apart from that, Kathi Bibi's possession was adverse to the plaintiff and that somehow the cause of action for the plaintiff arose not at some later date after Ali Saheb's death as found by the Subordinate Judge, but the date of the death of Ali Saheb himself. It is impossible to imagine that the advocate can successfully argue the former point, but in the present case it seems to me that the latter point is almost impossible of argument, because it is found not only by the Subordinate Judge but also by the District Judge in other parts of his judgment in dealing with the merits on other issues that defendant 2 in a litigation of 1925 admitted that the other daughters were entitled to shares. Now the importance of this observation lies in this, namely, that Mr. Sambamurthi Iyer never seriously argued the question of limitation before the District Judge who says:

"The learned vakil for the appellant has not argued this question, contenting himself with the observation that he does not press it though he does not abandon it."

If it is a mere question of law that has to be argued, a statement of this kind no doubt may enable the point to be re-argued in the appellate Court. But if it involves a question of fact and one does not press the point, merely saying that he does not abandon it is of no avail and as already observed, the facts are scarcely capable of being denied. In my opinion up to 1917 Kathi Bibi's possession was that of a coheir and all the heirs of Ali Saheb must be regarded as in possession. In fact the Subordinate Judge expressly found that the other daughters were even getting rent. It is true that because the plaintiff had alleged dispossession she must show prior possession within 12 years of suit. But I think on the findings of the Subordinate Judge which were not attacked before the District Judge, the reservation being useless the plaintiff has successfully shown that she was in possession up to 1917, that is within 12 years of suit. In this view of the case the other question, namely, whether the time taken twice before Munsif's Court should be excluded does not arise. I may however observe that the cases cited on this point by Mr. T. R. Ramachandra Iyer, the learned advocate for the appellant, namely, *Murugesa Mudaliar* v. *Jattaram Davy* (1), *Vidhyatheerthaswamigal* v. *Venkatarama Iyer* (2), *Ganapathi Mudaliar* v. *Krishnamachari* (3)

(1) [1900] 23 Mad. 621.
(2) [1917] 45 I. C. 460.
(3) A. I. R. 1922 Mad. 417=70 I. C. 743.

and *Narayana Sah* v. *Sankar Sah* (4), are all distinguishable and in my opinion do not apply to the facts of this case, and the lower Court having exercised its discretion in favour of excluding those periods I am not inclined to interfere with that discretion in second appeal. The second appeal fails and is dismissed with costs of plaintiff.

This second appeal coming on for further hearing this day as directed regarding the contentions of respondents 4 to 6 (defendants 6 to 8) the Court delivered the following:

Judgment.—Respondents 4 to 6 (defendants 6 to 8) claim their share viz., 1/72nd for each or 1/24th for all the three. They now pray for a decree to be passed in their favour on their paying the court-fee. A similar decree was passed for respondent 2 by the District Judge. These parties perhaps did not make such a request by oversight. But I do not see any objection to the passing of the decree prayed for. The appellant's advocate has not been instructed either to agree or to oppose. There will be a decree for 1/72nd share in favour of each of respondents 4, 5 and 6, but there will be no order as to costs.

P.R.S./S.N. *Appeal dismissed.*

(4) A. I. R. 1929 Mad. 865=121 I. C. 1=53 Mad. 1 (F. B.).

A. I. R. 1931 Madras 634

SUNDARAM CHETTY, J.

(*Vatakee Neelamana Illoth*) *Iswaran Nambudiri* and *others*—Defendants—Appellants.

v.

(*Vatakee Neelamana Illoth*) *Vishnu Nambudri* and *others*—Plaintiffs—Respondents.

Second Appeal No. 1521 of 1927, Decided on 13th November 1930, against decree of Dist. Judge, North Malabar, in A. S. No. 393 of 1925.

Malabar Law—Tarwad—Question whether property standing in junior member's name is joint property or that member's self acquisition — Whether presumption should be drawn in favour of property being joint property or not would depend upon circumstances of each particular case.

In deciding the question whether a particular property is the joint property of a tarwad or the self-acquisition of a junior member of the tarwad, there is no presumption of law either way. The presumption is one of fact and whether it should be drawn in favour of the property being tarwad property or not in any particular cases would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, possession of private means by the junior member, the existence of any family funds at the time of the acquisition which disappeared after the acquisition and any other facts that may throw light on the source of the money used for the acquisition : 36 *Mad.* 304, *Foll.* ; 33 *Mad.* 250 and 3 *Mad.* 141, *Expl.* ; 60 *I. C.* 77 and 38 *I. C.* 292, *Rel. on.* [P 635 C 2]

P. Govinda Menon—for Appellants.

O. T. Govindan Nambiar—for Respondents.

Judgment.—Defendants 6 to 9 and 13 are the appellants. This second appeal arises out of a suit brought by the plaintiff who is a junior member in a Nambudri illom for the recovery of a certain sum of money alleged to be due as arrears of maintenance. In deciding the matters relating to the plaintiff's claim for maintenance it became necessary to decide whether certain properties covered by Ex. 14 should also be treated as the properties of the tarwad for the purpose of determining the proper amount of maintenance awardable to plaintiff. There is no doubt that these properties were purchased in the name of defendant 1 when he was a junior member of the illom and during the period of his father's term of karnavanship. Some time after the acquisition, these properties were gifted by defendant 1 to his sons, the present defendants 6 to 9. On the plaintiff's side, it is contended that these properties though they were purchased in the name of defendant 1 are really the properties of the tarwad, whereas on behalf of defendants 6 to 9, it is contended, that they were the self-acquisitions of defendant 1. The learned District Judge has found that the properties in question are the properties of the tarwad and as such should be taken into consideration for determining the amount of maintenance due to the plaintiff. As against this finding, the present second appeal has been filed.

It is argued on behalf of the appellants, that the lower appellate Court was not correct in applying to the present case the rules of presumption applicable to an ordinary joint Hindu family, and on account of the erroneous view taken by that Court in the matter of applying the presumption of law, the finding should be deemed to be vitiated. The question for consideration is, whether in the case of a tarwad, the pre-

sumption is just like the one applied to an ordinary Hindu family or whether there is any special presumption which should be applied to an acquisition made in the name of a junior member of a tarwad, so as to throw the burden of proof on the party who sets up that it is tarwad property. It is true that there are some vital differences between a Malabar tarwad and an ordinary joint Hindu family in certain respects, that is, as regards impartibility and inalienability. Though a junior in a tarwad cannot claim partition and separation of his share, he is still entitled to joint enjoyment of the tarwad property, subject of course to some well-known restrictions. As regards the pious obligation of the son to discharge the debt of his father even out of his share of the joint family property, which, of course, exists in an ordinary joint Hindu family it has been held that such an obligation does not exist in the case of a son of any member of the tarwad : vide *Kunhu Kutti Ammah* v. *Mallapratu* (1). In view of the incidents appertaining to a joint Hindu family and those relating to a tarwad, it seems to me that it may not be quite correct to apply the presumption that will hold good in the case of a joint Hindu family, without any reservation, to Malabar tarwad. I at first thought that in the case of an acquisition by a junior member of a Malabar tarwad, the presumption as to self-acquisition would be a little stronger than in the case of an ordinary Hindu family. But the decision in *Mani Veetil Chathu Nair* v. *Veetil Mulamparol Sekaran Nair* (2), lays down that the rules of Hindu law, that if nothing appears in the case except that a member of the joint family is in possession of property, the burden of proving self-acquisition lies on such person applies also to property in the possession of a junior member of a tarwad. It is stated that this rule has been applied in certain earlier decisions of this Court, namely *Vira Rayan* v. *Valia Rani Putia Kovilagam, Calicut* (3), and two other unreported decisions. The well recognized principle of Hindu law applicable to joint Hindu families has been clearly applied to a Malabar tarwad also in *M. V. Chathu Nair* v. *Sekaran Nair* (2). But, in the decision in *Govinda Panikar* v. *Nani* (4), the learned Judges, while observing that the presumption of law laid down in *Vira Rayan* v. *Valia Rani of Putia Kovilagam, Calicut* (3) and two other unreported cases is to the above effect, state that they do not however understand those cases as laying down that there is any presumption of law either way. They explain the position in the subsequent passage which is as follows :

"The presumption is one of fact—see Mayne's Hindu law, paras. 289 to 291, and whether a presumption in favour of the property being tarwad property should be drawn or not in any particular case would depend on various circumstances, such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of any family funds at the time of the acquisition which disappeared after the acquisition, and any other facts that may throw light on the source of the money used for the acquisition."

According to this decision, much importance is not attached to the abstract question of law: "On whom does the burden of proof lie ?" but the facts that are admitted or proved in a particular case should be mainly taken into account in order to apply the rule of law as to presumption. In a later decision *Subramania Pattar* v. *Krishna Embrandevi* (5) Sadasiva Ayyar, J., refers to the decision in *Govinda Panikkar* v. *Nani* (4) and also to the decision in *Dhanu Shetti* v. *Degamma* (6), as authorities for the view that there is no presumption either way. The learned Judge observes that if there is no presumption either way, the plaintiffs coming into Court should prove the facts which would show that their contention is true. An opinion is expressed that as regards the Malabar tarwad, the presumption should be against the tarwad. But this view, as I have stated above runs counter to what is expressed in *Mani Vetil Chathu Nair* v. *Mulamparol Sekaran Nair* (2) and also in the three earlier cases referred to therein. The general trend of all these cases does not negative the application to a tarwad, of the rule of Hindu law as to a joint Hindu family, in the matter of deciding whether a particular item of property claimed to be the self-acquisition of one

(1) [1915] 38 Mad. 527=22 I. C. 546.
(2) [1910] 33 Mad. 250=5 I. C. 143.
(3) [1881] 3 Mad. 141.
(4) [1913] 36 Mad. 304=21 I. C. 211.
(5) [1920] 60 I. C. 77.
(6) [1917] 38 I. C. 292.

member thereof is really his self acquisition or the property of the family. That being so, the main argument of the learned advocate for the appellants that the lower appellate Court was wrong in applying the ordinary rule of Hindu law to the present case cannot be accepted as correct. In my opinion, the view expressed in *Govinda Panikkar* v. *Nani* (4) can be safely followed in deciding questions of this kind.

Now we must see what the outstanding facts established in this case are. As found by the learned District Judge, defendant 1 was in actual management of the affairs of the illom under his father who was too old to take any part in the effectual management of the family. It is true that defendant did not possess any power-of-attorney or muktearnama to entitle him to manage the family affairs. But still he was in de facto management of the affairs though not in his own right but under his aged father. Moreover, the acquisitions in question were all made by defendant 1 during the period of such management. Even granting that if nothing is known, we should say that there is no presumption either way, the aforesaid facts which have been found to be true in the present case give rise to a presumption in favour of the plaintiffs' contention that these properties should have been acquired with the funds of the tarwad. Whether this presumption is strong or slight, it is still perfectly open to the defendants to rebut that presumption in any manner. Whether they have rebutted or not has also been considered by the learned District Judge. Taking the evidence into consideration, he disbelieves defendant 1's version that he had some private funds with which he made these acquisitions. That finding is one of fact and based upon the evidence in the case. The only effectual way of rebutting the aforesaid presumption would be by showing that defendant 1 had some private funds of his own to enable him to acquire these properties. That proof not having been adduced, the District Judge is right in saying that the presumption has not been rebutted.

In the present case, there is no basis for attacking the finding of the learned District Judge as due to an erroneous application of a presumption of law. I therefore hold that his finding is correct and should be accepted. In the result, the second appeal fails and is dismissed with costs.

P.R.S./S N. *Appeal dismissed.*

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*A. I. R. 1931 Madras 636

WALLACE AND STONE, JJ.

Vaidyanatha Rao—Appellant.

v.

Kandappa Chetty—Respondent.

Appeal No. 200 of 1929, Decided on 19th January 1931, against decree of Dist. Judge, North Arcot, at Vellore, in O. P. No. 55 of 1928.

***(a) Evidence Act (1872), S. 92—Mortgage bond—Higher rate of interest in default—Oral agreement to show right of waiver by mortgagee as to higher rate on default—Such agreement is inadmissible if taken to impose legal obligation on mortgagee to accept lower rate always—It is admissible if it is taken to be mere promise of grace—S. 92 cannot bar evidence showing probable acceptance at lower rate under Contract Act, S. 63—S. 63 applies to cases of remission of some part while whole contract exists—Contract Act (1872), S. 63.**

A mortgage bond provided for a higher rate of interest in default of payment at the original rate. On default the mortgagor in the mortgagee's suit, pleaded an oral agreement to the effect, that the mortgagee agreed to waive the default and to waive his right for future higher interest. The lower Courts had shut out the evidence as to this agreement.

Held: that if this agreement was taken to impose a legal obligation on the mortgagee to accept the lower rate always, then it was not admissible as it was a variation of the original contract. But if it was taken to mean a promise of grace imposing no legal obligation S. 92 could not bar any evidence to probabilize the alleged acceptance of a lesser rate of interest. That S. 63, Contract Act, was in point as it applied to cases where the old contract subsisted, but where there was a voluntary remission of performance of some promise in it that there was nothing to prevent proof of actual waiver of past breaches whether or not in pursuance of a promise to waive. A promise of grace to waive future breaches could be proved but would be of no avail, unless performance had been actually waived. That a binding agreement to waive future performance could not be proved. Under S. 63, Contract Act, any sum becoming payable could prima facie be the subject of remission and there was no reasonable ground for holding that in law a mortgagee could as of grace remit under S. 63, Contract Act, only when the whole contract was thereby extinguished: *A. I. R.* 1930 *All.* 721; 42 *Mad.* 41, *Expl. A. I. R.* 1928 *P. C.* 99; 27 *Mad.* 368; *A. I. R.* 1927 *Mad.* 1111; *A. I. R.* 1929 *Mad.* 794; *A. I. R.* 1928 *Mad.* 382; 26 *Mad.* 195; 30 *Mad.* 231 and 43 *Mad.* 803, *Ref.*; 44 *Bom.* 55, *Diss. from.* [P 638 C 2; P 639 C 1]

(b) Words and Phrases—Waiver—Meaning Explained.

Waiver of a ground of forfeiture or of breach of a term or condition in a contract arises when

one party with knowledge of the fact giving rise to the forfeiture or the breach does or says something which expressly or by implication shows an intention to treat the thing which might be forfeited as subsisting or the breach as forgiven. It assumes a ground of forfeiture of a breach. The intention once expressed the waiver is complete. [P 639 C 1]

K. S. Krishnaswami Iyengar and *T. D. Srinivasa Chari*—for Appellant.

P. Vishwanatha Iyer—for Respondents.

Judgment.—This appeal arises out of an award in a land acquisition case. The immediate point before the lower Court was what proportion of the amount awarded should go to certain mortgagees of the appellant in discharge of their mortgage for Rs. 10,000 dated 11th July 1912. The mortgage bore interest at 7 1/2 per cent per annum but on default of payment of principal or interest, the rate of interest was to be increased to 9 per cent per annum. It is admitted that there was default. In dealing with the point the lower Court has shut out evidence of an agreement alleged by the appellant whereby his mortgagees agreed "to waive the default in the payment of interest and to waive their right in future also to claim enhanced rate of interest at 9 per cent per annum and to receive payment of interest throughout only at 7½ per cent per annum.

It was further alleged that in pursuance of this agreement certain renderings of account, Exs. 1 and 2 in C. M. P. 5514 of No. 29, have been submitted by the mortgagees to the mortgagor calculating interest at 7 1/2 per cent rate only. The District Judge held that proof of such an agreement was inadmissible under S. 92, Evidence Act, rejected such proof, and refused to admit Exs. 1 and 2 or any other evidence on the point. It is against this refusal that the appellant now comes up here.

We think the District Judge has not sufficiently considered the legal aspect of the problem and in particular that he has overlooked the provisions of S. 63, Contract Act. The application of S. 92, Evidence Act, is only called for in so far as the alleged agreement is put forward in variation of the original contract of mortgage. So far as the alleged arrangement is advanced as imposing any legal obligation on the mortgagee to accept a lower rate of interest than that specified in the contract, it tantamounts to a binding agreement that the penalty clause is inoperative and therefore is a variation of the contract and proof of it is inadmissible; but in so far as it is put forward merely as a promise of grace imposing no legal obligation, S. 92 cannot be any bar and evidence of it relevant, so far as may be, to probabilize the alleged acceptance of a lesser rate of interest. Since no legal obligation to accept the less amount can be proved the only value as evidence of such an arrangement would be to support other independent evidence that such less amount was actually accepted, not on account or in part payment, but in satisfaction of a larger amount due; and the crucial evidence in the case would not be evidence of the arrangement, but evidence of such actual acceptance in satisfaction. To state the proposition of law in another form, if the evidence of such acceptance cannot be understood or will not prove the acceptance without evidence that the mortgagee was under a legal obligation so to accept, the evidence is inadmissible; but if it can be understood and proved without proof that the mortgagee was under such legal obligation, there is nothing in S. 92 to prevent the admission of such evidence. By way of example we may cite Illus. (e), S. 63, Contract Act, that evidence of a composition arrangement made with creditors, by which they agree to receive less than the sums due to them, can be admitted to explain receipt of a less sum in full discharge of a debt due.

Section 63, Contract Act, is clearly in point. It is obviously intended to apply not to cases where the whole contract has been supplanted by a new one because then it will be superfluous, but to cases where the old contract subsists, but there is a voluntary remission of performance of some promise in it, for example, a remission of part of the debt at the time when it becomes payable. S. 63 will not be extended to cover a case of a binding promise to dispense with or remit performance in the future unless that waiver is made the subject of a fresh contract, because then S. 92, Evidence Act, will stand in the way.

Several reported cases bearing on the subject have been brought to our notice. We shall consider only those which to our minds throw light on the problem. A Full Bench case in the Allahabad High Court, reported so far in *Collector of Etah* v. *Kishore Lal*, *A. I. R.* 1930 *All*

721, is in point, and supports the above conclusion. It relies inter alia on various decisions of this Court, including the Full Bench case in *Mallappa* v. *Matum Nagu Chetti* (1). The only reasonable ground on which this case can be distinguished from the present is that there the remission was accepted in discharge of the whole contract, while here the contention is that remission was from time to time accepted in payment of parts of the contract, leaving the contract still alive. This is a point to which we shall come later. The respondents challenge the interpretation put by the Allahabad Court on *Mallappa* v. *Matum Nagu Chetti* (1), but we cannot see that there is any misinterpretation of that decision. The headnote is worded in very general terms, but the whole tenor of the judgment shows that the Full Bench was considering the admissibility of an oral agreement which remitted the legal obligation under the contract, a case obviously within the mischief of S. 92, Evidence Act. This is particularly clear from the language used by Seshagiri Iyer, J.

This Full Bench case follows *Goseti Subba Rao* v. *Varigonda Narasimham* (2). The learned District Judge here relies on those decisions which no doubt support his view of what he thought was the only problem in the case, namely, whether an oral agreement varying the legal obligation under the contract could be proved. He also relied on *Yegnanarayana Ayyar* v. *Suppan Chetty* (3), a judgment of a single Judge, which goes further and holds that the actual discharge of a mortgage by payment of a less amount than is due in pursuance of an oral agreement to that effect cannot be proved. The learned Judge there relied mainly on *Jagannath* v. *Shankar* (4). The ratio decidendi of the latter decision seems to be that proof of actual acceptance of a less amount in full discharge cannot be given because underlying such acceptance there must have been an agreement to accept, which, the Bench held, would be inadmissible under S. 92. With respect we would point out that this annuls the operation of S. 63, Contract Act, and ignores the contingency that the less amount is accepted not because oral agreement has imposed on the creditor a legal obligation so to accept but as a matter of grace.

The decision in *Jagannath* v. *Shankar* (4) has been dissented from in various other cases, twice by the Calcutta High Court and by a Bench of this Court in *Balasundara Naicker* v. *Ranganatha Ayyar* (5) which cases, if we may so with respect, give a very luminous exposition of the legal position, pointing out that the remission of debt under S. 63, Contract Act, is not in pursuance of an agreement at all. The same view is taken by another Bench of this Court in *Ramanathan Chettiar* v. *Sethuraman Medige Rao Sahib* (6). Similar views had already been expressed in earlier cases of this Court, *Kerampalli Unni Karup* v. *T. V. Muthorakutti* (7); *K. Bapamma* v. *K. Krishtamma* (8) and *Neelamani Patnaik Mussadi* v. *Shukaduvu Behari* (9), and these are in consonance with the Privy Council view in *Firm Chenna Mal Ram Nath* v. *Firm Mool Chand Ram Bhagat* (10). We may add with reference to the *Yegnanarayana Ayyar* v. *Suppan Chetti* (3) case that we looked into the printed papers and it would appear from them that the alleged discharge was said to have been in pursuance of an undertaking underlying the mortgage contract which was that the rate of interest should be Re. 1-4-0 and not Rs. 3-12-0 as stated in the contract. Such an agreement would of course clearly be inadmissible under S. 92.

To sum up this point : there is nothing to prevent proof of actual waiver of past breaches whether or not this is in pursuance of a promise to waive or not. A promise of grace to waive future breaches may be proved but is of no value unless performance has been actually waived. A binding agreement to waive future performance cannot be proved.

Two points then arise : first, whether in the case of a remission of payment S. 63 is restricted to cases where by the remission the whole contract is discharged and extinguished, and,

(1) [1919] 42 Mad. 41=48 I. C. 158 (F.B.).
(2) [1904] 27 Mad. 368.
(3) A. I. R. 1927 Mad. 1111.
(4) [1920] 44 Bom. 55=48 I. C. 158 (F.B.).
(5) A. I. R. 1929 Mad. 794.
(6) A. I. R. 1928 Mad. 382=107 I. C. 808.
(7) [1903] 26 Mad. 195.
(8) [1907] 30 Mad. 231=17 M. L. J. 30.
(9) [1920] 43 Mad. 803=60 I. C. 255.
(10) A. I. R. 1928 P. C. 99=108 I. C. 678=55 I. A. 154 (P.C.).

secondly, whether the case now put forward by the mortgagor was pleaded in the lower Court and ought to be allowed to be pleaded here. As to the first point, it is contended that the mortgage debt is indivisible and cannot be discharged in part, and that therefore there cannot be a remission of part of the amount due under the contract unless thereby the contract as a whole is discharged. But S. 63 on the face of it contains no such restriction and its applicability would seem to arise on any and every occasion on which any sum becomes due and payable under the contract. Any sum which becomes payable can prima facie be the subject of remission and there seems no reasonable ground for holding that in law a mortgagee can as of grace remit under S. 63 only when the whole contract is thereby extinguished. We are not shown any reported authority for such a proposition. On the contrary the case reported in *Kerampalli Unni Karup* v. *T. V. Muthorukutti* (7) is one where the acceptance of a less amount than the lease amount for the first year of lease was held binding although the lease was still current. So in *Bapamma* v. *Krishtamma* (8) the acceptance of possession of land in discharge of a debt for maintenance arrears was held provable although the whole obligation to pay maintenance was not thereby discharged. We think there is no substance in this contention of the respondent.

As to the second point the word used in the pleadings to describe the alleged agreement is "waiver" and the waiver is related not only to the past but the future. Waiver of a ground of forfeiture or of breach of a term or condition in a contract arises when one party with knowledge of the fact giving rise to the forfeiture or the breach does or says something which expressly or by implication shows an intention to treat the thing which might be forfeited as subsisting or the breach as forgiven. It assumed a ground of forfeiture of a breach. The intention once expressed the waiver is complete. It is apparent therefore that "waiver" is not entirely apt to describe a remission which falls within S. 63, Contract Act. Further, even if we can speak of a waiver that will operate as to further breaches it is clear that such a "waiver" would amount to a variation of the contract. In the present case the alleged remission assumes that the old liability to pay 9 % continues. The creditor receives the 7 1/2 %. There is thus no question of a breach forgiven. In the eye of the law the contract liability is deemed to be performed, not because one party has precluded himself from relying on a breach (waiver) but because one party has received in satisfaction of a liability something less than the contract liability. The fundamental question is not : Has the contract liability been altered ? but "when 7 1/2 % was paid and received, was it received in part payment or in satisfaction ?" This raises not a question of waiver but of remission. At the same time though the pleadings are not very aptly worded we are satisfied that the point of substance was raised and certainly from the argument before us it was apparent that the respondent had not been taken by surprise.

It is argued that the present position was not taken up in the Court below. Of that we are not satisfied. The lower Court in its order, para. 14, admits that while the appellant conceded that the subsequent oral arrangement cannot be proved to modify the written registered contract, he did urge that payments made in pursuance of such oral agreement could be proved constituting a discharge. The lower Court held that no actual discharge was alleged. This does not appear to us to be correct, unless the learned Judge means a discharge which extinguished the whole contract. Para. 6 of the written statement of the appellant to our minds implies a contention that the mortgagee had at least accepted and appropriated up to 15th December 1923 payments of interest at 7 1/2 % up to an aggregate sum of Rs. 4,549-1-0, that is, that the interest debt nominally at 9 % contract sale had been discharged up to that date by payment at 7 1/2 % accepted by the mortgagee, and in proof of that the Ex. 1 in Civil Miscellaneous Petition was offered ; and similarly it was contended that in December 1927 the mortgagee had, by account rendered, Ex. 2 in the Civil Miscellaneous Petition, accepted and appropriated payments of interest at 7 1/2 % up to 14th April 1924. The lower Court refused to admit both these documents, holding that no such evidence was admissible. Undoubtedly

in his written statement the appellant did endeavour to establish the untenable proposition that the alleged agreement was binding as such on the mortgagee and that therefore he must be held to have accepted the 7 1/2 % rate for all interest payments up to 24th August 1926, although even then in para. 11 he did not claim that the agreement prevented the mortgagee claiming interest at 9 % subsequent to 24th August 1926; so that it cannot be maintained that the written statement alleged an agreement binding on the mortgagee to forgo the default penalty in toto. There is no evidence at present brought to our notice as available beyond Exs. 1 and 2 which only carry the possibility of proof of actual acceptance of the 7 1/2 % rate up to 14th April 1924. Nevertheless, so far at least as acceptance up to that date is concerned, available evidence should not have been excluded, nor can any other evidence that may be available to prove other late acceptances at the same rate be shut out.

For the reasons given above therefore, we must set aside the decree of the lower Court and remand the case for fresh disposal in the light of the above remarks. The appellant will get his costs here and costs in the Court below will abide the result.

Court-fee on the appeal memo. will be refunded.

P.R.S./B.V. *Case remanded.*

A. I. R. 1931 Madras 640

RAMESAM, J.

(*Moparthi*) *Nayudamma* and *others*—Defendants—Appellants.

v.

(*Sreemanthuraja Yarlagada*) *Ankineedu Prasad Bahadur* — Plaintiff — Respondent.

Second Appeal No. 2192 of 1927, Decided on 21st November 1930, against decree of Sub-Judge, Bapatla, in A. S. No. 193 of 1926.

Madras Legal Practitioner's Fee Rules (1925), R. 37 (b) — Suit for declaration and injunction — Subject-matter of suit, fishery, which is incapable of valuation — Its value not being shown to be less than Rs. 1,000, even if it could be valued at all, Rs. 50 as pleader's fee was proper.

In a suit for declaration followed by injunction the plaintiff should value only the injunction and he has no business to value declaration.

Where the subject-matter of such a suit is fishery, which is generally incapable of valuation, or even where it could be valued, and its value is not shown to be less than Rs. 1,000, the pleader's fee of Rs. 50 as awarded by the trial Court is proper. Under R. 37 what the Court has to see is whether the subject-matter in respect of which relief is claimed is capable of valuation. [P 640 C 2]

M. Ramachandra Rao—for Appellants.

Ch. Raghava Rao—for Respondent.

Judgment.—The only point raised in this second appeal relates to the amount of pleader's fee awarded by the lower appellate Court to the successful plaintiff. The suit was for a declaration in respect of the right of fishery and injunction. The plaintiff succeeded in both Courts. In appeal Rs. 50 was given as pleader's fee. The learned advocate for the appellant argues that the pleader's fee ought to be only Rs. 25 under R. 31, Legal Practitioner's Fee Rules issued in 1925. Under R. 31 (b) (1) the minimum fee is Rs. 25 for all cases not falling under Cls. 1, 2, 3, S. 7, Court-fees Act, or under Cl. 4, sub-Cl. (f) of that section. But Mr. Raghava Rao relies on R. 37 (b) which relates to declaratory suits. This is a suit for declaration followed by injunction. If the subject-matter is capable of valuation, we are thrown back on R. 31. But the subject-matter here is a fishery and it is not capable of valuation according to the rules in the Court-fees Act, S. 7, sub-S. 5. We must therefore refer to R. 37 (b) (2) and under this the Subordinate Judge can fix a fee between Rs. 25 and 100. It is said by the learned advocate for the appellant that the plaintiff himself valued the declaration at Rs. 50 in the plaint. But this seems to be merely a mistake. The plaintiff should value only the injunction and he had no business to value the declaration. Even if he can value the declaration, that does not help us. Under S. 37 what we have to see is whether the subject-matter in respect of which relief is claimed is capable of valuation. I think that, either the right of fishery is not capable of valuation or, if it is capable of valuation, there is nothing to show that its value is less than Rs. 1,000, on which the fee would be Rs. 50. It is not necessary to disturb the order of the Subordinate Judge. The second appeal is dismissed with costs.

P.R.S./B.V. *Appeal dismissed.*

A. I. R. 1931 Madras 641

MADHAVAN NAIR, J.

Subramania Aiyar—Appellant.

v.

Vaithilinga Pandara Sannathi — Respondent.

Second Appeal No. 580 of 1927, Decided on 8th October 1930, against decree of Sub-Judge, Negapatam, in A.S. No. 149 of 1925.

Civil P. C. (1908), S. 11 — Trustee by not taking possible defence and allowing decree to be passed against temple—Decree will not be binding on succeeding trustee.

A decree allowed to be passed against a temple on account of the gross negligence on the part of the then trustee in not putting forward a valid defence which he could have put forward, is not binding on the succeeding trustee : *A I. R.* 1925 *Mad.* 204, *Appl.* and *A.I.R.*1928 *Mad.* 614, *Dist.*[P 641 C 2, P 642 C 1]

T. V. Muthukrishna Ayyar and *N. Muthuswami Iyer*—for Appellant.

A. Srirangachariar—for Respondent.

Judgment.—The legal representatives of defendant 1 are the appellants. The suit properties originally belonged to one Ramaswami Aiyar. After his death, his widow Anantammal became entitled to the properties. She had three daughters, Muthammal, Chinnammal and Narayani Ammal, one of whom, Narayani Ammal, the mother of defendant 2, predeceased Anantammal. As a result of a family settlement the two surviving daughters surrendered their life estate to defendants 1 and 2 and to Ramaswami Aiyar, the deceased brother of defendant 1. Ramaswami Aiyar and Subramania Ayyar are the children of Chinnammal. In 1891 the two daughters of the propositus Ramaswami Ayyar and defendant 2, and Ramaswami Ayyar for himself and as guardian of his brother, the present defendant 1, executed Ex. C in favour of the plaint temple in respect of the suit property. The temple had been enjoying the property from that date till it was dispossessed in 1921 as a result of a decree obtained by the present defendant 1 in O. S. No. 550 of 1920.

The suit out of which this second appeal arises was instituted for the recovery and possession of the plaint property with mesne profits. Plaintiff 2, the present trustee of the temple, was originally defendant 3 but was transposed by an order of the Court as plaintiff 2. The contesting defendant was defendant 1. Various issues were framed in the case but the only issue arising for consideration in this second appeal is issue 4, namely whether the suit is barred by res judicata by reason of the decision in O. S. No. 550 of 1920 of the District Munsif's Court, Tiruvalur. The lower Courts found this issue in favour of the plaintiffs and passed a decree for possession and mesne profits in favour of the plaint temple represented by plaintiff 2.

In O. S. No. 550 of 1920 the present defendant 1 instituted the suit to recover possession of the plaint property. The then trustee of the plaint temple was impleaded as a defendant in that suit. He allowed an ex parte decree to be passed in favour of defendant 1 and the plaintiff in that suit. The question for consideration is whether that ex parte decree would operate as res judicata against the plaintiffs in this suit. It is clear from the evidence in the case that the plaint property belonged to the temple at the time of that suit. Under Ex. C the property was gifted to the temple by all the persons who had title to it. So far as the present defendant 1 was concerned he was represented by his brother. O. S. No. 550 of 1920 was instituted by the present defendant 1 long after he had attained majority and after his claim had become barred by limitation under Art. 44. The temple had also perfected its title by adverse possession before the date of that suit. From these circumstances it is clear that the temple had a very valid defence in that suit but the then trustee did not file any written statement nor did he contest the suit. After the ex parte decree he put in an application to set it aside. That was dismissed and the appeal filed against that order was also dismissed. From these circumstances both the lower Courts have come to the conclusion that the conduct of the trustee in not defending the suit amounted to gross negligence. This finding of the lower Courts which is amply justified by the circumstances of the case has not been questioned before me. The question is whether a decree allowed to be passed against a temple on account of the gross negligence on the part of the then trustee in not putting forward a valid defence which he could have put forward, is binding on the succeeding trustee. No authority directly bearing on the question has been brought to my

notice. In *Dada Sahib* v. *Gajraj Singh* (1) it was held by Devadoss, J., that if a guardian of a minor is guilty of gross negligence in conducting the suit on behalf of the minor the decree passed in that suit will not be binding on the minor. The learned Judge says :

"It is not every kind of negligence that would be sufficient ground for setting aside a decree or for declaring that the proceedings in Court are null and void ; but where the guardian omits to do his plain duty and where by reason of such negligence a suit is decided against a minor which would not have been decreed against him it must be held that the guardian's negligence contributed to the Court proceeding in the manner it did."

As already stated, it is clear that if the then trustee had defended O. S. No. 550 of 1920, no decree would have been passed in it against the temple. On principle I do not see any reason why an idol of a temple should not be treated in the same manner as a minor with respect to the gross negligence on the part of the trustee in not defending the suit, the trustee representing its interests just in the same way as the guardian represents the interests of the minor. An idol can act only through the trustee of the temple. As Mr. Muthukrishna Aiyar has pointed out it is possible in certain respects to distinguish the position of a trustee representing an idol from the position of a guardian of a minor but on broad principle I cannot find any satisfactory ground for treating the case of a trustee representing an idol in a suit differently from the case of a guardian representing a minor. In *Vadlamudi Sastrulu* v. *Venkataseshayya*, *A.I.R.* 1928 *Mad.* 614, the learned Judges assumed without deciding the question that the idol is in the position of a minor but held that there was no negligence in the course of the previous litigation in that case. In the absence of specific authority on the point I am inclined to hold that the principle underlying the decision in *Dada Sahib* v. *Gajraj Singh* (1) may well be applied to the facts of the present case and I would therefore hold that the decision in O. S. No. 550 of 1920 would not operate as res judicata in the present suit. In the result, the second appeal fails. In the circumstances each party will bear its own costs in the second appeal.

P.R.S./S.N. *Appeal dismissed.*

(1) A. I. R. 1925 Mad. 204=85 I. C. 258.

A. I. R. 1931 Madras 642

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Ramanathan Chettiar—Petitioner.

v.

Audinatha Ayyangar and *others*—Respondents.

Civil Misc. Petn. No. 424 of 1930, Decided on 19th December 1930, for leave to appeal to His Majesty in Council, against the decision of the High Court in Appeal No. 176 of 1927, reported in *A. I. R.* 1929 *Mad.* 890.

Civil P. C. (1908), S. 109 (c)—Difficult question of law is not sufficient—It must be of public importance.

Per *Madhavan Nair, J.*—The existence of a question of law of some difficulty is not a sufficient ground for certifying the case to be a "fit one" for appeal to the Privy Council, unless it is of general and public importance: 23 *All.* 227; *A. I. R.* 1922 *Mad.* 34; *A. I. R.* 1921 *P. C.* 25; 31 *I. C.* 46; *A I. R.* 1923 *Mad.* 232; *A. I. R.* 1923 *Mad.* 125; *A I. R.* 1924 *Mad.* 231, *Ref.* and 18 *I. C.* 305,. *Expl.* (*Venkatsubba Rao, J.*, dubitante) [P 643 C 2, P 644 C 2]

S. Varadachariar and *T. M. Ramaswami Ayyar*—for Petitioner.

K. R. Rangaswami Ayyangar, *T. M. Ramaswami Ayyar* and *R. Krishnaswami Ayyangar*—for Respondents.

Madhavan Nair, J.—This is an application for leave to appeal to the Privy Council against the decree of this Court in A. S. No. 176 of1 927 dated 2nd August 1929. The amount of the subject matter involved in the suit is now by the accumulation of interest more than Rs. 10,000, but was below that sum at the time of the institution of the suit. Leave is therefore claimed under S. 109 (c), Civil P. C., on the ground that the case is a "fit one" for leave to appeal to the Privy Council.

The facts of the case appear fully from the judgments of this Court. However a brief statement of them may be made here for the purposes of this petition. The first counter-petitioner was the holder of a third mortgage over some properties belonging to defendant 1. The heirs of the first mortgagee over the properties instituted a suit on his mortgage making defendant 1, the second mortgagee and the present plaintiff, the third mortgagee, parties to it and obtained a decree for sale. The decree-holders purchased the properties in execution and afterwards sold them to one Bharati, defendant 5 in the present suit. Thereupon the mortgagor, defendant 1, instituted a suit against

Bharati for a declaration that the purchase was made for his own benefit. This suit was contested by Bharati but eventually it was compromised, it being agreed that defendant 1 should take over the properties on depositing in Court Rs. 29,000 to the credit of Bharati within a specified date. Defendant 1 obtained Rs. 30,000 from defendant 16 in the present suit, undertaking to sell him the properties in question. He then deposited Rs. 29,000 in Court and made a gain for himself of Rs. 1,000. By this time the present suit had been instituted by the plaintiff for the enforcement of his mortgage over the properties. It has been found by this Court that when defendant 16 entered into an agreement with defendant 1 the former had distinct notice of the plaintiff's claim and that he was not a bona fide purchaser of the property.

As stated in the opening paragraph of my judgment in the appeal the question for decision was whether the mortgage executed by defendant 1 in favour of the first counter-petitioner (that is, the plaintiff-appellant) is entitled to priority over the sale deed executed by him in favour of defendant 16 in so far as the mortgage deals with the properties covered by the sale deed. We held that the plaintiff was entitled to priority. Whether he is so entitled to or not is a pure question of law. It is now well settled that if in execution of a decree for sale of the mortgaged property the mortgagor purchases the property for himself, it passes into his hands subject to the right of the subsequent mortgagee it being his duty as owner of the estate to discharge the debt of the subsequent mortgagee for which he had pledged the estate: see *Otter* v. *Lord Vaux* (1). It is also settled in this Court that the same principle would apply even if there had been intermediate purchasers of the property before it came into the hands of the mortgagor, a question that was left undecided in *Otter* v. *Lord Vaux* (1): see *Manjappa Roi* v. *Krishnayya* (2). The petitioner accepts the correctness of this decision though the soundness of the particular reasoning on which it is based is questioned. How far the application of the above principles will be affected, if at the time when the mortgagor purchases the property from a stranger purchaser, he has already agreed to sell it to another person from whom he gets the money to purchase it, is the question with respect to which the decision of the Privy Council is sought in this case. There is no specific decision or authority covering this point.

It may be conceded that this is a substantial question of law and is one of some difficulty. What we have to decide is whether the existence of a question of law of some difficulty for decision is a sufficient ground for certifying the case to be a "fit one" for appeal to His Majesty in Council as required by S. 109 (c), Civil P. C. What class of cases would fall within this clause has been considered by the Privy Council in some cases. In *Banarsi Prasad* v. *Kashi Krishna Narain* (3) it was pointed out by Lord Hobhouse that this clause

"is clearly intended to meet special cases; such for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance."

In a later case, *Radhakrishna Ayyar* v. *Swaminatha Ayyar* (4), the Judicial Committee pointed out that this clause contemplated

"cases in which it is impossible to define in money value the exact character of the dispute; there are questions, as for example, those relating to religious rites and ceremonies, to caste and family rights, or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject-matter in dispute cannot be reduced into actual terms of money."

It is admitted that the point in dispute is not of any public importance. Is it then of any private importance? I think not. The question is in what circumstances a case may be said to be a fit one in which certificate may be granted for leave to appeal to the Privy Council under S. 109 (c), Civil P. C., has arisen for decision in various cases in this Court and most of them have been brought to our notice. These are *Raghunatha Thathachariar* v. *Tiruvengada Chariar* (5), *Raja Rajeswara Sethupathi* v. *Kamaith Ravuthan* (6), *Alagappa Chetty* v. *Nachiappan* (7) *Raja Rajeswara Sethupathi* v. *Tiruneelakantam*

(1) 43 E. R. 1381.
(2) [1906] 29 Mad. 113.
(3) [1901] 23 All. 227=28 I. A. 11=8 Sar. 447 (P.C.).
(4) A. I. R. 1921 P. C. 25=48 I. A. 31=44 Mad. 293 (P.C.).
(5) [1915] 31 I. C. 46.
(6) A. I. R. 1922 Mad. 34=66 I. C. 636.
(7) A. I. R. 1923 Mad. 125=69 I. C. 385.

Servai (8) and *Kesava Mudali* v. *Govindachari* (9). It is not necessary to discuss these cases in detail. In most of them the learned Judges have pointed out when a case can be said to be of private importance. I do not think that any one of these cases, except perhaps *Raja Rajeswara Sethupathi* v. *Kamaith Ravuthan* (6) would justify the argument that the mere existence of a substantial question of law is by itself sufficient to give the High Court jurisdiction to give leave to appeal under Cl. (c), S. 109, Civil P. C. In *Raja Rajeswara Sethupathi* v. *Kamaith Ravuthan* (6) strongly relied on by Mr. Varadachariar, the decision no doubt turned upon the meaning of S. 12, Madras Estates Land Act, a question of law but the learned Judges observed that the decision was

"likely to have very serious and far reaching consequences in the Ramnad Zamindari, seeing that other Courts in that district will follow it in dealing with disputes as to the rent payable for trees and as to the right of ryots to take the timber of growing trees. Looked at from this point of view, the right in dispute is not exactly measurable in money but is of great private importance".

We are not called upon to consider whether the learned Judges' view that the particular case before them was one of private importance is correct. It is true that in one of the cases on which they relied in support of their conclusion, *Anant Ram* v. *Raja Sheoraj Singh* (10) the Allahabad High Court certified the case as a fit one for leave to the Privy Council though it involved only pure questions of law; but the learned Judges make it very clear that these questions of law were "substantial questions of law of general importance." It seems to me that the decision in the case before us is not likely to affect any large number of persons; nor is it likely to be a precedent governing numerous other cases. In this case defendant 16 lent the money though he obtained an agreement in his favour before the loan was given with the full knowledge that the person claiming the property had instituted a suit with reference to it. It is not likely that many persons will lend money to mortgagors in circumstanstances like those present in this case and I do not think occasions will arise very frequently for applying the decision in this case as a precedent. In my opinion the question raised in this case is not one of any general interest or of local or public importance and is therefore not a fit one for granting leave to appeal to the Privy Council under S. 109 (c), Civil P. C. This petition is dismissed with costs.

(8) A. I. R. 1923 Mad. 232=72 I. C. 250.
(9) A. I. R. 1924 Mad. 231=75 I. C. 901.
(10) [1912] 18 I. C. 305.

Venkatasubba Rao, J.— As my learned brother was a member of the Bench that decided the appeal and I was not, I yield to what he says and will not differ from him, although my inclination is the other way.

P.R.S./B.V. *Petition dismissed.*

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* A. I. R. 1931 Madras 644

WALLACE AND PANDALAI, JJ.

R. M. C. T. Ramanathan Chettiar and *another*—Plaintiffs—Appellants.

v.

P. L. C. Lakshmanan Chettiar and *others*—Defendants—Respondents.

Appeal No. 240 of 1925, Decided on 18th December 1930, against decree of Temporary Sub-Judge, Devakotta, in Original Suit No. 22 of 1923.

*** Limitation Act (1908), Art. 142—Ordinarily plaintiff seeking on title to oust defendant in possession must prove possession within 12 years of suit—In case each party claims possession and fails to prove effective possession then possession goes with title and plaintiff succeeds—Possessory title.**

It is no doubt as a general rule true that where the plaintiff seeks on the strength of title and dispossession to oust defendant in possession he must prove possession within 12 years of suit. But the possession to be proved is such possession as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any act of effective possession and therefore the normal method of possession is not referable to any such act, possession must follow title, since the defendant is no more able than the plaintiff to claim effective possession for 12 years before suit. Possession in such circumstances is with the party holding title and the plaintiff title holder should not be deprived of what he has acquired merely because he equally with the other side has exaggerated his case in the pleadings by alleging definite act of possession and has failed to prove this: 16 *Cal.* 473; *A. I. R.* 1922 *Cal.* 557; 20 *W. R.* 25 (*P. C.*); 27 *Cal.* 25; 28 *I. C.* 477; 1 *Pat. L. J.* 146; 9 *Cal.* 744; *A. I. R.* 1922 *Bom.* 243 and *A. I. R.* 1927 *Mad.* 509, *Ref.* [P 646 C 1]

C. S. Venkatachariar—for Appellants.

K. R. Rama Ayyar, M. Patanjali Sastri and *C. S. Rama Rao Saheb* — for Respondents.

Judgment.—The original suit from which this appeal arises was a suit in ejectment, the plaintiff alleging title under a sale deed, Ex. B, dated 22nd November 1898, from the two sons of one Sethuraman Servai, Kaliappan and Audiappan and alleging also possession up to 10th February 1919 and a dispossession by the defendants on that day. The suit was brought on 18th February 1920 for possession from the defendants and consequential reliefs. The lower Court dismissed the suit on its finding that the plaintiff had not proved possession within 12 years of suit. The plaintiff appeals.

The suit site is punja No. 120 in Eravacheri village, Guttakainattu taluk, Devakottah. It has of late years owing to its potential value as house-site become the subject of a scramble for possession which has led to claims well and ill founded based on documents or otherwise being put forward by various people and to litigation thereon. In the course of hearing before us the remarkable fact was disclosed that never in the whole course of the history of this plot in the Courts had it been measured, and that parties had throughout adopted a hypothetical figure of area which bears small relation to the actual area. We have now had the plot properly measured and the correct area may be taken as 63,597 sq. ft. The plot appears to be an open site, regarded of late years as suitable for house sites but for nothing else, and it has been dealt with as an area enclosing so many house sites of 1,200 sq. ft. each. At one time it appears to have been cultivated, and plaintiff himself at one time asserted (see Ex. I, dated 3rd January 1901) that he bought out a usufructuary mortgagee, Alagappan, so that presumably in those days there was some usufruct accruing from the land. Even if there was any such cultivation then and the plaintiff's allegation of having bought out a usufructuary mortgagee was not made merely to support a claim of title, any form of cultivation of the land seems to have ceased long before 12 years before suit. The plot is in a zamin tract, and if there had been payment of a punja rent; but no one on either side has produced any proof of such payment.

One thing however seems clear, that in regard to a portion of the plot said to measure 7,200 kulis or sq. ft. the possession of it had passed from the plaintiff, if he ever had it, by the litigation, Ex. E series.

* * *

The net result of this discussion is that for the period of 12 years before suit up to the date of the alleged dispossession in 1919 there was no sort of effective enjoyment of the plot by anyone, and the land had not been put to any sort of use which can be styled effective possession. The claims of each party to have been in effective possession before early in 1919 are unsupported by any reliable evidence and must be rejected.

The plaintiff on this footing argues that he is entitled to stand upon his title, and upon the legal presumption that possession follows title and continues until the title holder is dispossessed. To see how far that will carry him, it is necessary to inquire into his title.

* * *

The result will be that the plaintiff's title is prima facie good to the extent only of one-third of 63,597 minus 7,200, that is, 18,799 sq. ft. in the north of the plot. It is not open to the plaintiff to plead for more than this. The question whether or not the decree-holder in Ex. 7-E had or had not enforced his decree and obtained possession is irrelevant when the plaintiff must succeed, if at all, merely on title. It is not open to him claiming on title alone to claim that the Court should presume possession to any extent larger than that for which he has proved a valid title in himself. An invalid title carries with it no presumption of possession.

* * *

To sum up: so far as effective possession goes, neither party has established it earlier than 1919. So far as title goes, that of the plaintiff is superior to, and more reliable than, that of the defendants to the extent of 18,799 sq. ft. in the north. To that extent the plaintiff's title carries with it a presumption that he was in such possession as the land was capable of, which possession his vendors had, and his possession was not effectively invaded till 1919, only two

years before suit. He is entitled to have that possession restored.

It is urged as a point of law by the defendants that the plaintiff cannot succeed on the mere plea of title when he comes into Court with an allegation of a definite act of possession and dispossession and has failed to prove this. This plea is based on the fact that the plaintiff alleges acts of possession, of storing timber and putting up a prickly pear fence, neither of which acts we can regard as proved. The plea might have force if effective acts of possession by the defendants prior to the dispossession alleged in the plaint had been proved. But we find none such are established and they certainly cannot be presumed. The net result therefore is that the plaintiff's possession presumed by law upon his title has not been displaced by any act of dispossession prior to 1919, and his failure to prove specific acts of possession does not afford any proof of defendants' possession or any displacement of the possession which under the law is presumed from his title. In these circumstances it is unnecessary to go at length into the law on the subject. It is true of course as a general rule that when the plaintiff seeks on the strength of title and dispossession to oust defendants in possession he must prove possession within 12 years of suit: *Mohima Chunder Mozoondar* v. *Mohesh Chunder Neoghi* (1). But the possession to be proved is such possession as the property is capable of or such as has been the normal method of user. When each party who claims possession is unable to prove any act of effective possession and therefore the normal method of possession is not referable to any such act, possession must follow title, since the defendants are no more able than the plaintiff to claim effective possession for 12 years before suit. Possession in such circumstances is with the party holding title. The case in *Rakkal Chendra Ghose* v. *Durgadas Samanta* (2), is strongly relied upon for the proposition that this presumption does not follow in a case where acts of possession have been pleaded and the evidence of both parties is equally unworthy of reliance. That ruling sought to carry further the proposition of the Privy Council in *Runjeet Ram Panday* v. *Goburdhan Ram Panday* (3) at p. 30:

> "Now the ordinary presumption would be that possession went with the title. That presumption cannot of course be of any avail in the presence of clear evidence to the contrary; but, where there is strong evidence of possession, as there is here, on the part of the respondents opposed by evidence, apparently strong also on the part of the appellant their Lordships think that, in estimating the weight due to the evidence on both sides, the presumption may, under the peculiar circumstances of this case, be regarded."

The Calcutta Weekly Notes case cited as authority for its proposition *Thakur Singh* v. *Bhogeraj Singh* (4), *Lala Singh* v. *Mir Latif Hossein* (5) and *Fakira Lal Sahu* v. *Ramachandran Lal* (6). In the first of these cases we do not find the proposition contended for set out in the judgment although it does appear in the head-note. In the second case the Bench quotes *Thakur Singh* v. *Bhogeraj Singh* (4) as if it had in fact set out that proposition which we do not find set out. The character of the property in that case and the nature of the possession that would ordinarily be exercised over it is not noted. The third case makes a special exception in the case of land of a special character such as waste, jungle or land under water. In the Calcutta Weekly Notes case the land appears to have been cultivable and in fact cultivated until a tank was excavated. If parties are to be held strictly to their pleadings no doubt land over which acts of user are asserted is land over which acts of user may be and have been exercised and therefore can be ordinarily exercised. But we think the real test is whether in fact acts of user were being regularly exercised over it by one or the other party so as to constitute in the words of the Calcutta Full Bench in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (7) "such acts of ownership as are natural under the existing condition of the land" during the critical period between 12 years before suit and the actual dispossession which forms the cause of action. And we find that none such were in this case in fact exercised. In such circumstances it does not seem to us proper that, where there has been no effective

(1) [1889] 16 Cal. 473=16 I. A. 23=5 Sar. 321 (P. C.).
(2) A. I. R. 1922 Cal. 557=67 I. C. 673.
(3) [1873] 20 W. R. 25 (P. C.).
(4) [1900] 27 Cal. 25.
(5) [1915] 28 I. C. 477.
(6) [1916] 1 Pat. L. J. 146=35 I. C. 554.
(7) [1883] 9 Cal. 744=12 C.L.R. 257 (F. B.).

possession by anyone, the title holder should be deprived of what he has acquired merely because he equally with the other side has exaggerated his case in the pleadings. In a case like the present, when effective enjoyment was not the customary method of exercising the right of possession, it must be held that the plaintiff by his title obtained such possession as the property was capable of, and therefore his possession goes with the title to the extent to which that title is found valid: see *Mahammad Saheb* v. *Tilokchand* (8) and *Venkata Somarajulu* v. *Suryanarayana* (9). For these reasons we think that the lower Court's decree should be modified and the plaintiff given a decree for the possession of 18,799 sq. ft. in the north of the suit plot. The strip will be a quadrilateral figure whose northern boundary is the northern boundary of the suit plot whose east and west sides are of equal length along the east and west sides of the suit plot and whose area is 18,799 sq. ft. In view of the fact that neither party has put forward a true case, we direct that each party bear his own costs in both Courts. Plaintiff's plan will be attached to and form part of the decree.

P.R S./P.N. *Decree modified.*

(8) A. I. R. 1922 Bom. 243=66 I. C. 764=46 Bom. 920.

(9) A. I. R. 1927 Mad. 509=101 I. C. 813.

* A. I. R. 1931 Madras 647

VENKATASUBBA RAO, J.

Kathiyumma —Plaintiff — Appellant.

v.

Urathel Marakkar —Defendant—Respondent.

Second Appeal No. 200 of 1929, Decided on 26th February 1931, against decree of Sub- Judge, South Malabar, at Ottapalam, in A. S. No. 82 of 1926.

*** Limitation Act (1908), Art. 104—Wife's claim to deferred dower accrues only when she becomes aware of the fact of divorce pronounced in her absence.**

So far as a claim for dower is concerned the marriage is dissolved by divorce only when it comes to the wife's notice. Hence under Art. 104 wife's claim to deferred dower accrues only on the date on which she becomes aware of the divorce and therefore a suit filed within three years from that date is not barred, in spite of the fact that the divorce was actually pronounced by the husband in the wife's absence long before that date: 30 *Bom.* 537; 36 *Cal.* 184; 33 *Mad.* 22; 44 *Bom.* 44 and *A. I. R.* 1927 *P. C.* 15, *Rel. on.* [P 649 C 1, 2]

V. K. John—for Appellant.

K. P. M. Menon—for Respondent.

Judgment.—The parties are Sunni Mahomedans belonging to the Hanafi subsect. The question I have to decide is whether the claim of the wife (the plaintiff) for deferred dower is barred by limitation under Art. 104, Lim. Act. That article reads thus:

By a Mahomedan for deferred dower.	Three years.	When the marriage is dissolved by death or divorce.

The husband (the defendant) pleads that the talak was validly effected more than three years before the suit and that it is therefore barred. The Munsif overruled this contention and gave judgment for plaintiff. The Subordinate Judge, finding that the claim was barred by limitition, dismissed the suit.

The Subordinate Judge finds that the defendant pronounced a valid talak on 21st July 1919 and requested the Kazi to communicate the fact to the plaintiff who was informed of it by that official on 24th August. On these findings he has held that there was a valid divorce on 21st July 1919 and that the suit filed on 25th July 1922 was barred. The District Munsif has, on the other hand, found that the talak was pronounced on 21st August and held that the suit was within time.

The Kazi communicated the fact of the divorce by Ex. A dated 24th August, written by him to the plaintiff's father. It is common ground that so far as that letter goes, the divorce is stated to have been effected on 21st August and not on 21st July. The Kazi explains that he was informed by the defendant that the talak was effected on 21st July, but that it was due to a slip on his own part that the date was wrongly given as 21st August. The District Munsif has refused to act upon this statement and, as I have said, found that the talak was actually effected only on 21st August. The lower appellate Court has accepted the Kazi's explanation. Dr. John, for the appellant, contends that the finding of the Subordinate Judge is perverse and that it is open to me in second appeal to set it aside, although the question is one of fact. In the view I take it is unnecessary to decide whether the finding is perverse or not, for I proceed upon the footing that the Subordinate Judge's conclusions of fact are

correct, namely that the talak was pronounced in the absence of the wife on 21st July and that fact was communicated to her on 24th August. On these findings, in my opinion, the suit is not barred by limitation.

It is now settled law that the absence of the wife does not make the pronouncement of talak void and inefficacious, for the husband may pronounce a valid talak in her absence. *Sarabai* v. *Rabibai* (1), *Fulchand* v. *Nawab Ali Choudhary* (2), *Ashabibi* v. *Kadir Ibrahim Rowther* (3), *Rajasaheb Rasul Saheb, In re* (4) and *Ma Mi* v. *Kallander Ammal* (5). But on the question whether the talak takes effect only after it comes to the notice of the wife, there seems to be some uncertainty. Ameer Ali in his Mahomedan Law states the law thus :

"It is not necessary for the husband himself to pronounce the talak in the presence of the wife, but it is necessary that it should come to her knowledge. If a talak is given by letter, it will take effect on the receipt of the letter by the wife. If the letter reaches her father and he tears it to pieces there will be no talak unless the father transacts all her business, is, in fact, her agent, and resides in the same house with her. If the father should inform the wife of the receipt of the letter and deliver to her the torn pieces thereof, the talak will take effect only if the letter can be read and understood: 4th Edn, Vol. II, p. 544."

In *Sarabai* v *Rabibai* (1) Batchelor, J., makes the following observations :

"On the contrary, the authorities show that a bain talak, such as this, reduced to manifest and customary writing, takes effect immediately on the mere writing; see e. g., Baillie, p. 233; Moulvi Mahomed Yusoof, Vol., III, p. 95. The divorce being absolute, it is effected as soon as the words are written, "even without the wife receiving the writing".

This is clearly opposed to the extract from Mr. Ameer Ali's book. But I must point out that the actual point decided in *Sarabai* v. *Rabibai* (1) is somewhat different. It was argued in that case that the divorce could not be considered final, because it was never communicated to the plaintiff. The learned Judge meets this contention by observing

"that the evidence was quite clear that every practical step was taken to communicate the divorce and make over the iddat money to the plaintiff, and that these measures, if they were frustrated, were frustrated solely by her own obstinate refusal to accept the paper or the money."

In these circumstances, the learned Judge went on to say, it would be a strange result if the plaintiff were allowed to take advantage of her own inaccessibility. He added that he found nothing in the Mahomedan law to countenance such a conclusion.

In *Ashabibi* v. *Kadir Ibrahim Rowther*, (3), to which Abdur Rahim, J., was a party the question arose whether for a talak to be effective, the words of repudiation must be addressed to the wife. The learned Judges dealt in that case elaborately with the incidents of marriage and divorce under the Mahomedan law. They held that it was unnecessary that the words of repudiation should be addressed to, or uttered in the presence of, the wife. In that case, they were not called on to consider whether the talak takes effect only when it comes to her knowledge. There are some passages, no doubt, in the judgment, from which it may be inferred that the talak becomes effective the moment it is pronounced, but the decision can hardly be said to be an authority on the question. As Mr. Ameer Ali points out, many of the observations in that judgment are obiter: see p. 548 of Ameer Ali's Mahomedan Law, Vol. 2, But there is a passage in the judgment which is relevant to the present inquiry. The learned Judges suggest that without communication a talak may cease to be effective at least for certain purposes. I quote their words:

"All that the law requires is that the words should refer to the wife though if they be not communicated to her at the time, a question may possibly arise as to whether she is not entitled until she comes to know of the divorce, to bind her husband by certain acts, such as pledging his credit for obtaining the means of subsistence."

The question more directly arose in *Fulchand* v. *Namal Ali Choudhury* (2). That was a suit by a Mahomedan widow against the heirs of her deceased husband for the deferred portion of her dower. The defence was that she was divorced in 1897 and that the suit (brought in 1905) was statute barred under Art. 104, Limitation Act. It was argued that the absence of the wife made the pronouncement of the talak void and inefficacious. In holding that it did not, the learned Judges refer to the following passage in Mr. Ameer Ali's book:

"It is not necessary for the husband himself to pronounce talak in the presence of the wife, but

(1) [1906] 30 Bom. 537=8 Bom. L. R. 35.
(2) [1909] 36 Cal. 184=1 I. C. 740.
(3) [1910] 33 Mad. 22=3 I. C. 730.
(4) [1920] 44 Bom. 44=54 I. C. 573.
(5) A. I. R. 1927 P. C. 15=100 I. C. 1=54 I. A. 61=5 Rang. 18 (P. C.).

that it is necessary that it should come to her knowledge."

The law is thus stated in the judgment:

"We therefore hold that it is not necessary for the wife to be present when the talak is pronounced. It is necessary certainly for the purpose of dower that the fact of the pronouncement of talak should come to her notice. That it came to the notice of the woman there can be no doubt, for before her husband's death she saw him and claimed the dower."

There was no distinct finding when the wife got knowledge of the talak, but the learned Judges held that the suit was barred stating their reasons thus:

"If we count the period of limitation from the time of divorce or from a little later, it is obvious that the suit is statute barred * * * * But on the findings such as they are before us, we have no doubt at all that the woman had notice of the talak anterior to the period of limitation."

The judgment clearly seems to proceed on the ground, that time began to run more than three years before the suit, whether the starting point was the pronouncing of the talak or the wife receiving notice of it. This case, to a large extent, supports the appellant's contention.

The last case cited is *In re Raia Saheb Rasul Saheb* (4), on which also the appellant relies. It was there argued for the wife that the talaknama was not valid, as it was not duly communicated to her. Shaw, J., points out that no authority was cited to show that this proposition was correct. But the learned Judge goes on to say (and this is important):

"All that appears necessary is that the fact of the talak having been effected must come to the notice of the wife."

The talaknama came to the wife's knowledge within a reasonable time from the date of its execution and that (says the judgment) seems to be sufficient to satisfy the requirements of the Mahomedan law.

On the authorities cited, there is a clear preponderance of view in favour of the plaintiff; but I am not prepared in the absence of fuller investigation to decide, whether a talak pronounced in the absence of the wife does or does not take effect till it comes to her knowledge. It is unnecessary to decide that general question. I am content to follow the authority of *Fulchand* v. *Nawab Ali* (2) which holds:

"It is necessary certainly for the purpose of dower that the fact of the pronouncement of talak should come to her notice."

This case is referred to by Munro and Abdur Rahim, JJ., in *Ashabibi* v. *Kadir Ibrahim Rowther* (3), and in their elaborate judgment its correctness has not been doubted. Moreover, that very judgment on which Mr. K. P. M. Menon for the respondent so strongly relies, suggests, as I have said, that the doctrine, that the divorce becomes efficacious immediately on its being pronounced, may be subject to some kind of reservation. I therefore hold that the plaintiff's right to claim the deferred dower accrued only on 24th August 1919 and that the suit is within time.

Art. 104, Limitation Act, must be read in the light of the rule of the Mahomadan law to which I have just adverted. It provides (to quote only the material part), that for a suit for deferred dower, the period of limitation is three years from the date when the marriage is dissolved by divorce. It is a part of the Mahomedan law that, so far as a claim for dower is concerned, the marriage is dissolved by divorce only when it comes to the wife's notice. Construed in this way, there is nothing in Art. 104 which stands in the plaintiff's way. I am perpared on this ground to allow the appeal.

There is another ground which is equally fatal to the defendant's case. The rule of estoppel applies to the facts as found. The defendant could himself have communicated to his wife that she had been divorced; but he constituted the Kazi his messenger. He alleges that he specifically mentioned to the Kazi that the talak had been effected on 21st July; but the latter, in words which are unequivocal, informs the plaintiff that it was effected on 21st August. Not till she came to Court was she told that August was a mistake for July. As I have said, the suit was filed on 25th July that is, before the expiry of the three years period, computing it from 21st August. Why should the plaintiff be deprived of her right she having acted upon the statement which was made to her? What was there to make her suspect that the statement might be wrong? To say that it was an innocent mistake of the Kazi is no answer; nor can it be doubted that the Kazi was the defendant's agent. A representation made by an agent is as effectual for the purpose of estoppel as if it had been made by a principal. I am satisfied that even on

this ground the plaintiff is bound to succeed.

I accept the finding of the lower Courts that on the evidence the plaintiff is entitled to Rs. 105 and not Rs. 150 as her dower. In the result the second appeal is allowed to that extent. There will be judgment for the plaintiff for Rs. 105 with interest at 6 per cent per annum from the date of plaint, with costs throughout on the full amount claimed.

P.R.S./S.N. *Appeal allowed.*

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* * A. I. R. 1931 Madras 650
Full Bench

BEASLEY, C. J., RAMESAM, REILLY, ANANTAKRISHNA AYYAR AND SUNDARAM CHETTY, JJ.

Vellathusseri Chakkala Kumpil Pankunni Menon—Plaintiff—Appellant.

v.

Vellathusseri Chakkala Kumpil Raman Menon—Defendant—Respondent.

Letters Patent Appeal No. 70 of 1926, Decided on 11th March 1931, against judgment of Madhavan Nair, J., in Appeal No. 68 of 1924.

*** * Civil P. C. (1908), S. 2 (12) and O. 20, R. 12 (2)—Executing Court cannot allow interest when decree is silent as to interest—Civil P. C. (1908). S. 34:** *A. I. R*, 1927 *Mad.* 954=105 *I. C* 34, *Overruled.*

It is not open to the Court which executes a final decree fixing the amount of mesne profits but silent as regards the award of any interest or the rate thereof, to make up the omission and itself fix a rate of interest and then allow execution for the interest so fixed. Under the Civil Procedure Code the amount of mesne profits is inquired into and fixed, and a final decree regarding the same is passed under O. 20, R. 12 (2). Such a decree is open to appeal in the manner provided by the Code; but unless appealed against, at the stage when the execution of the same is sought the executing Court could not award interest or fix the rate of interest when the final decree is silent on those matters: 6 *C. L. J.* 462; 53 *I. C.* 227, *Appr.*; 27 *Cal.* 951 (*P.C.*), *Dist.*; **A. I. R. 1927 Mad. 954=105 I. C. 34, Overruled.** [P 652 C 2]

K. P. Raman Menon—for Appellant.

K.P. Krishna Menon—for Respondent.

Order of Reference

Kumaraswami Sastri, J.—The question for decision in this Letters Patent Appeal is whether the Court to which a decree is sent for execution can award interest on mesne profits where the decree sent to it for execution is silent on that point. There is a conflict of authority in this Court as regards this question. Madhavan Nair, J., in the judgment which is now appealed against, followed the decision in *Harmanoji Narain Singh* v. *Ramprasad Singh* (1), and the decision of Wallace, J., in *A. A. A. O. No.* 74 *of* 1924 and held that the executing Court could not allow interest where the decree it executes is silent on the point.

For the respondent it is contended that having regard to the definition in S. 2, sub-Cl. (12) of mesne profits interest is part of the mesne profits and that the executing Court can award interest. Reliance is placed on the decision of a Bench of this Court (Odgers and Curgenven, JJ.), in *Ramkrishna Rangarao* v. *Ayyagari Sodemma* (2). The learned Judges disagreed with the two decisions of Madhavan Nair, J., and of Wallace, J., which were referred to them as also the decision of the *C. L. J.* case in *Harmanoji Narain Singh* v. *Ramprasad Singh* (1), on which the judgment of Madhavan Nair, J., is based and held that it is competent for the executing Court to allow interest. We may point out that under O. 20, R. 12, the Court which passes a decree for possession of property in cases where there is a claim for possession and mesne profits can either assess mesne profits itself or direct an inquiry as to the rents or mesne profits from the institution of the suit until delivery of possession or other period mentioned in Cl. (c). Then sub-S. (2), S. 12, provides that when an inquiry is directed under Cl. (b) or (c) final decree in respect of rents or mesne profits shall be passed in accordance with the result of such an inquiry. It is no doubt correct to say that where the Court passing a decree holds that a party is entitled to mesne profits and without saying anything more directs an inquiry, the Court dealing with the question can allow mesne profits having regard to the definition of mesne profits in S. 2, sub-S. (12), because there the whole inquiry is before the Judge determining the mesne profits and there is no judgment determining the quantum of mesne profits or anything further than that the party is entitled to mesne profits.

It is something like working out a declaratory decree determining the rights of the parties in a partnership suit where each party is declared entitled to a cer-

(1) [1907] 6 C. L. J. 462.

(2) A. I. R. 1927 Mad. 954=105 I. C. 34.

tain share and accounts are directed to be taken on that basis. The difficulty comes in where a decree under S. 2 (12) has been passed and is sent down for execution to another Court. It has been held in a series of cases that the executing Court cannot go behind the decree it executes and any error or omission in the decree should be rectified only by the Court which passes the decree. In the present case we must take that assuming that the Court which passed the decree for mesne profits under O. 20, R. 12 (2), committed an error having regard to the definition of mesne profits under S. 2 (12) in not awarding interest the remedy would be to apply to the Court which passed the decree under R. 12, and get the decree amended by allowing interest. There is nothing which prevents the party from doing so and if the Judge refuses to do it he can take the matter in appeal. The definition of mesne profits simply says it includes interest. Neither S. 2, sub Cl. (12), nor R. 12, O. 20, fixes the rate of interest. Ordinarily 6 per cent is given but there is nothing to prevent the Court from giving more or less than 6 per cent. If there is a residue of discretion left in fixing the rate that we think should be exercised by the Court, which passed the decree the executing Court's function being solely to execute the decree passed. Having regard to the conflict of opinion we think it desirable that the following question be referred to a Full Bench of this Court for decision:

"Whether where a decree of Court which awards mesne profits under R. 12, O. 20, is silent as to interest, it is open to the executing Court to fix the rate of interest and to execute the decree allowing interest."

Opinions

Anantakrishna Ayyar, J. — The question referred for the decision of the Full Bench is:

"Whether where a decree of Court which awards mesne profits under R. 12, O. 20, Civil P, C. is silent as to interest, it is open to the executing Court to fix the rate of interest and to execute the decree allowing interest."

In a suit for the recovery of possession of immovable properties and for mesne profits, the Court, if it finds the plaintiff's case to be proved, may pass a decree: (a) for the possession of the property; (b) for mesne profits which have accrued on the property during a period prior to the institution of the suit and (c) directing an inquiry as to the mesne profits from the institution of the suit until the delivery of possession to the decree-holder etc.; under R. 12 (2), where an inquiry is directed under Cl. (b) or Cl. (c), a final decree in respect of the mesne profits shall be passed in accordance with the result of such inquiry.

When therefore the Court holds an inquiry in respect of the amount of mesne profits, it has to pass "a final decree" incorporating the amount fixed by it as the result of the inquiry made regarding the amount of mesne profits. According to the definition of the expression "mesne profits" contained in S. 2 (12), Civil P. C., "mesne profits of property" means:

"those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom together with interest on such profits."

The result is that though the first decree (which would be a final decree so far as the delivery of the property is concerned, but only a preliminary decree in so far as it directed an inquiry as to the mesne profits, past or future), be a decree for "mesne profits," merely, yet having regard to the definition of the term "mesne profits" mentioned above, the Court which inquires into the amount of mesne profits should award to the successful plaintiff not only the profits which the defendant in wrongful possession actually received or might with ordinary diligence have received from the property during the period in question, but also award "interest" on such profits. No separate or specific direction in the first decree as regards the award of interest is necessary to enable the Court when inquiring into the amount of mesne profits to pass a decree for interest also on the said amounts of profits, under O. 20, R. 12 (2), Civil P. C. The questions—whether mesne profits should be awarded or not, and if so, the period for which the same should be awarded—are questions to be decided by the Court which passes the first decree under O. 20, R. 12 (1), Civil P. C.:

"Mesne profits are in the nature of damages which such Court may mould according to the justice of the case."

It may, having regard, to the circumstances, decline to award any mesne profits at all; or limit the period for which such profits are to be awarded;

or give specific directions as to how the same should be calculated having regard to the special circumstances of the case. Similarly such Court has jurisdiction to direct that no interest at all be awarded to the plaintiff, or to fix the rate of interest in the circumstances. All these are open to the Court which passes the first decree under O. 20, R. 12 (1). But if that Court simply passes a decree for "mesne profits" for a particular period, then it is no more open to the Court inquiring into the matter under R. 12 (2), either to refuse mesne profits at all, or to limit the period for which mesne profits should be decreed or to decline to award any interest at all though it is open to it to fix the amount of such profits and also to fix the rate of interest.

The Court when passing the final decree fixing the amount of mesne profits under O.20, R. 12 (2), has therefore to fix the amount of profits and also the rate at which interest on the amount ascertained by it should be awarded to the plaintiff. If for any reason it should decline, or omit, to award interest in the final decree, the party feeling aggrieved thereby should take appropriate proceedings either by way of appeal or otherwise, to have interest included and the decree set right by its inclusion. If however he should allow such a decree to become final, then he could not in execution proceedings claim interest on the amount mentioned in the final decree. It is a settled principle of law that when a decree is unambiguous on its face, the executing Court cannot go behind the decree. A decree, even though it may not be according to law, is binding and conclusive between the parties until it is set aside either on review, appeal, or revision. The Court executing a decree cannot alter, vary, or add to, the terms of the decree under the guise of executing the decree—questions of adjustment of decree by consent of parties apart. When a decree is ambiguous, it has been held that a reference to the pleadings and judgment is legitimate. If the decree is based upon, or refers to, another document, then reference to the same in such cases would be permissible, in order to understand what the decree really means. Though therefore the executing Court is entitled, and is in fact bound, to construe the decree of which execution is sought, it is not entitled to add to the terms of the decree. If on its construction of the decree, the executing Court comes to the conclusion that the decree does not award interest on the amount of profits mentioned in the final decree, it is not open to the executing Court to fix the rate of interest itself when the same has not been fixed in the final decree. As already mentioned, it is a question of the construction of the final decree in each case, whether the same either specifically, or by necessary reference to the documents referred to by it, awards and fixes the rate of interest; but when the final decree does not award interest in that manner, it is clear that it is not open to the executing Court to fix the rate of interest and then to execute the decree allowing interest.

Great reliance was placed by the learned advocate for the plaintiff decree-holder-appellant on the decision of the Privy Council in the case reported in *Girish Chander Lahiri* v. *Shoshi Shikhareswar Roy* (3). To understand that decision correctly, it is necessary to remember that under S. 211, Civil P. C. (Act 14 of 1882)--in force at that time,

"when the suit is for the recovery of possession of immovable property yielding rent or other profits, the Court may provide in the decree for payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession of the party in whose favour the decree is made with interest thereupon at such rate as the Court thinks fit."

Under S. 212:

"when the amount of mesne profits is disputed, the Court may either determine the amount by the decree itself, or may pass a decree for the property and direct an inquiry into the amount of mesne profits and dispose of the same on further orders."

Section 244 of the same Code enacted that

"questions regarding the amount of any mesne profits as to which the decree has directed inquiry shall be determined by order of the Court executing a decree and not by a separate suit."

Accordingly, the Court, after passing a decree for mesne profits, proceeds by subsequent proceedings to inquire into the amount of such mesne profits, and, in the result, fixes the amount due by the one party to the other. Under the

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3) [1900] 27 Cal. 951=27 I. A. 110=7 Sar. 687 (P. C.).

definition of the word "decree" in S. 2 of the Code of 1882,

"an order determining any question mentioned or referred to in S. 244, but not specified in S. 588"

is specifically mentioned as coming within the definition of a "decree." The explanation attached to S. 211 is to the following effect:

"Mesne profits mean those profits which the person in wrongful possession of such property actually received..... together with interest on such profits."

Under S. .196, Act 8 of 1859:

"the Court may provide in the decree for the payment of mesne profits, ... with interest thereupon at such rate as the Court may think proper."

That Act did not contain any definition of "mesne profits." S. 211, Act 10 of 1877 enabled

"the Court to provide in the decree for payment of mesne profits, with interest thereupon at such rate as the Court thinks fit,"

and, at the same time added an explanation to the effect that

"mesne profits of property mean those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom."

By Act 12 of 1879, the words "together with interest on such profits," were added to the explanation. S. 211, Act 14 of 1882, reproduced the explanation as amended by the Act of 1879. Therefore after 1879 the expression "mesne profits," includes interest on such profits.

The appeal before the Privy Council was against the order of the Court fixing the amount of mesne profits in the proceedings undertaken to inquire into the amount of mesne profits in pursuance of a decree passed for land and mesne profits on 23rd December 1883. The Court of first instance awarded interest on the amount of profits which it held should be awarded to the successful decree-holder; but the High Court declined to grant interest. On appeal their Lordships of the Privy Council held that the successful plaintiff was entitled to interest also on the amount of profits, and therefore they reversed the decision of the High Court and restored the decision of the Subordinate Judge allowing interest on the profits as ascertained, year by year.

The following passages at p. 967 of the report throw light on the point:

"The learned Judges say that the Court has still jurisdiction to give or refuse interest as it chooses. Their Lordships agree because mesne profits are in the nature of damages which the Court may mould according to the justice of the case. But the question is what is the effect of a decree which grants mesne profits and says nothing about interest, which as their Lordships think, is the proper construction of the decree in this suit. The learned Judges treat that silence as equivalent to a decision that there be no interest. But then it is difficult to see what effect is given to the alteration made in S. 211 in the year 1882. Its obvious effect is to provide that a simple decree for mesne profits shall carry interest on them. No reason has been assigned for holding the true effect to be other than the obvious one. If the Court does not intend to give interest it should say so. The learned Judges give reasons for thinking that interest ought not to be given in this case. But in execution proceedings we are only construing the decree and not considering its merits:" *Girish Chandar Laheri* v. *Shoshi-Shikhareshwar Roy* (3) 967 *of* 27 *Cal.*)

When therefore a decree granted mesne profits but said nothing about interest, their Lordships held that the Court which inquires into and fixes the amount of mesne profits should award interest on the amount of profits ascertained year by year. As the appeal to the Privy Council was from the decision of the High Court passed in the proceedings taken to ascertain the amount of profits the Privy Council modified the High Court's decision and allowed interest on the amount of profits ultimately fixed by the Court.

If in any case the plaintiff, the decree-holder, be not satisfied with the decree of the lower Court fixing the amount of profits but not allowing interest on the profits as ascertained year by year, it was open to him to appeal against that decree and urge in support of his appeal the decision of the Privy Council in *Girish Chander Lahiri* v. *Shoshi Shikhareshwar Roy* (3). He however should not allow the lower Court's decree to become final; otherwise proceedings to ascertain the amount of mesne profits would have ended, and the decree would have become final. What remains in such a case would be to take execution only in respect of the amount mentioned in the final decree. Having regard to the principle laid down by the Privy Council in various cases, that the Court executing a decree could not go behind the decree, nor alter, vary, or add to the terms of the decree, I am clear that the appellant's contention—that it is open to the Court which executes a final decree fixing the amount of mesne profits

but silent as regards the award of any interest or the rate thereof, to make up the omission and itself fix a rate of interest and then allow execution for the interest so fixed is untenable.

Under the present Code of Civil Procedure, the amount of mesne profits is inquired into and fixed and a final decree regarding the same is passed under O. 20, R. 12 (2). Such a decree is open to appeal in the manner provided by the Code; but unless appealed against, at the stage when the execution of the same is sought the executing Court could not award interest or fix the rate of interest when the final decree is silent on those matters.

Under the Code of 1882 first a decree for immovable property and also for mesne profits was passed; by subsequent orders, on proceedings taken to inquire into and ascertain the amount of such mesne profits decreed to the plaintiff, the Court fixed the amount; in doing so, the Court could allow interest. Such orders fixing the amount were treated as "decrees" within the definition of the word "decree" in S. 2 and were open to appeal. The appellate Court could, if it chose, modify the amounts awarded by the lower Court and fix such rate of interest as it in its discretion thought fit; but when once the amount had been finally fixed in those proceedings, there is no authority to support the contention that the executing Court could either alter the figures, or award interest, or fix for the first time, or change the rate of interest.

This is the view that was taken by the Calcutta High Court in *Harmanoji Narain Singh* v. *Ramprasad Singh* (1) and *Narendra Lal* v. *Bymoomkesh* (4), and in this Court by Madhavan Nair, J., in the judgment now appealed against, and by Wallace, J., in the case referred to in the order of reference to the Full Bench. A Bench of this Court would seem to have taken a contrary view in *Ramkrishna Ranga Rao* v. *Ayyagiri Sodemma* (2). Of course we are not concerned with the construction put by the learned Judges in *Ramkrishna Ranga Rao* v. *Ayyagiri Sodemma* (2), on the decree which was sought to be executed in that case; for as I have already mentioned, the question of construction of a decree is for the Court which executes the decree; but there are certain observations in the judgments of the learned Judges which seem to me, with all respect, to be unsustainable. At p. 621, it is remarked:

> "There remains the question whether the executing Court was competent to grant interest, no express provision for interest being made in the decree". . . . .

At p. 623 reference is made to the passage already extracted from p. 967 of the Privy Council judgment in *Girish Chandar Lahiri* v. *Shoshi Shikhareshwar Roy* (3). The inference is drawn from that passage that

> "It is competent to an executing Court to grant interest when no express provision for interest is made in the decree."

A similar reasoning is adopted in the judgment of the other learned Judge at pp. 626 and 628 of the report. For reasons already mentioned, the learned Judges do not seem to have attached due weight to the circumstances that the observations relied on were made by the Privy Council in the appeal preferred against the decision of the Court fixing the amount of profits; in which case it follows that the appellate Court has got full powers in the matter of interfering with the amount awarded by the lower Court and also to award such rate of interest as the appellate Court thought fit. If the appeal before the Privy Council arose, not against the decree fixing the amount of profits, but against orders passed in execution proceedings undertaken to realize the amount of profits finally fixed in proper proceedings by the Court, then undoubtedly the observations would be relevant and in fact conclusive on the question. I am therefore unable to agree with the view taken by the learned Judges that "the executing Court was competent to grant interest when no express provision for interest was made in such a decree."

The decisions of the Allahabad High Court do not seem to be uniform; the earlier decisions supporting the position taken up in *Harmanoji Narain Singh* v. *Ramprasad Singh* (1) whereas the later decisions seem to take a contrary view.

Decrees should be clear and self-contained as far as possible, and difficulties would in most cases be avoided if Courts bestow proper attention in passing such decrees.

It is clear that the executing Court would not be warranted in fixing tht rate of interest when the Court which

(4) [1919] 53 I. C. 227.

passed the decree fixing the amount did not do so. Whatever other reliefs the decree-holder might have in such circumstances, it seems to me that it is not open to the executing Court to fix the rate of interest and to execute the decree allowing interest where the decree of Court which awards mesne profits is silent as to interest.

For the above reasons I would answer the question referred to us in the negative.

Reilly, J.—I agree that, that if a decree for mesne profits is not only silent in regard to interest but properly interpreted does not award interest the executing Court cannot allow interest. I agree that an executing Court can never grant interest on mesne profits unless interest has been explicitly or implicitly awarded by the Court which fixes the mesne profits. The duty of the executing Court in this, as in other cases, is to carry out the decree, not to add to it nor vary it in any way; but it is a duty not always easy to perform. The absence of the word "interest" from the decree is not always decisive.

"Mesne profits" by the definition of that expression in S. 2 (12), Civil P. C., means (1) "those profits which the person in wrongful possession, , . , . , actually received or might with ordinary diligence have received,"

which I call the "net income," plus (2) interest on that net income. But it is open to the Court which makes the decree to award the net income without also awarding interest, and, if that is done, the duty of the executing Court is merely to carry out the decree so made. The executing Court however sometimes finds a difficulty because the effect of the decree in this respect is not clear. The Court which makes the decree should always make its meaning clear but sometimes does not do so. The executing Court has then the duty of interpreting the decree. Cases are met in which the decree first awards "mesne profits"—which in itself by the definition in the Code means net income plus interest and then goes on to specify in kind or in money the rate of the net income. When the decree is framed in that way the proper interpretation of it is in my opinion that the Court making the decree intended to give the net income fixed and also by implication in the use of the expression "mesne profits" intended to give interest, and the interest not being specified, will be at the Court rate, viz. 6 per cent per annum. In other cases without saying anything explicitly about interest a lump sum is fixed either as total or for each year in such a way as to indicate that is all that is awarded—perhaps because interest has been calculated and included in the lump sum, perhaps because it has been refused. If it is clear that nothing more than the lump sum has been awarded, the executing Court is not interested in the reason but has only to carry out the decree as made. But the exact significance of the decree is again a matter of interpretation. Sometimes the fact that interest is mentioned in respect of some other amount in the same decree but is not mentioned in respect of the amount described in the decree as "profits" or "mesne profits" indicates that interest on the net income has been refused. There again the executing Court has to interpret the decree and so ascertain the intention of the Court which made it. All these are instances of badly drawn decrees, the result of careless work. But unfortunately such decrees are sometimes—indeed too often made, and executing Courts have to make the best of them. A little time ago my brother Anantakrishna Ayyar and I had to interpret a decree for mesne profits in A. A. O. No. 348 of 1928. There the decree awarded "mesne profits" and then fixed a rate of net income in money without mentioning interest explicitly. We interpreted that to mean that the net income mentioned and interest at 6 per cent were awarded as mesne profits. The reason that the decree was not better worded may have been that it was mainly based upon a compromise between the parties. But it is not only compromise decrees which are worded obscurely in this respect, and, where there is obscurity, the executing Court has the duty of interpretation. S. 34 (2) is not of much help in such cases as the failure to mention interest explicitly is not decisive when the expression "mesne profits" which ordinarily includes interest. is used.

I cannot answer the question put to us with a simple "Yes" or "No." My answer is that, even if the decree "is silent as to interest" in the sense that the word "interest" does not appear in it nevertheless, if by the use of the expression

"mesne profits" combined with a reference to a rate of income or in any other way the decree indicates that interest is awarded the executing Court must give it and, no rate of interest being mentioned, should give it at the Court rate of 6 per cent. But this result, when reached, must be reached solely by interpretation of the decree, not by the use of any supposed discretion in the executing Court. And as the Court making the decree has the right to refuse interest, any indication that it has done so must be allowed full weight by the executing Court. "Silence" so complete that there is no indication that interest has been awarded would itself be an indication that interest has been refused. In every case in which the intention of the decree is not expressed with unquestionable clearness it is the duty of the executing Court to ascertain that intention by interpretation. But I may add that it is the duty of the Court making the decree to make its intention in the matter so clear that there is no room for interpretation.

If I may express an opinion regarding the decree in the suit out of which this reference has arisen, I interpret it as not awarding interest on the future mesne profits fixed, an indication of that intention in spite of the use of the expression "mesne profits" being found in the fact that no interest is mentioned in respect of those profits, though interest is explicitly awarded on the past kannipattam.

I agree that in reading the judgment of their Lordships of the Judicial Committee in *Girish Chander Lahiri* v. *Shoshi Shekhareshwar Roy* (3) we must remember that they were dealing with a case in which mesne profits had to be fixed in execution under the Code of 1882, a duty which can never properly fall on the executing Court under the present Code. I agree also that the application of that judgment in *Ramakrishna Ranga Rao* v. *Ayyagari Sodemmal* (2) was incorrect, though the interpretation which the learned Judges in the latter case put upon the decree before them, which had not been drawn with sufficient care, may have been right.

Ramesam, J.—I agree with the judgment of Anantakrishna Ayyar, J., and have nothing to add.

Sundaram Chetty, J.—I ... the judgment of my learn... Anantakrishna Ayyar, J.

Beasley, C. J.—I agree also.

P.R.S./K.N. *Answered neg...*

**** A. I. R. 1931 Madras**
Full Bench

BEASLEY, C. J., RAMESAM, REI. ANANTAKRISHNA AYYAR AND SUNDA CHETTY, JJ.

Arunachalam—Appellant.

v.

P. K. A. C. T. Veerappa Chettiar—Respondent.

Appeal No. 274 of 1929, Decided on 9th March 1931, against order of Temporary, Sub-Judge, Devakottah, D/- 6th March 1929.

**** (a) Civil P. C. (1908), O. 9, R. 13—R. 13 does not apply to execution proceedings under O. 21, as fall within S. 47.**

Order 9, R. 13 does not apply to such execution proceedings under O. 21, as also fall within S. 47. Reason is that the provisions of O. 9 do not apply to anything but suits and an order in such execution proceedings is not a decree in suit : *A. I. R.* 1929 *Mad.* 757 (*F. B.*), *Expl.*; 37 *Mad.* 462 ; *A. I. R.* 1926 *Mad.* 412 and *A.I.R.* 1927 *Mad.* 355, *Ref.* [P 657 C 2,P 658 C 2]

(b) Civil P. C. (1908), O. 9, R. 13—Advisability of framing new rule suggested.

Advisability of framing a rule making O. 9 applicable to proceedings in execution in certain cases suggested. [P 659 C 1]

T. M. Krishnaswami Iyer and *S. Subramania Iyer*—for Appellant.

K. S. Krishnaswamy Iyengar and *N. Srinivasa Iyengar*—for Respondent.

Order of Reference.—The plaintiff obtained a decree for money against defendant 6, the father of the appellant before us. Defendant 6 died, and his minor son, the appellant before us—was brought on record as the legal representative of the deceased. The decree-holder applied by E. A. No. 17 of 1929 on 7th January 1929 for attachment of certain immovable properties and notice to the appellant, the minor son, was ordered on 8th January 1929, and the hearing of the petition was adjourned to 29th January 1929. The appellant not appearing on 29th January 1929, the learned Subordinate Judge passed orders that day ordering attachment of the immovable properties as prayed for by the decree-holder. Subsequently the appellant applied on 2nd February 1929, under O. 9, R. 7, Sch. 1 and S. 151, Civil P. C., to set aside the order passed on 29th January 1929, after excusing his

non-appearance on 29th January 1929, to hear his objections to the attachment of the properties and to cancel the order of attachment, alleging that his guardian ad litem had instructed a vakil to appear for him on the 29th and to oppose the decree-holder's application, but that his vakil was late in appearing before the Court by "a minute," and that orders were passed by the learned Subordinate Judge "a minute before the said vakil came to Court." The decree-holder contended that the petition was not maintainable under any of the provisions of the Code. The learned Subordinate Judge dismissed the application holding that O. 9, Civil P. C., was inapplicable to execution proceedings, and observed as follows :

"It appears to me that under the law as it stands the objections of the respondent must prevail. This petition cannot therefore be granted."

On this appeal preferred against the decision of the learned Subordinate Judge, it was contended by the learned advocate for the appellant that the recent decision of the Full Bench of this Court in *Alagasundaram Pillai* v. *Pichuvier* (1) is authority for the proposition that O. 9, Civil P. C., applied to such proceedings under O. 21 as fall within S. 47 of the Code, and that the proceedings now in question being proceedings under O. 21, falling also within S. 47 of the Code, the decision of the Full Bench is directly applicable, and that the appeal must be allowed and the petition remanded to the lower Court for fresh disposal. On the other hand, the learned advocate for the respondent-decree-holder contended that the Full Bench had not to decide the general question whether O. 9, Civil P. C., applies to execution proceedings under O. 21, Civil P. C., falling within S. 47, Civil P. C., and that the questions which the Full Bench had to decide were only the two questions specifically mentioned in the order of reference. It was also pointed out that there are several decisions of this Court where learned Judges have held that O. 9, Civil P. C., does not apply to execution proceedings under O. 21, Civil P. C., and that it could not be said that the Full Bench has considered that question and overruled those decisions, more especially as the points referred to the Full Bench did not necessitate the same.

On the other hand, the learned advocate for the appellant drew our attention to the wordings of the answer of the Full Bench to the first question, viz.:

"Order 9 does not apply to such proceedings under O. 21, Rr. 97 or 100, Civil P. C., as do not also fall within S. 47 of the Code."

We were referred to the decisions in *Subbiah Naicker* v. *Ramanathan Chettiar* (2), *Chidambaram Chetti* v. *Theivanai Ammal* (3), *Kali Shettathi* v. *Shama Rau* (4), *Kajuluri Sawmi* v. *Sooryanarayana Razu* (5), *Kaleakkal* v. *Palani Koundan* (6), *Narayana Chettiar* v. *Muthu Chettiar* (7) and *V. Ramaraghava Reddi* v. *Rajah of Venkatagiri* (8) among others. We have not thought it necessary to refer in detail to the various other decisions that were cited to us in support of the contentions raised by the respective parties, as most of them have been referred to either in *Subbiah Naicker* v. *Ramanathan Chettiar* (2) or *Kaliakkal* v. *Palani Koundan* (6). The question relates to a matter of practice of frequent occurrence, and as there should not be any doubt on such an important matter, we think that the following question should be referred to the decision of a Full Bench:

"Whether O. 9, R. 13, Sch. 1, Civil P. C., applies to such execution proceedings under O. 21 as also fall within S. 47 of the Code."

This appeal coming on for hearing in pursuance of the aforesaid order of reference to a Full Bench, the Court expressed the following

Opinion

Beasley, C. J.—The plaintiff obtained a decree for money against defendant 6. Defendant 6 died and his minor son was brought on record as his legal representative as defendant 8. The decree-holder applied by E. A. No. 17 of 1929 for attachment of certain immovable properties in the hands of defendant 8 and notice was ordered on him. When the petition came on for hearing on 29th January 1929, in the absence of defen-

(1) A. I. R. 1929 Mad. 757=120 I. C. 567=52 Mad. 899 (F.B.).

(2) [1914] 37 Mad. 462=22 I. C. 899.
(3) A. I. R. 1924 Mad. 1=74 I. C. 155=46 Mad. 768.
(4) [1917] 37 I. C. 229.
(5) A. I. R. 1925 Mad. 126=81 I. C. 841.
(6) A. I. R. 1926 Mad. 412=92 I. C. 533.
(7) A. I. R. 1926 Mad. 980=97 I. C. 1008=50 Mad. 67.
(8) A. I. R. 1927 Mad 355=99 I. C. 954.

dant 8 who did not appear, the learned Subordinate Judge ordered attachment of the immovable properties as prayed for by the decree-holder. Subsequently defendant 8 applied on 2nd February 1929 under O. 9, R. 13, Civil P. C. to set aside that order on the ground that his non-appearance on the 29th January was due to the late appearance of his vakil. He alleged that his vakil had only been a minute late in appearing before the Court and that orders were passed by the learned Subordinate Judge a minute before the said vakil came to Court. The decree-holder contended that the petition was not maintainable under any of the provisions of the Code. The learned Subordinate Judge dismissed defendant 8's application holding that O. 9 of the Code was inapplicable to execution proceedings. From that order of the learned Subordinate Judge an appeal was preferred to the High Court. That appeal was considered by a Bench and the following question has been referred by that Bench to the decision of this Full Bench, namely,

"whether O. 9, R. 13, Sch. 1, Civil P. C., applies to such execution proceedings under O. 21, as also fall within S. 47 of the Code."

In the order of reference certain cases have been referred to, the most important of which are the decisions in *Subbiah Naicker* v. *Ramanathan Chettiar* (2) and *Kaliakkal* v. *Palani Koundan* (6). These two decisions are directly in conflict. In the former case it was held that O. 9, R. 13, Civil P. C., applies to ex parte orders in execution, and unless they are set aside by application under O. 9, R. 13, or by appeal, they cannot be questioned in the further stages of execution proceedings. On p. 475 it is stated as follows:

"It is contended by the appellant's learned vakil, Mr. L. S. Govindaraghava Ayyar, that O. 9, R. 13, Civil P. C., does not apply to ex parte orders passed in execution, but only to ex parte decrees in suits. We think that that argument cannot be accepted. Orders in execution which come under S. 47, Civil P. C., are decrees as defined in S. 2 of the Code and hence ex parte orders passed in execution are ex parte decrees and O. 9, R. 13, provides generally for the setting aside of ex parte decrees and not only for setting aside of those classes of ex parte decrees which are not also orders passed under S. 47 in execution proceedings. We are fortified in this view by the decision in *Krishna Chandra Pal* v. *Protap Chandra Pal* (9)."

The last mentioned decision is the only decision upon this point which is in agreement with the decision in *Subbiah Naicker* v. *Ramanathan Chettiar* (2). In *Kaliakkal* v. *Palani Koundan* (6), Devadoss and Waller, JJ., took the opposite view. Before us it was contended that the ex parte order passed against defendant 8, attaching his property, was a decree within the provisions of S. 47 of the Code, and that since it is a decree, and since O. 9 provides for the setting aside of ex parte decrees, defendant 8's petition was maintainable. We are invited to interpret O. 9, R. 13, as applying to all ex parte decrees whether in suits or in execution proceedings. On the other side it is contended that O. 9 does not apply to execution proceedings at all and that the whole scheme of the order is to provide for procedure in suits. In the rules of that order the words "summons," "defendant" and "suit" are used all of which are inappropriate to execution proceedings and in *Vamareddi Raghava Reddi* v. *Rajah of Venkatagiri* (8); it was held that cases of dismissal for default of an execution petition are not within O. 9 at all. It is quite true that in a Full Bench decision of this Court, namely, *Alagasundaram Pillai* v. *Pichuvier* (1) in which was raised the question of the power of this Court to set aside an order of dismissal for default it is stated on p. 909 :

"It is not contested that O. 9 does not apply to proceedings in execution except such as involve the determination of any question under S. 47 in which case the orders thereon would amount to decrees,"

and further on

"the orders passed in the proceedings would be decrees and O, 9 would apply."

It may be observed that these observations are obiter and unnecessary for the decision of the questions referred ; and it is quite clear that this question was not at all argued before that Full Bench although such a position may have been stated by way of an example. It is beyond dispute that such an ex parte order as was passed in these execution proceedings is a decree within the provisions of S. 47, but it does not follow that the provisions of O. 9, R. 13, apply to such a decree. If O. 9, R. 13, applies only to suits, then the fact that such an ex parte order is a decree within the provisions of S. 47 is of no real assistance to the defendant. Sub-S. 2 of that sec-

(9) [1906] 3 C. L. J. 276.

tion enables the Court to treat a proceeding under the section as a suit or a suit as proceeding. The use of the word "treat" is an indication to us that the proceedings under that section are not suits. Moreover, when S. 2 (2) of the Code which defines " decrees " is referred to, it will be seen that it shall be "deemed" to include the determination of any question within S. 47. Here again the use of the word " deemed " is inconsistent with something that is actual or real. It is quite clear to us that O. 9 does not apply to anything but suits and has no application to execution proceedings and that such an ex parte order whilst it is a decree is not a decree in a suit. That the provisions of O. 9 were not meant to apply even to appeals is evident from the fact that the legislature has made similar rules for governing cases of non-appearance of parties in appeals, viz., Rr. 11, 17, 18, 19 and 21 of O. 41. It follows therefore that the answer to the question referred to us must be in the negative. Although the facts of this case do not disclose that defendant 8 has suffered any real hardship, we are of the opinion that many cases may occur in execution proceedings where to prevent a judgment-debtor or a decree-holder having an application or petition restored under O. 9, R. 13, may be a great hardship and immediate steps will be taken to frame a new rule making O. 9, applicable to such proceedings in execution.

Ramesam, J.—I have no alteration or addition to make.

Reilly, J.—I agree.

Anantakrishna Ayyer, J.—I agree.

Sundaram Chetty, J.—I agree.

P.R.S./P.N. *Answered negatively.*

A. I. R. 1931 Madras 659

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Srimath Jagathguru Sringeri Sri Satchithanantha Chandrasekara Bharati Swamigal—Plaintiff—Appellant.

v.

C. P. Duraiswami Naidu (dead) and *others*—Defendants—Respondents.

Appeal No. 380 of 1926, Decided on 6th January 1931, against order of Dist, Judge, Chittoor, D/- 4th March 1926, in Appeal Suit No. 324 of 1923.

(a) Madras Eatates Land Act (1908), Ss. 151 and 189—Agriculture—Growing of timber and fuel trees is not agriculture.

The growing of timber or fuel trees is not an agricultural purpose within the meaning of the Estates Land Act. [P 660 C 2]

Even if a man holds raiyati land in an " estate " under the Act, he is not a raiyati, unless he holds it for agricultural purposes and the jurisdiction of a civil Court to try a suit for his ejectment is not barred : *A. I. R.* 1931 *Mad.* 194 ; *A. I. R.* 1924 *P. C.* 247, and 34 *I. C.* 730, *Ref*; 24 *Mad.* 421 and 38 *Mad.* 738, *Diss. from* [P 660 C 1]

(b) Interpretation of Statutes—Meaning of—Particular word, how to be determined stated.

To use the definition of a word in one Act and to apply it as the definition of that word in another Act, especially when the second Act is in force in another country and under other conditions is a very dangerous course. That is a road which leads to many pitfalls. On the other hand to compare and contrast the definitions of the same word in a number of Acts is often of the greatest use in determining what is the meaning to be attached to the word in one of those Acts. [P 661 C 2]

S. Srinivasa Ayyar—for Appellant.

T. Kumaraswamiah—for Respondents.

Reilly, J.—In this case the plaintiff has sued to recover from the defendant about six acres of land in the village of Chinnamapet with damages. The plaintiff granted a leasa of the whole village of Chinnamapet to the defendant as an inamdar for eight years in 1911. After the expiry of that term the defendant surrendered the whole village to the plaintiff with the exception of the six acres with which we are now concerned. On these six acres during the period of his lease the defendant had himself planted casuarina trees, and he claimed the right to remain in possession of that area as an occupancy ryot. The District Munsif of Sholinghur who heard the suit, found that the defendant was not a raiyat but a trespasser and made a decree for the plaintiff for the recovery of possession with Rs. 20 as damages and subsequent mesne profits to be fixed later. Against that decree both the plaintiff and the defendant appealed to the District Judge, the plaintiff claiming that the damages awarded to him were insufficient and the defendant objecting to the whole decree. It has been found by the District Judge that the village of Chinnamapet is an " estate " under the Madras Estates Land Act, and that finding has not been disputed before us. It is also not now disputed that the land upon which the defendant planted his

casuarina trees is raiyati land. The District Judge found that the civil Court had no jurisdiction in this case and returned the plaint for presentation to a revenue Court. Against that order the plaintiff now appeals.

The only contention which has been urged before us on his behalf is that the defendant, although he has been occupying raiyati land in an "estate" under the Madras Estates Land Act, is not a raiyat because he has not held the land for the purpose of agriculture, and, that being so, the jurisdiction of the civil Court is not excluded. It is not suggested that the defendant holds his land for any other purpose than for his casuarina plantation, and, as was decided recently by my learned brother and Wallace, JJ, in *Venugopala Rice Mill* v. *Rajah of Pittapuram* (1), even if a man holds raiyati land in an "estate" under the Madras Estates Land Act, he is not a raiyati unless he holds it for agricultural purposes. The question we have to decide in this appeal is whether growing casuarina trees, that is trees for fuel, is an agricultural purpose so as to make the person who holds the land for that purpose a raiyati within the meaning of the Estates Land Act. It has been pointed out to us for the defendant that, after he had surrendered the rest of the village to the plaintiff, the plaintiff accepted rent from him for the land on which these casuarina trees stand for one fasli and gave him a receipt, Ex. 1, which refers to "payment of cist made by the ryot" and that the plaintiff also sent him a notice, Ex. B, on the following day saying that he might retain the land up to the end of the following fasli and should then surrender it, incidentally mentioning that the defendant was cultivating it and had planted casuarina trees thereon." I do not think we can decide this question whether the growing of casuarina trees as fuel is an agricultural purpose, on the language used by the plaintiff either in Ex. 1 or in Ex B. It is a legal question which affects the jurisdiction of the civil Courts, and that can certainly not be determined by the language which the plaintiff happens to have used in those documents.

I agree with the remark of Shephard, J. in *Murugesa Chetti* v. *Chinnathambi Goundan* (2), that a man who plants or maintains trees for firewood is not in ordinary parlance an agriculturist. If we take the strict meaning of "agriculture" according to its derivation it means the cultivation of a field, the cultivation of an open space, as opposed to horticulture, the cultivation of a comparatively small enclosed space. The cultivation either of the field in agriculture or of the garden in horticulture cannot be confined, I think, to any particular product. With great respect, I do not agree with the opinion of Bhashyam Ayyangar, J. in *Murugesa Chetti* v. *Chinnathambi Goundan* (2), that agriculture implies production of things useful as food for man or beast or other products fit for human consumption by way of luxury. That appears to me to be too narrow an interpretation. Still less do I agree with the opinion expressed by Sadasiva Ayyar, J., in *Rajah of Venkatagiri* v. *Ayyappa Reddi* (3), that agriculture is confined to the production of grain crops. I can see no reason why the cultivation in open space of such useful products as cotton, jute, flax and hemp should not be agriculture. Indeed I think agriculture cannot be defined by the nature of the products cultivated, but should be defined rather by circumstances in which the cultivation is carried on. In some cases it has been suggested that agriculture is confined to tillage. I think it can easily be shown that agriculture was carried on in this world before ploughs were invented.

In the present day in many places cultivation is done with spades and not with ploughs. But the planting of timber or firewood trees, which are to stand on the land for a considerable number of years forming plantations or woods or forests, appears to me to be opposed to the idea of agriculture, the cultivation of an open space. It is true that for the purpose of growing trees in a plantation it may be necessary first to prepare the land. Later on it may be necessary to protect and water the young plants. Still later it may be necessary to thin out the plantation. But, when the land is covered with trees which have to stand on it for a number of years, sometimes as long as

(1) A. I. R. 1931 Mad. 194=128 I. C. 525=53 Mad. 367.

(2) [1901] 24 Mad. 421.

(3) [1915] 38 Mad. 738=21 I. C. 532.

a century, during most of which period the land itself is untouched, to describe that as agriculture appears to me inappropriate. To my mind it is something very different from the cultivation of a field or of an open space. It may be noticed that in *Kesho Prasad Singh* v. *Sheo Pragash Ojen* (4), their Lordships of the Privy Council approve of the opinion expressed by two learned Judges of the Allahabad High Court that land let for a grove was not let for an agricultural purpose. It happened that the case then under consideration was one arising under the Agra Tenancy Act. But in that Act there is no definition of "agriculture." Therefore both the learned Judges of the Allahabad High Court and their Lordships of the Privy Council were, we may take it, considering what is the meaning of the word " agriculture " in its general sense, I may mention also that in *Commissioner of Income-tax, Madras* v. *Manavedan Tirumalpad* (5), a Full Bench of this Court remarked that income from cutting timber was not agricultural income.

But for our present purpose I do not think any discussion or investigation of the meaning of " agriculture " in general conversation or as ordinarily used by educated men is sufficient. We are more interested in ascertaining in what sense the word is used in the Act with which we are particularly concerned, in this case the Madras Estates Land Act. It happens that there is no direct decision on the question whether the growing of timber and fuel trees is agriculture as " agriculture " is used in that Act. There are two decisions of this Court in regard to the meaning of " agriculture " and " agricultural purposes " as used in the Transfer of Property Act, to which I may refer. In *Pavadai Pathan* v. *Ramaswami Chetty* (6), Spencer and Ramesam, JJ., held that a lease of land for growing casuarina trees for fuel was a lease for agricultural purposes within the meaning of S. 117, T. P. Act. If that could be applied to the present case, it would decide the matter in favour of the defendant. Spencer, J., went so far in that case as to say that agriculture includes horticulture, arboriculture and sylviculture. If I may say so with great respect that appears to me to be using the word " agriculture " in a very loose way. It ignores the first two syllables of that word. It appears to me to be the result rather of stretching than of defining the word. Ramesam, J., also agreed that the growing of timber trees would be included in agriculture. But again with the very greatest respect perhaps I may point out that his view of the matter appears to have been affected by the definition of "agriculture" in three modern English Acts.

To use the definition of a word in one Act and to apply it as the definition of that word in another Act, especially when the second Act is in force in another country and under other conditions appears to me to be a very dangerous course. That is a road which, I think it is well known, leads to many pitfalls. On the other hand to compare and contrast the definitions of the same word in a number of Acts is often of the greatest use in determining what is the meaning to be attached to the word in one of those Acts. However, so far as the Transfer of Property Act is concerned, it must be remembered that in *Devaraja Naicken* v. *Ammani Ammal* (7) another Bench of this Court, Seshagiri Ayyar and Kumaraswami Sastriar, JJ., held that a lease for planting casuarina trees is not a lease for agricultural purposes within the meaning of that Act. That shows that even in regard to the Transfer of Property Act the question is not a very easy one to decide. But what we are concerned herewith is, not the Transfer of Property Act, but the Madras Estates Land Act; and, as I think it cannot be denied that in different Acts " agriculture " is used with varying contents and as ordinary educated people use " agriculture " in different senses, the only safe course for us is to try by examining the Madras Estates Land Act itself to ascertain in what sense that word has been used in that Act.

There appear to me to be several indications in the Madras Estates Land Act that the growing of timber and fuel trees was not regarded by the legislature when making that act as an agriculture purpose. We have first the definition of the word " agriculture " in that Act;

(4) A. I. R. 1924 P. C. 247=82 I. C. 962=51 I. A. 381=46 All. 831 (P. C.)
(5) A. I. R. 1930 Mad. 764=126 I. C. 596=14 Mad. 21 (F. B.).
(6) A. I. R. 1922 Mad. 351=70 I. C. 657=45 Mad. 710.
(7) [1916] 34 I. C. 539.

"agriculture" with its grammatical variations and cognate expressions shall include horticulture." Now as I have mentioned according to its derivation agriculture does not include horticulture; but the framers of this Act have said that for the purpose of the Act agriculture shall include horticulture. They have chosen to extend the meaning of the word in that direction. But what is even of more interest to us is to notice that they have not chosen to extend the meaning of the word in any other direction. When we find that the essential, literal meaning of a word is deliberately extended by the framers of an Act for the purpose of that Act in one direction but not in any other, surely that is a clear indication that they wished to exclude any possibility of the word being extended by interpretation in any other direction. As I have mentioned Spencer, J., thought that the word "agriculture" might include among other things horticulture; but no one, so far as I am aware, has ever suggested that horticulture can include sylviculture and arboriculture in the sense of growing a large plantation or wood of timber or fuel trees. That definition of "agriculture" in the Act appears to me to be a very strong indication that the growing of timber or fuel trees is not an agricultural purpose within the meaning of the Madras Estates Land Act.

Then if we look at the definition of "improvement" in the Act we find that "improvement" means with reference to a ryot's holding

> "any work which materially adds to the value of the holding, which is suitable to the holding and consistent with the character thereof."

We must remember that the holdings referred to are agricultural holdings and their character is agricultural. That definition goes on to say that "improvement" shall include (subject to the words I have quoted) certain specified things, and among them is the planting of fruit trees and fruit gardens. But under S. 14 of the Act that kind of improvement may not be made by one class of ryots, non-occupancy ryots, without the permission of the landholder. How could the planting of fruit trees have been provided for specially as an improvement and have been made subject to that restriction if the planting of trees generally was an agricultural purpose, which might be carried out by an ordinary agriculturist?

Then we have S. 12 of the Act. In that it is provided among other things that

> "subject to any rights which by custom or by contract in writing executed by any ryot before the passing of this Act are reserved to the landholder every occupancy ryot shall have the right . . . . . in the case of trees which after the passing of this Act may be planted by the ryot or which may naturally grow upon the holding . . . . . to use, enjoy and cut them notwithstanding any contract or custom to the contrary."

If the growing of trees was an ordinary agricultural purpose, why should it be necessary to provide that the ryot shall have the right to use, enjoy and cut down trees planted by him on his own holding? That too is an indication, I think, that the growing of trees is not regarded as an agricultural purpose in this Act. But I must mention in connexion with that argument that some weight should be attached to the contention urged by Mr. Kumaraswamiah for the defendant that S. 12 was introduced into the Act for historical reasons, because there had been certain disputes between landholders and their tenants about the right of the tenants to make use of trees on their holdings. That may detract a little from the use which we should otherwise make of the words in the section I have mentioned; and the last words of the section show that special protection of tenants in this respect was thought necessary.

Then later in the Act we have the provision in S. 77 and the following sections that, if a ryot does not pay the rent due on his holding in time, the landholder among his remedies has the right to distrain growing crops of the ryot. That is a very useful weapon for the landholder and one of which he makes frequent use. But if a ryot in the ordinary course of agriculture can plant timber trees which will not be worth anything for a considerable number of years, so far as such a ryot is concerned, the landholder's power of distress will often be illusory. That is perhaps another minor indication that the framers of the Act did not regard the growing of timber and fuel trees in large plantations as an ordinary agricultural purpose of a ryot.

Then again there is the provision in S. 151 of the Act that a landholder may institute a suit before the Collector to

eject an occupancy ryot from his holding on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. I take it that "agricultural purposes" in that section means agricultural purposes generally. It cannot be doubted that, if a ryot grew on his holding a large plantation of timber trees and cut them down when they matured, the stumps and roots in the land would render it entirely unsuitable for ordinary agricultural purposes until they had been removed, which could often be done only at very great expense. It is no answer, I think, to that argument to say that, if the growing of trees is an agricultural purpose, the land may still be suitable for growing trees in the spaces between the trees already cut down. I think the meaning of the section is that the landholder can eject a ryot who makes his holding unfit for agricultural purposes generally, not unfit for all agricultural purposes except one, even if the growing of timber were an agricultural purpose. Such a heavy penalty could hardly have been provided if the growing of timber trees were an agricultural purpose at all. With this provision S. 11 of the Act may be compared.

There are five indications I find in the Act that "agriculture" was not meant by the framers of the Act to include the growing of plantations of timber or fuel trees. Mr. Kumaraswamiah has drawn our attention to S. 26 of the Act. There we find mention of a raiyat accepting a patta with a rent lower than the lawful rate previously payable on the land on condition that he plants trees. Mr. Kumaraswamiah has urged that the use of the word "raiyat" and the use of the word "rent" in that section indicate that the ryot, who by definition must be a person holding land for the purpose of agriculture, may plant trees and pay rent for them under the Act as an agricultural purpose. Possibly the use of these two words "raiyat" and "rent" in that section may lend a little colour to the defendant's contention in this case. But I think, if we examine the section, we shall see that very little can be made of that. The section, so far as the planting of trees is concerned, is aimed at providing that a raiyat, who holds, or would ordinarily hold, land for agricultural purposes, may hold the land at a lower rate if he carries out the very useful purpose of planting some trees upon it and that, so long as he carries out that purpose and fulfils that condition, his rent shall not be enhanced. I do not think we can use the provision intended to secure reduction of rent to a raiyat who plants trees on his holding as showing that the planting of trees is an ordinary agricultural operation. Indeed, if the planting of trees was an ordinary agricultural operation of a raiyat, why should he be allowed a favourable rent when he did it? If the section is examined as a whole, I do not think it throws any doubt upon the view that the framers of the Act did not include in agriculture the planting of timber or fuel trees.

In my opinion therefore the defendant, though he holds raiyati land in an "estate" under the Madras Estates Land Act, is not a raiyat, because he holds it for some purpose other than agriculture within the meaning of "agriculture" as used in the Act. That being so, in my opinion the learned District Judge was mistaken in supposing that the jurisdiction of the civil Court was excluded in this case, and his order returning the plaint should be set aside.

As I have said, the plaintiff appealed against the award of damages, maintaining that he was entitled to something more. But Mr. Srinivasa Ayyar has informed us that, after the weary course this lengthy litigation has run, he does not wish to proceed with that appeal any further. So far as the defendant is concerned, although the learned District Judge found in his favour, that the suit should have been brought in a revenue Court, he dealt with the other aspects of the case, and it is unnecessary to send the defendant's appeal back to the District Court for further hearing.

In my opinion the present appeal should be allowed with costs and the decree of the District Munsif restored. In the District Court each party should bear his own costs.

Anantakrishna Ayyar, J.—I agree.

The plaintiff filed the original suit to recover possession of six acres of land which he described in para. 6 of the plaint as poramboke land of the village of Chinnamapet. He also claimed dam-

ages from the defendant. The village of Chinnamapet belongs to the plaintiff. In 1911 the plaintiff had granted, in favour of the defendant, an ijara to be in force for a term of eight years: Ex. A. Under that document, the defendant was practically to represent the plaintiff in respect of the plaintiff's rights in that village during the eight years, and this defendant was authorized under that document to grant pattas to raiyats and to do all other things that would have to be done by the plaintiff but for the ijara. After the expiry of the period, the defendant surrendered possession to the plaintiff of all that he got under the ijara, but as regards the suit lands the defendant had planted casuarina trees thereon and consequently he did not surrender the same to the plaintiff. The present suit was accordingly brought to recover possession of the suit lands with damages. The defendant's plea was that the village was an estate within the meaning of the Madras Estates Land Act, that the suit lands constituted raiyati lands, that the defendant was a raiyat, and that therefore the civil Court had no jurisdiction to entertain the suit; and he urged that the plaintiff should have sought whatever remedies he was entitled to in the revenue Court. The District Munsif of Sholinghur framed issue 1 in the following terms:

"Is the defendant a trespasser as stated by plaintiff, or is he a raiyat as alleged by him?'

Issue 3 was raised as to

" whether the District Munsif's Court had jurisdiction to try the suit."

The learned District Munsif came to the conclusion that the land was used by the defendant for rearing casuarina trees, and that the land which must be taken to have been let out for such a purpose could not be said to be let " for agricultural purposes " within the meaning of the Estates Land Act. He accordingly held that the civil Court had jurisdiction to entertain the suit and that the defendant was not entitled any longer to remain in possession of the land. He decreed the plaintiff's suit for possession of land, and awarded Rs. 20 damages, and also mesne profits after date of suit. Both parties preferred appeals to the District Court the plaintiff claiming a larger amount as for damages, and the defendant objecting to the decree in ejectment passed by the trial Court. The learned District Judge, after remand found, as I understand his judgment, that the defendant should be taken to have been holding this land for rearing casuarina trees. The question was therefore raised before the learned District Judge whether the letting of land for such a purpose would be letting lands "for agricultural purposes" within the meaning of the Madras Estates Land Act. He came to the conclusion that it was, and accordingly reversed the decision of the trial Court and directed the return of the plaint for presentation to the proper Court, holding that only revenue Courts have jurisdiction in the matter. The plaintiff has preferred the present Civil Miscellaneous Appeal against the order passed by the learned District Judge.

For the purpose of disposing of this appeal it is necessary only to consider the question whether assuming the land to be raiyati land, the defendant holds the land for "purposes of agriculture." As was held in *Venugopala Rice Mill* v. *Rajah of Pittapuram* (1), if by agreement between the parties, a raiyati land is no longer held for agricultural purposes but is held for non-agricultural purposes then, the jurisdiction of the civil Court to decide the rights of the parties thereto would not be ousted by the Estates Land Act. Therefore the argument in second appeal really centred on the question whether letting "land for rearing casuarina trees" is letting it "for agricultural purposes." This leads naturally to the discussion as to what exactly is the meaning to be attached to the expression "agricultural purposes" occurring in the Act. Our attention was drawn to various definitions of the term "agriculture" which learned Judges have given on various occasions. In *Murugesa Chetti* v. *Chinnathambi Goundan* (2) Shephard and Bhashyam Ayyangar, JJ., had to decide the question whether the lease of land for the cultivation of betel is an agricultural lease. The question arose in connexion with S. 17, Registration Act, and S. 117, T. P. Act. The learned Judges held that it was ; but in discussing the question, Bhashyam Ayyangar, J., at p. 425 defined "agriculture" in the following terms :

" Agriculture as distinguished from horticulture includes not only all field cultivation by

tillage but also all garden cultivation for purposes chiefly of procuring vegetables or fruits as food for man or beast and other products fit for human consumption by way of luxury, if not as an article of diet."

The learned Judge thus practically limited the application of the word "agriculture" to the procuring of vegetables and fruits which are useful as food for man or beast and other products fit for human consumption by way of luxury if not as an article of diet. Shephard, J., who agreed that the lease of land for the cultivation of betel is an agricultural lease was evidently not prepared to accept the definition of the word, "agriculture" given by Bhashyam Ayyangar, J. The learned Judge says that neither the man who planted fruit trees or bushes in an enclosed space, nor still less one who planted and maintained trees for firewood or other such purpose, could be called an "agriculturist." The term "agriculture" however is capable of being applied to tillage of the soil in the widest sense. The learned Judge considered the context in which the expression "agricultural purpose" occurred in the Transfer of Property Act, and came to the conclusion that a lease of land for cultivating betel was an agricultural lease. The learned Judge also took occasion to say that the view expressed by him in an earlier case: *Kunhayen Haji* v. *Mayan* (8), that a lease of coffee garden was not an agricultural lease, was not one to which he was inclined to adhere, after hearing further arguments upon the question. In *Emperor* v. *Alexander Allan* (9) Davies and Moore, JJ., referred to various dictionaries as to the definition of the word "agriculture." They referred to the Oxford Dictionary by Dr. Murray, and held in connexion with a case arising under the Madras District Municipalities Act, that lands let for pasture for cattle were lands let for agricultural purposes, in the absence of a definition of the word "agriculture" in that Act. Sadasiva Ayyar, J., had occasion to consider the definition of "agriculture" in two cases: *Rajah of Venkatagiri* v. *Ayyappa Reddi* (3) and *Seshayya* v. *Rajah of Pittapur* (10). In *Rajah of Venkatagiri* v. *Ayyappa Reddi* (3) the question that had to be considered was whether land leased for pasture for cattle was land let for "agricultural purposes" within the meaning of the Madras Estates Land Act. In deciding the question in the negative the learned Judge observed at p. 741 as follows:

"The ordinary meaning of "agriculture" is the raising of annual or periodical grain crops through the operation of ploughing, sowing, etc."

He reiterated the same definition in the later case in *Seshayya* v. *Rajah of Pittapur* (10). In *Maharaja of Venkatagiri* v. *Rami Reddi* (11) Sir John Wallis, C. J., and Phillips, J., had to consider the same question as regards lands let for pasture. These learned Judges agreed with the decision in the prior case in *Rajah of Venkatagiri* v. *Ayyappa Reddi* (3) and observed that lands held for purposes of pasture only could not be said to be held for purposes of agriculture within the meaning of the Madras Estates Land Act. Now, as regards the actual decision in those cases, I do not think that any doubt could be entertained. The Madras Estates Land Act itself contains indications with reference to pasture lands for the decision of such a question. In S. 3, Cl. 11, when defining "rent" as whatever is lawfully payable in money or in kind, etc., for the use of land for the purpose of "agriculture," the legislature thought it proper to include within that term and for the purpose of the Act, "sums payable by a rayot as such on account of pasturage fees and fishery rent." The learned Judges who had to deal with this question naturally laid emphasis on this Cl. 11, S. 3, and (if one may say so respectfully), properly came to the conclusion that, so far as the Madras Estates Land Act is concerned, land let for pasture could not be said to be land let for "agriculture," as otherwise there was no necessity for "including" in sub-Cl. (b), S. 3, Cl. 11 "sums payable on account of pasture as "rent." There are other indications also in the Act which would go to support the above decisions, which it is not necessary for me to mention here. Speaking with all respect, it seems to me that the definition of the word "agriculture" in *Murugesa Chetti* v. *Chinnathambi Goundan* (2) by Sir V. Bhashyam Ayyangar and by Sadasiva Ayyar, J., in *Rajah of Venkatagiri* v. *Ayyappa*

(8) [1894] 17 Mad. 98=4 M. L. J. 21.
(9) [1902] 25 Mad. 627=12 M. L. J. 393.
(10) [1916] 34 I. C. 730.
(11) [1916] 34 I. C. 607.

Reddi (3) and *Seshayya* v. *Rajah of Pittapur* (10) could not be accepted for all purposes without qualification. If we look into the recognized dictionaries as to the meaning of the word "agriculture," all that we find is that "agriculture" means "field cultivation," and "cultivation" is said to be "tillage or breaking up the soil."

There is nothing in the definition of "agriculture," given in the dictionaries, which I have been able to consult, which restricts its application to cases of production of those things only which are fit for human consumption for man or beast as described by Bhashyam Ayyangar, J. Ncr do I find anything which restricts its meaning to the raising of "grain crops" as mentioned by Sadasiva Ayyar, J. When this question came later on for discussion before this Court in *Pavadai Pathan* v. *Ramaswami Chetti* (6) Spencer and Ramesam, JJ., found themselves unable to agree with the definitions given by Bhashyam Ayyangar and Sadasiva Ayyar, JJ. I am not now however concerned with the definition given by the learned Judges in the case in *Pavadai Pathan* v. *Ramaswami Chetti* (6). In this connexion, reference may be made to a discussion of this question of "agriculture" and "husbandry" generally in *Duncan Keirm* v. *Thomas Gillespie* (12). However general definitions given in dictionaries would be of use only when there is nothing to the contrary in the context of any particular provision of law which the Courts have to construe. Pronouncements by Courts on other provisions of other Acts, however useful, would not be decisive as authority when we have to construe the provisions of quite a different Act. In several of the English statutes, viz. Agricultural Holdings Act, Agricultural Rates Act, and other similar Acts, the legislature has chosen to enlarge the meaning of the term "agriculture," as it thought fit, for the purpose of those Acts. It is therefore I think, not of real use to go to those definitions when we have to construe an Indian Act quite different. Our attention was drawn to a case in *Kajumal* v. *Salig Ram* (13) where the Privy Council held that lands let out for cultivation of tea are lands let for agriculture. Similarly, there are cases which show that lands let for producing indigo are also lands let for cultivation purposes. The Privy Council in *Kesho Prosad Singh* v. *Sheo Pragesh Ojah* (4) held, with reference to the Agra Tenancy Act, in which I understand there is no special definition of the word "agriculture," that rearing a grove was not one connected with agriculture : see also *Hedayat Ali* v. *Kalanand Singh* (14).

As already remarked, one has really to fall back on the provisions of and the indications contained in the particular Act which one had to construe in disposing of cases like the one before us. I find that the definition of the word "agriculture" in S. 3 (1), Madras Estates Land Act, specifically makes it include "horticulture." This, I think, is a matter of very great importance and help in deciding the point before us. If the legislature wanted the Courts to understand by the word "agriculture" what is generally supposed to come under its significance in its widest sense, then its express statement that "agriculture" in its grammatical sense shall "include horticulture" is meaningless, if we accept the view of the learned advocate for the respondent. If "agriculture," according to this contention, includes "horticulture," and possibly, also others, one cannot give effect to the inclusion of these words specifically in S. 3 (1) of the Act. There is the legal maxim—*expressio unis exclusio alteris*—that is, "the specific inclusion of one necessarily implies the exclusion of others;" so that, in the absence of any other indication afforded by the Act, this one circumstance is, I think, of so great significance that the contention of the learned advocate for the respondent on this point could not, in the circumstances, be upheld. But are there any further indications in the Act ?

Now the definition of the word "improvement" in S. 3, Cl. 4, sub-Cl. (f), refers to the planting of "fruit trees and fruit gardens." If agriculture includes the planting of fruit trees and fruit gardens, the definition of "improvement" mentioned above is meaningless. If one is however at liberty (I have my doubts whether one is) to look into other Acts passed by the Madras Legis-

(12) [1917] 7 Tax Cases 473.
(13) A. I. R. 1924 P. C. 1=79 I. C. 946=51 I. A. 11=5 Lah. 50.
(14) [1913] 20 I. C. 332.

lature, one may refer to S. 4, Malabar Compensation for Tenants Improvements Act, 1 of 1900—where the word "improvement" is made to include other things also, namely, "timber trees and other useful trees;" and in the recently enacted Madras Malabar Tenancy Act, 14 of 1930, the definition of the word "improvement" given in the Compensation Act, 1 of 1900, is taken to be the definition for the purpose of the new Act also. Again, while the planting of fruit trees and fruit gardens is included in the term "improvements" we have not got anything to indicate that the planting of trees as such (irrespectively of fruit bearing) should be considered to be an "improvement." S. 12 of the Act, as I read it, is strongly against the argument of the learned advocate for the respondent. It speaks of trees planted by the raiyat after the passing of the Act and enacts that the raiyat is entitled to the same. If a raiyat entitled to use the land for agricultural purposes would be entitled to plant trees as coming within the operation of agriculture as contended for by the learned advocate for the respondent, then a specific provision to this effect in S. 12, is, I think, not likely to have been made, there being no necessity for the same in that view. I am not able to agree with the explanation offered by the learned advocate for the respondent, namely, that it was ex abundanti cautela that such a provision was made. From what I am able to see, the first portion of S. 12 would be enough to achieve the object, and therefore I think that the indication afforded by S. 12 is also against the view contended for by the learned advocate for the respondent. Again, in S. 6, Cl. 4, I find the expression "agricultural crops." I do not find the expression "agricultural grain crops." Therefore to restrict the meaning of "agriculture" to the raising of "grain" crops, as was evidently sought to be done by Sadasiva Ayyar J. is, I think (speaking with all respect) against the indication afforded by the Act, so far as I can gather, from the reference to agricultural crops in S. 6, sub-Cl. 4.

It cannot be said that the idea of a "forest" was not present to the mind of the draftsman of the Act, for I find the word "forest" used in S. 6 of the Act. If the legislature meant that the term "agriculture" should also include "forestry" or "rearing of trees," it seems to me that it would have expressly said so, when it expressly included "horticulture" within the purview of the word "agriculture" for the purposes of this Act. I do not propose to attempt a positive definition of the word "agriculture." It is enough for the disposal of this case to say that letting lands for rearing casuarina trees does not come within the scope of "agriculture," as the term is used in the Madras Estates Land Act. As I said, it is not safe to draw any sort of conclusive inference from the meaning of the word "agriculture" used in one Act, when we have to construe another Act; but, so far as they go, the observations in *Commissioner of Income-tax, Madras* v. *Manavedan Tirumalpad* (5) (at p. 267 of 54 *Mad.*) a case that arose under the Income-tax Act—seems to support the contention of the appellant in the present case.

The question there was whether, under the Income-tax Act, amounts received from the sale of timber trees were income liable to income-tax assessment. The Court observed at p. 267 as follows:

> "Of course we are unable to distinguish between income derived from the sale of paddy which is grown on the land and the income derived from the sale of timber cut in a forest. But the profits earned from the sale of paddy would be assessable to income-tax but for the special exemption given to that income in the Income-tax Act by reason of its being "agricultural income." There is no such exemption in the case of income derived from the sale of timber."

Therefore when there was no definition of the word "agriculture," the Court held that planting trees on land could not be said to be operation by way of agriculture. In the case before us, we have got this extra indication, as I said, viz., the legislature has specifically said in so many words that "agriculture includes horticulture." That being so, it seems to me that it would not in this Act include other operations which in the widest sense of the term might otherwise be taken to come under the same. The question whether the raising of casuarina trees is using lands for agricultural purposes came up for decision before this Court, though not in connexion with the Madras Estates Land Act. In *Devaraja Naicken* v. *Ammani Ammal* (7), Seshagiri Ayyar and

Kumaraswami Sastri, JJ., had to consider that question in connexion with the Transfer of Property Act and the Registration Act. The learned Judges held that a lease for planting casuarina trees is not one for an agrieultural purpose. The learned Judges expressed concurrence with the opinion of Shephard, J., in the case in *Murugesa Chetti* v. *Chinnathambi Goundan* (2) and they also remarked that "Mr. Ramachandra Ayyar has rightly conceded that in the face of that ruling he cannot successfully contend that the lease is one for agricultural purposes."

This case is to some extent an authority in favour of the view I have expressed. But in *Pavadai Pathan* v. *Ramaswami Chetty* (6), Spencer and Ramesam, JJ., had to consider practically the same question, and, as I said, that case also was not one that arose under the Madras Estates Land Act, but under the Transfer of Property Act and the Registration Act. The learned Judges were of opinion that the decision in *Devaraja Naicken* v. *Ammani Ammal* (7) was based upon admission of counsel, and they were accordingly not prepared to accept the same as binding. The case before us is not under the general law, or under an Act which does not describe the term "agriculture." That being so, I do not think that the decision in *Pavadi Pathan* v. *Ramaswami Chetti* (6), concludes this case. I have already remarked that the learned Judges in the case in *Pavadai Pathan* v. *Ramaswami Chetti* (6) referred to the definition of the term "agriculture" given in some English statutes. All learned Judges are agreed that the word has to be construed with reference to the context, and, for reasons I have already given, it seems to me that the indications given not only by the definition (rather description) of the word "agriculture," but by the other provisions of the Madras Estates Land Act, to which my learned brother has elaborately referred, lead us to the conclusion that the contention of the learned advocate for the respondent should not be upheld by us. There is a decision in *Vellayappa Chetti* v. *Subramaniam Chettiar* (15) where Devadoss and Wallace, JJ., had to consider the question whether cocoanut trees would be "improvements" within the meaning of the Madras Estates Land Act. The learned Judges held that they were not improvements, though they held so with great hesitation. That exact question is not before us. The question before us is with reference to casuarina trees. I gather that it takes about eight or ten years for casuarina trees to mature, that the fruits of these trees (nor the trees) are not fit for consumption either by man or beast, that they are used for firewood purposes, and that, after they are cut, the stumps remaining on the ground would seriously impede cultivation unless great expense is incurred in removing the same. There is also the idea of periodically raising crops, and preparing the land, though it need not necessarily be at the end of every year, and of care and supervision involved in operations relating to agriculture; and, from what I am able to gather, the planting of casuarina trees in no way conforms to these ideas. For the foregoing reasons, I am of opinion that this appeal should be allowed and that the District Munsif's decree should be restored. I also agree in the order as to costs proposed by my learned brother.

P.R.S./K.N. *Appeal allowed.*

(15) A. I. R. 1927 Mad. 137=99 I. C. 559=50 Mad. 482.

* A. I. R. 1931 Madras 668

WALLACE AND STONE, JJ.

Srinivasa Ayyar and *another*—Appellants.

v.

Ammani Ammal—Respondent.

Appeal No. 412 of 1929, Decided on 24th February 1931, from decree of Dist. Judge, East Tanjore, in Original Suit No. 14 of 1929.

(a) Hindu Law—Maintenance—Suit for—Joint members need not file separate suit to recover from widow funds from which she is to be paid maintenance.

Whether a widow holds a joint property on the date of the suit or whether she has dissipated it before the suit, it is not necessary for the other joint members to take recourse to a separate suit to recover from her the funds from which she is to be paid the maintenance later on. [P 670 C 1]

*** (b) Hindu Law—Maintenance — Widow—Suit for maintenance — Her claim must first be satisfied out of joint family property in her possession—When it is not sufficient then she can claim maintenance from other joint family property — Principle applies when she has no such property in her hand but when she ought to have—When property dissipated unascertainable suit must be dismissed—When traceable in hands of third persons no charge can be imposed unless they are made parties to suit—It makes no**

difference whether property is held in lieu of maintenance or not.

When a widow claiming maintenance is in possession of the joint family property when she files her suit, it is the duty of the Court to compel her to satisfy her demand, so far as it can be satisfied, first out of the property in her hands before she can come upon it in the hands of the joint family. The correct decree in such a case is not to dismiss the suit but to direct the maintenance primarily be, quantum valeat a charge upon the family property in her hands. When the property in her hands is not sufficient and she must therefore live on the capital, she will be entitled to come again for maintenance when that has been exhausted provided she has spent it with reasonable care and caution on the proper purpose, namely, her maintenance. The principle applies when she does not have the joint family property in her hands on the date of the suit but when she ought to have, i. e., when she has dissipated the property. When the dissipated property is unascertainable there is no alternative but to dismiss her suit ; but when the property is traceable in hands of third persons, no charge can be imposed unless the third persons are made parties to the suit. When they are not made parties the suit must be dismissed. It makes no difference to this general statement of principle whether the joint family property was held ex consensu in lieu of maintenance or not. [P 670 C 2]

T. M. Krishnaswami Iyer and *R. Viswanatha Ayyar* and *S. Thyagaraja Iyer* —for Appellants.

V. V. Sriniwasa Ayyangar and *K. Venkataraman* - for Respondent.

Wallace, J.—This appeal is against the decision of the District Judge of East Tanjore in a maintenance suit by a widow against her son, defendant 1, and grandson, defendant 2. The suit was for arrears of past maintenance, for a declaration of the amount of future maintenance and to make the defendants liable to pay certain other sums demanded by the plaintiff. The lower Court refused the prayer for past maintenance and declared that the plaintiff was entitled to Rs. 500 a year for future maintenance, and to two sums of Rs. 400 for vratams and Rs. 500 for pilgrimage and that the defendants "do pay" these amounts. Defendants appeal. The plaintiff has not filed any memorandum of cross-objections or cross-appeal against the disallowance of past maintenance, or the rate of future maintenance, or the cash allowances.

The case before us turns on the general question how far, if at all, a widow can sue for maintenance when she has or ought to have in her hands sufficient joint family property from which to maintain herself. It has been found by the lower Court and has not been attacked here, that the plaintiff, who was for a long time managing the joint family property during and after the minority of her son, defendant 1, had in her hands in 1910, about Rs. 8,000 worth of joint family property. The lower Court has also found that she had by the date of the suit spent all that money, but if plaintiff is to be believed, she spent a major portion of it on purposes which would not be binding on the joint family. These are the essential facts on which the case has to be considered. On the legal inference from these facts each side takes up an extreme position. The plaintiff maintains that the fact that she had or has or ought to have joint family property in her hands is no legal bar to her right to maintenance, and that, if the defendants have any subsisting legal right to recover from her joint family property, they can only enforce that right by a separate suit. The defendants contend that the fact that she has or ought to have in her possession joint family property is a sufficient bar to her suit, whatever the amount of that joint family property may be, and that she cannot be allowed to sue until she has restored to the joint family so much of its property as she has or ought to have in her possession, the joint family property itself being the source from which her maintenance has to be met.

The plaintiff's claim seems to us untenable in the form advanced. The simplest way to demonstrate that is to take an extreme case where the widow suing the joint family for maintenance has the whole of the joint family property in her hands. Such maintenance is primarily a charge on the estate and in the case put is therefore primarily a charge on the joint family property in the widow's own hands. The plaintiff's contention is that even so she is entitled to a decree for maintenance against the joint family members which would have to be a personal decree as the joint family ex hypothesi has no joint family property out of which the claim could be met. We are clear that the Court would be stultifying itself by giving her a decree for maintenance in such circumstances, unless the decree made it clear that the maintenance payment was to come out of the joint family

property in her hands, and no personal decree against the joint family members was given. Next let us assume a case in which she has herself dissipated the whole of the joint family funds. Here again a Court could not give her a personal decree against the joint family members for maintenance amount which ought primarily to be met from the funds which she had already enjoyed to the full herself. Even if when the suit started she had joint family property in her hands, she could defeat it by getting rid of it while the suit was going on. A notice to her of demand to return the joint family property in her hands would simply be a warning to her to get rid of it as soon as possible, and since such conduct would not ex hypothesi in any way prejudice her right to maintenance, she would obviously do so. As we have said, whether she holds joint family property on the date of the maintenance suit or whether she had dissipated it before suit, a Court would be stultifying itself by driving the joint family members to a separate suit to recover from her to-day funds from which she is to be paid her maintenance tomorrow. We therefore cannot accept the plaintiff's extreme position, for which indeed no authority is quoted before us.

The defendant's extreme position is in part supported by two reported rulings of the Bombay High Court, *Dattatraya* v. *Rukmabai* (1), and *Bai Kanku* v. *Bai Parvati* (2), referred to in the former case. These rulings set out this principle: that where a widow suing for maintenance has, at the time the suit was brought, sufficient joint family funds to provide her with maintenance at the rate decreed, she has no cause of action and her suit must be dismissed. The defendant's contention, however, goes further, and is that, so long as the widow has or ought to have any joint family property in her hands, she cannot, unless and until she restore it to the joint family, sue for maintenance. For this extreme position the defendants quote a ruling of the Punjab Chief Court in *Bhagwan Kuar* v. *Harnam Kuar* (3).

In order to set out what appears to us to be the correct position, we shall take first the case where it is proved that the plaintiff is in possession of joint family property when she files her suit, that is, she herself is in possession of part of the very estate out of which her claim is to be met. In such a case it seems to us that it is the duty of the Court to compel her to satisfy her demand, so far as it can be satisfied, first out of the property in her hands before she can come upon the rest of it in the hands of the joint family. This is the principle of the Bombay cases, but we think that the more correct decree in such a case is not to dismiss the suit but to direct that the maintenance primarily be, quantum valeat, a charge on the joint family property in her hands. If the income from that is or ought to be sufficient to give her a return equal to the maintenance amount, she is not entitled to any further relief unless unforeseen circumstances beyond her control put that property out of her possession. If the property in her hands is not sufficient and she must therefore live upon the capital, she will be entitled to come again for maintenance when that has been exhausted, provided she has spent it with reasonable care and caution on the proper purpose, namely, her maintenance.

Does the same principle apply when she does not have joint family property in her hands on the date of suit, but when she ought to have? It seems to us that it must. Otherwise she has a direct incentive to dissipate the joint family property in order to prepare the way for her suit, a direct motive for dissipating the whole or part of the very fund out of which she is entitled to be maintained, and the Court would not support a plaintiff who comes into Court to claim from others what she has herself assisted in putting beyond their reach. Two classes of such cases would occur; first, when the property dissipated is unascertainable, or untraceable; and secondly, when it is known and ascertained and is in the hands of third parties. In the former case there seems no alternative but to dismiss the plaintiff's suit, since a charge cannot be imposed on unascertained or untraceable property; in the latter case also no charge can be imposed unless the third parties are made parties to the suit, and, when they are not, the proper decree again will be to dismiss the suit. It makes no difference to this general statement of

(1) [1909] 33 Bom. 50=1 I.C. 466.
(2) [1890] P. J. 400.
(3) [1915] 26 I.C. 430.

principle whether the joint family property was held ex consensu in lieu of maintenance or not. The plaintiff, we may point out, has in this very case accepted this general principle by not appealing against the disallowance of past maintenance, for that disallowance was on the very ground that she had joint family property out of which she had maintained or ought to have maintained herself in the past.

To apply these principles to the present case, the lower Court has found that in 1910 the plaintiff had Rs. 8,000 of joint family property. This amount at a reasonable rate of interest,say 7 1/2 per cent a rate at which she has in fact lent out other moneys (see Ex. 1-a), would give an income of Rs. 600 a year, which is considerably more than the rate of maintenance awarded by the lower Court. Prima facie then she is not entitled to hold the joint family legally liable for her maintenance. She contests this position on two grounds; first, that that Rs. 8,000 ceased, in 1911, by virtue of a compromise in a suit, O. S. No. 69 of 1911, to be joint family property at all, secondly, that she has spent part, if not most, of it on legitimate joint family purposes. As to point 1 it is necessary to set out shortly the history of O. S. No. 69 of 1911. In O. S. No. 23 of 1910, on the file of the Sub-Court, Mayavaram, defendant 1, her son, got a decree, Ex. VIII-b dated 30th September 1911, against her setting aside as fraudulent a maintenance document, Ex. 9, dated 20th October 1909, and declaring that he is entitled to recover from her whatever she had collected under Ex. 4, a promissory note for Rs. 10,000 dated 31st October 1908, and whatever was still due under it from the promisor, the latter amount to be determined in a separate suit. That suit was O. S. No. 69 of 1911 and was by defendant 1 against the promisor under Ex. IV and the present plaintiff. Ex. VII-a an extract from the suit register, shows that that suit was dismissed as adjusted out of Court. Neither the judgment nor the decree in that suit has been filed. They appear to be not available. The Rupees 8,000 which the plaintiff is now found to have been in possession of is the amount recovered by her under Ex. IV. It is contended that, since defendant 1's claim against the plaintiff for the sum recovered by her under Ex. IV was finally settled by adjustment, it is not open to the defendants now to contend that they can recover it from the plaintiff as a kind of set-off to her claim for maintenance. Now in the first place the plea of this adjustment as a legal bar to the defendant's contention that the plaintiff has or ought to have Rs. 8,000 joint family property in her hands was not only not taken in the lower Court, but is entirely contrary to the plaintiff's case there, for there she denied all knowledge of this suit whatever. On her case therefore apparently she had so little interest in the result of the suit that she knew nothing about it. Her present contention, if allowed, also will have an obvious repercussion on other parties and the question would arise whether the adjustment binds defendant 2, who says he partitioned from his father on 19th December 1910 before the date of this adjustment; such questions have never been put in issue or contested.

The case which the defendants were called upon to meet in the lower Court was that the Rs. 8,000 was joint family property in her hands except a sum of Rs. 3,000 which was the proceeds of the sale of the plaintiff's daughter's jewels, and the only point at issue there was whether this Rs. 3,000 really was plaintiff's daughter's private property or part of the joint family property. The decision was that the whole Rs. 8,000 was joint family money in the plaintiff's hands, and that was the ground on which the lower Court disallowed past maintenance, a decision which the plaintiff has accepted. We are of opinion therefore that it is not open to the plaintiff to abandon here entirely her position in the lower Court and contend that the Rs. 8,000 ceased by virtue of the adjustment in O. S. No. 69 of 1911 to be joint family property in her hands. Each side has given oral evidence about this adjustment, plaintiff denying all knowledge whatever about the suit and defendant 1, saying that she took the Rs. 8000 in lieu of maintenance. Neither of these two witnesses is reliable, but on this part of the case we need say no more than that, if the retention of Rs. 8,000 by the plaintiff had no relation whatever to her maintenance, it is extraordinary that for 18 years she had never

attempted to come down on the joint family for her maintenance, and that she does so at the very moment when on her plea that Rs. 8,000 has come to an end. The contention put forward in her plaint that she had to borrow money for her maintenance she contradicted in her evidence. It may also be pointed out that even on her own case she did not realize the whole Rs. 8,000 before the date of the adjustment in O. S. 69 of 1911, since Rs. 3,000 she lent under Ex. 1-A she says she got after the death of her daughter's husband. That must be in 1913. The question for decision on this part of the case is not whether this joint family property can now be recovered for the joint family by a suit against the plaintiff, but whether the plaintiff was holding in her hands joint family property. Plaintiff's case in the lower Court was that she was, and we have no doubt that she was, to the extent of Rs. 8,000.

The second point then is whether she has made out her plea that it was spent for purposes binding on the joint family. The District Judge seems to think it enough if the plaintiff proves that she had spent it, irrespective of whether the purpose of the expenditure was binding on the joint family or not, and that the onus of proving what the plaintiff did with it lies on the defendant. This is obviously wrong. The plaintiff alone knows what she did with the money and must give some account. Even on the view he took the District Judge has not been able to account for the whole sum and has to fall back upon vague statements that the plaintiff must have spent for ceremonies or for maintenance. One item which he allows to her credit is the costs of the suit which defendant 1, on behalf of the joint family, had to file against her to get rid of the fraudulent maintenance deed, Ex. 9. Obviously these costs cannot be jusifiably debited to the joint family account. Most of the purposes for which the plaintiff says she spent the Rs. 8,000 are not binding on the joint family and it is not contested here that they are. The only expenditure which was ostensibly for joint family purposes was Rs. 1,000 to repair the family house in which the plaintiff resides and Rs. 150 to construct a well there. Even here we have only the plaintiff's word, and that is far from reliable, as to the amount spent, although the defendants on the other hand might have called evidence to show that that amount had not been so spent. But even if we allow that cut of the Rs. 8,000 held by her Rs. 1,150 was spent on legitimate purposes binding on the joint family, she ought still to have a capital sum of Rs. 6,850 in her hands, which at 7-1/2 per cent will give an income of about Rs. 513 a year, more than the Rs. 500 considered by the lower Court to be a proper rate of maintenance. It appears clear therefore that the plaintiff has had or ought still to have in her hands a sufficient portion of joint family property to give her the lower Court's rate of maintenance, and even if she has dissipated it, that does not, for the reasons we have already given, afford her a legal claim on the balance of joint family property in the hands of the defendants. As the amount which ought to be with her available for her maintenance has, on her own showing, been mostly dissipated to third parties and is not now with her and therefore cannot be made in this suit the subject of a charge, we have no alternative but to dismiss her suit.

As to the amount decreed by the lower Court, namely Rs. 500, it is unnecessary to discuss here, but we are inclined to regard it as decidedly generous. We must however express our surprise that the lower Court was able to fix on such a figure without discussing the income of the joint family or recording any finding thereon.

As to the claim for vratams and pilgrimage, as we have held that plaintiff ought to have had with her sufficient funds to meet this extra expenditure also, we are not prepared to uphold this claim. We therefore reverse the decree of the lower Court and dismiss the plaintiff's suit with costs here and below.

P.R.S./R.M. *Suit dismissed.*

A. I. R. 1931 Madras 672

CURGENVEN AND CORNISH, JJ.

Ramaswami Chettiar and *others*—Appellants.

v.

Official Assignee of Madras—Respondent.

Original Suit Appeals Nos. 7 and 11 of 1931, Decided on 18th February 1931, from judgment of Waller, J.; D/- 26th January 1931.

Presidency Towns Insolvency Act (1909), S. 58 (2)—Title disputed—Insolvency Court can authorize Official Assignee to take charge of property.

The insolvency Court, in a case where the title of the insolvent to certain property is disputed, can authorize the Official Assignee to take charge of that property pending settlement of the dispute : 36 *Cal.* 713, *Rel. on.* [P 673 C 2]

V. V. Srinivasa Iyengar for *N. T. Shamanna* and *T. R. Srinivasa Iyengar* —for Appellants.

M. Subbaraya Ayyar—for Respondent.

Curgenven, J.—These two appeals arise out of two applications by the Official Assignee of Madras for the delivery to him of certain property alleged to belong to a firm known as the T. S. N. Firm, which was adjudicated insolvent on 10th March 1930 by the High Court of Rangoon in I. C. No. 14 of 1930. The applications recite that that High Court sent a copy of the order of adjudication to this Court, and requested that, under S. 176, Presidency Towns Insolvency Act read with S. 77, Provincial Insolvency Act, the Official Assignee of Madras should be directed to act as auxiliary to the Official Assignee of Rangoon in respect of the properties within the jurisdiction of this Court. This direction being given, the Official Assignee sent a representative to Tirupapuliyur to take possession of certain properties believed to belong to the insolvent firm, but the representative was met by a refusal to deliver on the ground that the properties were trust properties, the income of which was dedicated to charitable purposes. The Official Assignee accordingly took out applications before our learned brother Waller, J., sitting in insolvency, calling upon certain members of the firm and their agents to show cause why they should not deliver possession. It is stated, and I think it must on the materials before us be conceded, that the respondents to these notices were not afforded sufficient opportunity to appear before the Court and show cause in accordance with the terms of the summonses issued to them. The Judge's summonses appear to have issued on 16th January, orders in terms of the applications were passed on 26th and the appellants here have given reasons, which it is not possible at present to dispute, why they were unable to get their case ready in the interval. So far as appears from the record therefore the Official Assignee's prayers for orders directing the insolvents and their agents to deliver possession were granted ex parte, upon the representations which his applications contained. This is as much as I can infer from the learned Judge's orders, which give no reasons for the summary character of the orders passed. The question now raised before us is whether the Court had jurisdiction under the terms of the Presidency Towns Insolvency Act to pass such orders.

This raises the general question whether the insolvency Court, in a case where the title of the insolvent to certain property is disputed, can authorize the Official Assignee to take charge of that property pending settlement of the dispute; because I conclude that it was only to that length that the learned Judge's orders were intended to go, and that it was not his intention to deprive the respondents to the applications of further opportunity to contest either the jurisdiction of the Court to make the orders, or the liability of the property to form the subject matter of them. Under sub-S. (2), S. 58, Presidency Towns Insolvency Act:

"The Official Assignee shall, in relation to, and for the purpose of acquiring or retaining possession of, the property of the insolvent, be in the same position as if he were a receiver of the property appointed under the Civil Procedure Code, and the Court may, on his application, enforce such acquisition or retention accordingly."

Now it is indisputable that under the terms of O. 40, R. 1, Civil P. C., it is perfectly open to a Court to commit property of which the title is in dispute into the hands of a receiver, pending settlement of that dispute. In fact, no receiver pendente lite could be appointed if it were first necessary to determine the ownership of the property. It seems further evident that this principle must extend, subject to sub-S. (2), R. 1, O. 40, to cases where, as here, one of the parties alleges that the property is held under a paramount title. This point has, I think, been correctly dealt with in *Hudson* v. *Morgan* (1). The circumstances of that case were of a more extreme kind than we have here, because there a stranger to the litigation set up a paramount title, whereas here it is the insolvents themselves (and their agents) who claim title, though in a

(1) [1909] 36 Cal. 713=1 I. C. 356.

capacity different from that in which they were adjudicated.

"If this," the learned Judges say "were the true rule of law, the action of the Court might be paralyzed by the groundless assertion of an entirely unfounded claim. But as was pointed out by this Court in the case of *Budh Singh Dudhuria* v. *Niradharan Roy* (2), "it is an elementary principle that when the jurisdiction of a Court to take cognizance of a matter brought before it is disputed, the Court must adjudicate upon the question. The jurisdiction of the Court is ousted, not by the mere assertion of the existence of the circumstances under which the Court loses its jurisdiction, but by proof of their actual existence."

No doubt, the question of jurisdiction must be judicially investigated, but the view that the Court must stay its hands upon the mere assertion of a paramount title cannot be supported. I cannot therefore accede to the appellant's contention that the learned Judge had no power to pass his orders, not only until they had had an opportunity of representing their case, but until the Court had adjudicated upon such questions of jurisdiction and title as they thought fit to raise.

There remains the question whether we should interfere with the discretionary power exercised by the insolvency Court. I think that, in view of the allegations contained in the Official Assignee's reports, there are no sufficient grounds at this stage to take this course. On the broad facts alleged, and without prejudging the issues, I am not prepared to say that the order was wrong. As however the title of the Official Assignee is likely to be contested, I think that, until due opportunity for such contest has been given, he should not hold them as would an interim receiver, without disposing either of the properties themselves or their proceeds. The appeals are dismissed. The Official Assignee will get his costs out of the estate and the appellants will bear their own.

Cornish, J.—I agree. If the property is held by the insolvents on trust for charity it will not be property of the insolvent which vests in the Official Assignee, and the Court would not be competent to order delivery of it to the Official Assignee. But it appears from the Official Assignee's report that the only ground for supposing the property to be trust property is the statement by an agent of the insolvents that the property is "earmarked for charities," whatever they may mean. The insolvents themselves, who reside without the jurisdiction of the Court, have declined, in spite of several letters from the Official Assignee, to give him any information or assistance in discovering the true character of the property. On the other hand the enquiries made by the Official Assignee show that these properties stand in the names of the insolvents personally in the municipal registers. This is not of course conclusive that the insolvents are not trustees of the property. But ostensibly the property is the property of the insolvents, and in the circumstances this would justify the order of the Court under S. 58 (2), Presidency Towns Insolvency Act, for the delivery of the properties to the Official Assignee. The order however will not preclude the insolvents from showing to the satisfaction either of the Official Assignee or of the Court that they have no more than the legal interest of trustees in the properties.

P.R.S./B.V. *Appeals dismissed.*

(2) [1906] 2 C. L. J. 431.

* A. I. R. 1931 Madras 674

RAMESAM, J.

(*Gunnam*) *Gangaraju* — Defendant—Appellant.

v.

(*Arimilli*) *Satyanarayana* and *others* —Plaintiffs—Respondents.

Second Appeal No. 1979 of 1927, Decided on 21st January 1931, from decree of Sub-Judge, Cocanada, in Appeal Suit No. 110 of 1925.

*** Minor—Minor unrepresented in suit—Decree against him is nullity—Proper person not appointed guardian — Decree whether nullity depends on whether minor has been prejudiced by such irregularity— Civil P. C. (1908), O. 32, R. 3.**

Where in a suit no guardian is appointed for a minor, or where a disqualified person is appointed as guardian, the result is as if the minor is not represented and the decree must be regarded as a nullity; where a guardian, and that a qualified person is appointed, but where there is some irregularity in the proceedings, or whether on account of the fraud of the opposite party, appointment of one person is obtained instead of another who would have conducted the case better on behalf of the minor, the decree is not a nullity. One has to see whether the irregularity has prejudiced the minor. It may be that in spite of the irregularity or fraud the result is the same as if he has been most efficiently represented. If so, the Court would not set aside the decree. But if the Court finds that the irregularity or fraud

has prejudiced the minor the Court will give appropriate relief: (*Case Law discussed.*)

[P 677 C 2]

G. Lakshmanna—for Appellant.

P. Satyanarayana — for Respondents.

Judgment.—The facts of this second appeal may be stated as follows:

The plaintiff's father Subbarayudu died before 1911 leaving three sons and a widow. The eldest son, defendant 1, was adopted by him. After adoption he had natural-born sons, the plaintiff and defendant 2. His widow is defendant 3. After the father's death, the two elder sons, namely, defendants 1 and 2, were managing the property, and in the course of their management they had incurred considerable debts. In connexion with such debts suits had been filed against them and defendant 3 and decrees obtained. It is now necessary to mention only two such suits. One is Small Cause Suit No. 1055 of 1919 on the file of the Subordinate Court of Cocanada. The decree in it is Ex. 4. It was obtained on three promissory notes, Exs. 4-C and 4-D of 1917 and Ex. 4-E of 1918. The other papers in connexion with that suit are filed as Exs. 4 series and D series. Another such decree was obtained in S. C. S. No. 1292 of 1919 on the file of the Sub-Court, Cocanada on a promissory note Ex. 3-1 of 1918, which itself was in renewal of another promissory note, Ex. 3-M. The other papers connected with that suit are filed as Ex. 3 series and C series. The first decree was transferred to the District Munsif's Court, Cocanada for execution and certain properties belonging to the three brothers were sold by Ex. 1. Ex. 2 is the delivery receipt to the purchaser. Out of the sale proceeds both the decrees were apparently paid off. The present suit was filed on 10th September 1921. It purports to be a suit for partition of the family properties against the two elder brothers. The mother was made defendant 3. Defendants 4, 5 and 6 are creditors of the family. Defendant 7 is the tenant of the family lands. Defendant 8 was the purchaser in execution of S. C. S. No. 1055 of 1919 and he was added as a supplemental defendant in 1924. The plaint denies defendant 1's adoption. It also alleges that defendants 1 and 2 were making alienations which were not binding on the plaintiff and prays for partition of the family properties. The District Munsif gave plaintiff a decree. He declared that the decrees in the two Small Cause suits already mentioned and the sale in execution were not binding on the plaintiff. There was an appeal by defendants 5, 6 and 8. The appeal was dismissed by the Subordinate Judge. The present second appeal is filed by defendant 8 only. In this second appeal we are concerned only with the purchase by him in execution of the Small Cause decree. Both the lower Courts find that the Small Cause decrees were obtained by the fraud of the plaintiffs in those suits namely, the present defendants 5 and 6. Those suits were filed against the three brothers. The present plaintiff being a minor, defendant 1, the eldest brother, was originally proposed as his guardia nd litem. He refused to be guardian and alleged that the minor was under the protection of his mother. The plaintiffs then proposed that the mother should be appointed as guardian. The mother appeared in Court and filed counterpetitions, Exs. C-4 and D-5, in which she stated that the minor was not under her protection but under the protection of her daughter Rathamma residing at Bhimavaram and that the said Rathamma should be appointed guardian of the minor. The plaintiff thereupon filed another petition in which he merely stated that the mother refused to receive notice saying that she would not act as guardian and that the summons was returned. He made no mention of the fact that according to the mother the minor was under the protection of his sister and that the sister was to be appointed as guardian. This fact was suppressed in his petition. The result was that the Subordinate Judge appointed a clerk as Court guardian. The written statement filed by the Court guardian and the judgments in the suits are not now available, though all the rest of the record has now been exhibited. When I called for them I got a report that they were destroyed. The Subordinate Judge says :

> "The plaintiff obtained the appointment of the Court guardian on false allegations that there was no near relation of the minor who could serve as his guardian."

This statement is strictly incorrect. The District Munsif says that the Court guardian

"filed vakalats in those suits which were not properly attested and duly stamped. All that the vakil did in those suits was simply to put the plaintiffs in proof of their claim."

I do not know how the District Munsif got this information. Perhaps, he looked into the original judgments and written statements which were then not destroyed. As I have already stated, both the District Munsif and the Subordinate Judge held that the decrees were not binding on the plaintiff on the ground that he was not properly represented. The Subordinate Judge relies on the decision in *Ririchand* v. *Manakkal Raman Somayajipad* (1). They also find that defendants 1 and 2 were living a life of reckless extravagance and both of them, or at least defendant 2 was addicted to women and drink.

It is now clear that the object of the present suit is really to get rid of the decrees obtained against the family so far as the plaintiff is concerned, that the partition is merely an incidental relief and that in fact the plaintiff seeks to set aside the decrees under the guise of a suit for partition. In this suit the plaintiff appears by his sister as his next friend. Issue 1 is whether defendant 1 is the adopted son of Subbarayudu. This was, of course, found in favour of defendant 1 against the plaintiff. This rather suggests that there was only a show of quarrel between the plaintiff and defendant 1 and that defendants 1 and 2 are really helping the plaintiff. But it is not possible to be very positive about the fact. The question now arises whether the former decrees should be regarded as nullities. When defendant 1 refused to be guardian and when the mother also refused to be guardian in those suits, one may fairly infer that they were not acting bona fide and that their object was to protract the litigation and to throw as many difficulties as they could in the way of the plaintiffs in those suits—a common trick with which we are too familiar in this country. But though we cannot sympathize with these tactics of defendants 1 and 2, this ought not to make us blind to the fact that the plaintiff, a minor, ought not to suffer on account of these tactics. The fact remains that his elder brothers, defendants 1 and 2, entered upon a career of extravagance after their father's death. Between the years 1911 and 1918 they executed several documents—promissory notes or mortgages—for debts contracted by them. In 1911 they executed Ex. X a mortgage, and Ex. X-b, a promissory note; in 1912 Ex. X-A, a promissory note, and Ex. IX-A a mortgage bond; in 1919 Ex. VII a promissory note in 1914 another promissory note Ex. VIII in 1915, a mortgage Ex. VI and a promissory note, Ex. III-m; in 1916 a promissory note, Ex. IV-e in 1917, a mortgage, Ex. XII, and promissory notes Exs. IV-c, IV-d and XIII and in 1918, a promissory note Ex. III-l in renewal of Ex. III-m.

It is not likely that the brothers who were guilty of such extravagance would raise proper pleas on behalf of their minor brother or can conduct the case properly on his behalf. It was impossible that they could plead their own extravagance and immorality. Defendant 1 therefore rightly refused to act as guardian in those suits. But the same cannot be said of the mother's refusal to act as guardian. The mother represented the plaintiff as guardian in the promissory note Ex. III-m, and when it was renewed by Ex. III-l, it was executed by defendants 1 and 2 only. Anyhow if she was to conduct the defence properly, she will have to plead extravagance on the part of her other son and the adopted son. So she tried to shift the burden on to her daughter. I do not think that it would have made much difference whether the mother or the daughter represented the minor in those suits. But one thing is clear. It is only a member of the family who knew the course of extravagance of the two elder brothers that can adduce evidence of it and can effectively establish it in a Court of law. It is impossible for a clerk to adduce evidence of all these matters. The result was that none of these documents or debts contracted by the brothers was exhibited in those suits. The clerk did all that he could to defend the case. The witnesses for the plaintiffs were cross-examined at great length. This of course did not avail. Under these circumstances, it cannot be said that, when the plaintiffs in those suits omitted to mention the sister who was suggested as guardian by the mother and obtained the appointment of a Court guardian, it was al-

(1) A. I. R. 1923 Mad. 553=74 I. C. 309.

together without a motive or that they were acting entirely bona fide. In *Maruthamalai* v. *Palani Goundan* (2) the plaintiff suggested the head clerk as guardian, though he knew that there was the maternal grandfather who was a person fit and willing to act as guardian for the minor.

The learned Judges, Sundara Ayyar and Sadasiva Ayyar, JJ., found that the statement of the plaintiff in that case could not be regarded as deliberately false and it amounted to no more than a statement that in his view there was no one who was fit and proper to be appointed. To this extent, no doubt the facts of the present case seem to be similar to the facts in that decision, and Mr. Lakshmanna, who appeared for the appellant, contended that that decision ought to be applied here. But it must be remembered that in that case the other defendant was the father, and the father's debts are prima facie binding upon the son and the father's refusal to represent his son cannot be regarded as bona fide. In the later suit there is no evidence of the father's immorality, and seeing that the Hindu law requires, for father's debts not to be binding on a son that a specific connexion must be established between the father's immorality and the debt and that it is not enough to prove a general course of immoral conduct, it is clear that the appointment of the Court guardian in that case could not have prejudiced the minor. In the present case the other defendants were the brothers and the debts were not contracted by the father but by the brothers. It is for the plaintiff's creditors to show that the debts were binding on the minor. The omission to suggest a relation and suggesting a Court guardian has far larger consequences in the one case than in the other, and one suspects that in the present case there is a motive behind it, whereas it is difficult to suspect such a motive in the other case. It is because of the surrounding circumstances and the consequent dissimilarity between the two cases that I hold that the decision in *Maruthamalai* v. *Palani Goundan* (2) cannot apply to this case. I must agree with the finding of the Courts below that the omission of the plaintiffs in the Small Cause suits in not suggesting the sister as guardian ad litem is not bona fide.

The next question is, should the decrees be held ipso facto to be nullities. In *Ririchand* v. *Manakkal Raman Somayajipad* (1) Krishnan, J., and myself held that the result of the plaintiff's fraud was as if the minor was not represented at all. It seems to me that the legal effect of a fraudulent appointment of a guardian is not quite accurately stated there. The corrct proposition in such cases is stated by Das, J., in *Pande Satdeo Narain* v. *Ramanyan Tewari* (3), at p. 345 (of 2 *Pat.*). This was quoted with approval in *Mt. Chambi* v. *Tarachand* (4). There are two well-known categories in relation to this matter (1). Where no guardian was appointed for a minor, or where a disqualified person was appointed as guardian, the result is as if the minor was not represented and the decree must be regarded as a nullity; (2) where a guardian, and that a qualified person, was appointed, but where there was some irregularity in the proceedings, or where, on account of the fraud of the opposite party, appointment of one person was obtained instead of another who would have conducted the case better on behalf of the minor, the decree is not a nullity. One has to see whether the irregularity has prejudiced the minor. It may be that in spite of the irregularity or fraud the result was the same as if he had been most efficiently represented. If so, the Court would not set aside the decree. But if the Court finds that the irregularity or fraud has prejudiced the minor, the Court will give appropriate relief. The decision in *Rashidunnissa* v. *Muhammad Ismail Khan* (5), is a case where the minor was not represented at all and the proceedings were therefore regarded as nullity. In *Bhagwan Dayal* v. *Paramsukh Das* (6), the defect was only an irregularity and the Court proceeded to examine how far the minor was prejudiced by it.

It was only when the learned Judges were satisfied that the minor was prejudiced that the relief sought by him was granted. *Bhagwan Dayal* v. *Paramsukh*

(2) A. I. R. 1914 Mad. 584=16 I. C. 182.

(3) A. I. R. 1923 Pat. 242=71 I. C. 705=21 Pat. 335.

(4) A. I. R. 1924 All. 892=82 I. C. 516=46 All. 744.

(5) [1909] 31 All. 572=36 I. A. 168=3 I. C. 864 (P. C.).

(6) [1915] 37 All. 179=27 I. C. 623.

Das (7), is a continuation of the decision in *Bhagwan Dayal* v. *Paramsukh Das* (6) and it was held that the original proceedings were rightly revived. In the case in *Ririchand* v. *Manakkal Raman Somayajipad* (1) undoubtedly the minor was prejudiced because a lease was held to be binding on him though the minor could not cultivate the lands by himself, and a decree for sale followed. These were held properly to be not binding on the minor, though, as I have already remarked, it would not be quite accurate to say that they should be considered as nullities.

In *Ponnayya* v. *Jangula Kanna Kotayya* (8), all that was held was, where the appointment of the father who did not consent resulted in an ex parte decree against the minor an application under O. 9, R. 13, to set aside the ex parte decree did not lie as the decree may be regarded as a nullity so far as the minor was concerned. In *Venkata Lakshmikanta Raju Garu* v. *Peda Venkata Jagannadha Raju Garu* (9), it was held that, where a Court guardian was appointed after the father's refusal, the decree is not necessarily bad, unless some collusion between the Court clerk and the plaintiff is shown. I would only add "or unless prejudice is shown." In *Vytheswara Ayyar* v. *Kumarappa Chettiar* (10), there was a false allegation of the plaintiff that the guardian refused to act, whereas really no notice was sent to him. Afterwards in the same suit the error was sought to be rectified; and Phillips, J., held that the later proceedings did not bind the minor and directed the District Munsif to restore the suit to file and proceed according to law. The decree being set aside in the proceedings connected with the suit itself, the question did not there arise whether in a later litigation it should be regarded as a nullity.

Jambu Ammal v. *Natarajan Pillai* (11) is a similar decision by Devadoss, J., the proceedings being set aside in the suit itself. In the present appeal, I therefore hold that the plaintiff obtained appointment of the guardian by the suppression of an essential fact to suit his own purposes, but that the decree is not a nullity. We have to see how far the minor is prejudiced by this fraudulent act. The Courts below did not approach this question from this point of view. Having regard to the findings of the lower Courts as to the extravagance and immorality of defendants 1 and 2, I must find that the decree in S. C. S. No. 1292 of 1919 is not binding on the minor. But, as to the decree in S. C. S. No. 1055 of 1919, I have already observed it is based on three promissory notes for Rs. 250. Ex. 4-c was executed by defendant 2 alone; Ex 4-d was executed by defendant 1 alone; and Ex. 4-e by both.

So far as the first two are concerned, I think that they are not binding on the minor. Ex. 4-e purports to be executed for the expenses of a litigation. The judgment in this litigation is filed as Ex. 5. In this litigation the two brothers, acting for themselves and on behalf of their brother, obtained a declaratory decree establishing their right to certain property to which they were entitled as reversioners. The date of the appeal judgment is 30th September 1916 and Ex. 4-e is dated 11th October 1916. It is reasonable to hold that the connexión between Ex. 4-e and the litigation is made out. The amount of Ex. 4-e is Rs. 150. It purports to be partly for taxes and partly for the expenses of the litigation. How much was incurred under each head was not stated. Dividing it into two equal halves, we may presume that Rs. 75 was incurred for the purpose of the litigation. One-third share of this is Rs. 25. The amount of the decree in S. C. S. No. 1055 of 1919 is Rs. 332-6-4. One-tenth of this is Rs. 33-4-0. To this extent the decree is binding on the minor. He cannot obtain the benefit of the decree in Ex. 5 without paying what was spent for his benefit.

It seems to me that the sales in execution of those decrees are bad on the ground of lis pendens also. I would therefore uphold the decrees of the Courts below, merely adding a direction that plaintiff is liable to pay defendant 8 Rs. 33-4-0 with further interest up to the date from which the plaintiff gets mesne profits, i. e., the date of the plaint before recovering one-third share of the property. With this modification I dismiss this second appeal.

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(7) [1917] 39 All. 8=36 I. C. 366.
(8) [1919] 53 I. C. 184.
(9) A. I. R. 1924 Mad. 281=77 I. C. 464.
(10) [1929] 115 I. C. 247.
(11) A. I. R. 1922 Mad. 485=70 I. C. 867.

I direct the appellant to pay three-fourths of the respondent's costs.

P.R.S./B.V. *Decree modified*: *Appeal dismissed.*

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* A. I. R. 1931 Madras 679

MADHAVAN NAIR, J.

(*Valluru*) *Basavayya* and *another*—Plaintiffs—Appellants.

v.

Govindaraju Veerabhadra Rao and *others*—Defendants—Respondents.

Second Appeal No. 1583 of 1927, Decided on 1st December 1930, from decree of Sub-Judge, Bezwada, in Appeal Suit No. 16 of 1926.

(a) Civil P. C. (1908), O. 6, R. 15—Plaintiff is responsible for statements in plaint.

Unless there is some evidence to the contrary, it must be presumed that the plaintiffs are responsible for the statements contained in the plaint. [P 680 C 1]

*** (b) Decree—Setting aside—Ex parte decree — Plaintiff putting false case before Court—Decree can be set aside on ground of fraud—Civil P. C. O. 9, R. 13.**

When a party obtains a decree in a suit in which the defendant is ex parte by putting forward deliberately a false case before the Court and by misleading it by suppressing a fact which it was its duty to put before it that decree can be set aside on the ground that it was vitiated by fraud. (*Case law discussed*).

[P 681 C 1, P 682 C 2]

P. Venkataramana Rao—for Appellants.

P. Somasundaram—for Respondents.

Judgment.—Plaintiffs 1 and 2, who are father and son, are the appellants. This second appeal arises out of a suit instituted by them for a declaration that the decree obtained by defendants 1 to 4 against plaintiff 1 in O. S. 44 of 1921 on the file of the Sub-Court, Cocanada, is not binding on them.

The facts are these: One Sitapathi Rao was a divided brother of one Krishnamurti. After his death plaintiff 1 purchased items 7 and 8 of the properties involved in the suit, O. S. No. 44 of 1921. These properties belonged to Sitapathi Rao. The sale deed, Ex. A, was executed by his widow Venkayamma and her adopted son represented by her, and by Mahalakshmamma and her minor son, who are defendants 1 to 4 in the present suit, represented by her. After Venkayamma's death these defendants as plaintiffs filed O. S. 44 of 1921 to recover the properties of Sitapathi Rao as reversioners to his estate. By that time defendants 1 and 2 had become majors and defendants 3 and 4 (plaintiffs 3 and 4), who were still minors, were represented by their mother, Mahalakshmamma. In that suit the present plaintiff 1 was impleaded as defendant 12 and it was alleged that he was in possession of items 7 and 8 as a tenant. Those items are the present suit properties. Defendants 4, 5 and 12 (the present plaintiffs) were ex parte in that suit. The suit was compromised by the plaintiffs therein and they obtained a decree.

The present plaintiffs seek to set aside the decree in O. S. 44 of 1921 on the ground that defendants 1 to 4 played a fraud upon the Subordinate Judge's Court of Cocanada as they abstained from bringing to the notice of that Court the sale deed, Ex. A, and misrepresented that plaintiff 1 was only a tenant in possession, while as a matter of fact he was holding the properties as a vendee under Ex. A and also on the ground that they fraudulently prevented the service of summons on plaintiff 1 and got him declared ex parte. With respect to the latter ground both the Courts found that plaintiff 1 was not properly served and that the defendants had really nothing to do with the act of the Court in declaring the plaintiff ex parte.

The main point for consideration is whether the defendants played a fraud upon the Cocanada Sub-Court in O. S. 44 of 1921 by omitting to mention Ex. A and by saying that plaintiff 1 was a tenant, while as a matter of fact he was a vendee of the properties. On this point the first Court found that a fraud was practised on the Court by the defendants and so the decree was set aside. On appeal the learned Subordinate Judge held that he

"cannot believe that the defendants wilfully abstained from informing the Cocanada Court of Ex. A and misled it conscious of the existence of such a sale deed at the time of filing O. S. 44 of 1921."

He also held that

"even granting that the defendants had knowledge of Ex. A, made false statements and perjured themselves and misled the Court, no separate suit would lie"

to set aside that decree.

In second appeal it is argued that the opinion of the Subordinate Judge that he "cannot believe that the defendants wilfully abstained from informing the Cocanada Court of Ex. A and misled it conscious of its existence"

is a pure surmise and is not supported by any evidence and that a separate suit would lie to set aside a decree obtained by wilfully misleading the Court.

I shall first deal with the finding of the learned Subordinate Judge that the present defendants did not wilfully mislead the Court in O. S. 44 of 1921.

It will be remembered that, when Ex. A was executed, defendants 1 to 4 were minors represented by their guardian Mahalakshmamma. By the time the suit was instituted defendants 1 and 2 had become majors and defendants 3 and 4, who were still minors, were represented in the suit by Mahalakshmamma. The learned Subordinate Judge says that defendants 1 and 2 were very young men in 1921 and that the verification contained in the plaint does not say that defendants 1 and 2 knew of the allegations therein personally. He also says that, in executing the sale deed, Venkayamma might have taken a prominent part. The latter ground is obviously intended to exculpate Mahalakshmamma who, on behalf of defendants 3 and 4, should have brought to the notice of the Court the existence of Ex. A, she having taken part in its execution both on her own behalf and also on behalf of defendants 3 and 4. I must also mention that the Subordinate Judge refers to the fact that plaintiff 1 was enjoying a portion of the suit lands even before the date of Ex. A. These are the various reasons assigned by the learned Subordinate Judge for coming to the conclusion that defendants 1 to 4 cannot be taken to have misled the Court when they failed to mention about Ex. A in the plaint in O. S. 44 of 1921 and stated that defendant 12 was a tenant in possession. These reasons are mentioned in para. 13 of his judgment. A bare perusal of this paragraph is enough to show that the learned Subordinate Judge is indulging in what I consider to be special pleading on behalf of defendants 1 to 4. The plaint in O. S. 44 of 1921 has been signed by all the four defendants, defendants 1 and 2 signing for themselves and Mahalakshmamma, putting her mark on behalf of defendants 3 and 4 who were minors. Unless there is some evidence to the contrary, it must be presumed that the plaintiffs are responsible for the statements contained in the plaint. In para. 8 of the plaint it is distinctly stated " . . . . that defendant 1's father and other defendants," which would include plaintiff 1 who was defendant 12, "are the tenants in possession of the suit properties." Then it is stated that

"all the allegations in the above paragraphs of this plaint are personally known to the guardian (next friend) of plaintiffs 3 and 4 (they are) true. The allegations in paras. 1 and 2 have been borne out by record and they are true. Signatures and marks have been affixed to this verification etc. etc."

Not a word is mentioned in the plaint about Ex. A, the sale deed, or of the fact that defendant 12 is the purchaser of items 7 and 8. Assuming that plaintiffs 1 and 2 did not know anything about the sale deed—for this there is no justification—how can we ignore the fact that Mahalakshmamma, who subscribed to the plaint on behalf of defendants 3 and 4, must be taken to have known everything about it as she was herself a party to Ex. A and represented defendants 1 to 4 in the execution of that document? She was in full possession of the true facts and yet in the plaint it is stated that she knows that defendant 12 is a tenant in possession, that this is personally known to her and that the allegations in the plaint including this are borne out by record and that they are true. This is clearly a statement false to her knowledge. The Subordinate Judge excuses Mahalakshmamma's conduct by saying that in the execution of Ex. A, Venkayamma, the other widow, might have taken a more prominent part. There is no evidence in support of this statement. This is a surmise indulged in by the Subordinate Judge for the special purpose of ignoring the significance of the conduct of Mahalakshmamma. On these which are the only facts which form the basis of the Subordinate Judge's conclusion, I must find that the present defendants 1 to 4 had knowledge of Ex. A, when the plaint in O. S. 44 of 1921 was filed, that the statement made by them that defendant 12 therein (the present plaintiff) was a tenant in possession of items 7 and 8 was false to their knowledge and that they made this false statement and refrained from bringing Ex. A to the knowledge of the Court deliberately for the purpose of getting a decree against him with respect to those items without any difficulty. It will be remembered that defendants

5 and 12 (the present plaintiffs) were ex parte and with the rest of the defendants the suit was compromised.

It is obvious that, as a tenant in possession, the present plaintiff, inasmuch as he has in that view no title to the lands in question, will have to surrender them and the Court, when it finds that the title of the plaintiffs is not disputed, will pass a decree for possession; but if it was known to the Court that he was a vendee under Ex. A, then it is clear that the plaintiffs in O. S. 44 of 1921 (that is the present defendants) would not be entitled to get a decree unless the document is set aside for appropriate reasons. The sale deed, Ex. A, is not a void document. It was executed by two widows and the minors represented by their guardians and these were all the persons who had any interest in the property covered by it. Unless the Court was satisfied that the sale deed was executed for a purpose not binding on the minors, it would not set it aside. It would have been prima facie a very difficult, if not an impossible thing for the plaintiffs to get Ex. A set aside, and to avoid this difficulty they deliberately suppressed the fact of its existence and misled the Court by describing the plaintiff as a tenant in possession. I have already stated that, though the present defendants were not responsible for it, there was no proper service of notice on plaintiff 1 and he had throughout remained ex parte.

The question is whether, when a party obtains a decree in a suit in which the defendant is ex parte by putting forward deliberately a false case before the Court and by misleading it by suppressing a fact which it was its duty to put before it, can that decree be set aside on the ground that it was vitiated by fraud? This precise question does not seem to have arisen for decision in this Court before. In *Chinnayya* v. *Ramanna* (1) it was held, after an exhaustive discussion of the English and Indian law, that a judgment in a prior suit is not liable to be set aside on the ground that it was obtained by suppressing certain material evidence in the case. In *Kadirvelu Nainar* v. *Kuppuswami Naicker* (2), it was held by a Full Bench that a suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence. To the same effect is the judgment of this Court in *Subbanna* v. *Dhanda Bayamma* (3). In that case the plaintiff's case was a false one and he sought to support it by perjured evidence. The present case differs from it in this, that here the plaintiffs obtained the decree not by perjured evidence but by wilfully and deliberately misleading the Court by refraining from disclosing a fact which it was their duty to disclose. No such conduct on the part of the plaintiffs was alleged or found in *Subbanna* v. *Dhanda Bayamma* (3) and no question of perjured evidence arises in this case. It has been held in other High Courts that the mere fact that a decree was supported by perjured evidence would not be a ground for setting aside that decree on the ground of fraud : see *Munshi Mosuful Huq* v. *Surendra Nath Ray* (4), *Kripasindhu* v. *Nandu Charan* (5) and *Jani Kuar* v. *Lachmi Narain* (6). In *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (7) at p. 998, it was pointed out that a decree will not be set aside by merely showing that it was based on an erroneous appreciation of the evidence. None of these decisions applies to the present case though they are helpful as they contain discussions of the leading decisions bearing on the subject.

Two decisions of the Calcutta High Court, *Kedar Nath Das* v. *Hemanto Kumari Dasi* (8) and *Rajani Kanta Das* v. *Purnachandra Kundu* (9) and one of the Oudh Judicial Commissioner's Court, *Madari Singh* v. *Ram Ratan* (10) may be referred to with advantage in deciding the present case. In *Kedar Nath Das* v. *Hemanta Kumari Dasi* (8), it was pointed out by Fletcher, J. :

" . . . . . nobody ever challenged the proposition that the mere fact that a decree has been obtained by perjury is not a sufficient ground for setting it aside. A different consideration arises where a false case is placed before the Court. We have got the decisions in *Aboulff* v. *Oppen-*

(1) [1915] 38 Mad. 203=19 I. C. 579.
(2) [1918] 41 Mad. 743=45 I. C. 774 (F.B.).
(3) A. I. R. 1925 Mad. 640=86 I. C. 498.
(4) [1912] 16 C.W.N. 1002=15 I.C. 893.
(5) [1920] 56 I.C. 606.
(6) [1915] 37 All. 535=30 I.C. 789.
(7) A. I. R. 1914 Cal. 232=23 I. C. 337.
(8) [1914] 22 I.C. 709.
(9) A.I.R. 1921 Cal. 298=63 I.C. 712=48 Cal. 298.
(10) A. I. R. 1914 Oudh 189=23 I. C. 976.

heimer (11) and *Vadala* v. *Lawes* (12), which show quite clearly that, if the case which was placed before the Court was a false one, the Court has jurisdiction in a subsequent suit to set aside the decree which was obtained by fraud practised on the Court."

The learned Judge then stated that "the plaintiff in the previous suit presented a fraudulent case before the Court and that the learned Judge had jurisdiction to set aside that decree."

Chatterjea, J., agreed with these observations. In *Rajani Kantu Das* v. *Purnachandra Kundu* (9), a Bench of the Calcutta High Court held where plaintiff brings a suit or claim which to his knowledge is false, and obtains an ex-parte decree, the decree is liable to be set aside. The following observations of the learned Judges are very instructive :

"The present case is not a case in which it has been found merely that the decree was obtained by perjured evidence. It has been found here that the suit or claim was a false suit or claim and the falsity of the claim was necessarily known to the party putting forward the claim. That being so, it is clear that the decree in question has been properly set aside."

In *Madari Singh* v. *Ram Ratan* (10), it was held by the Oudh Judicial Commissioner's Court that

"if a plaintiff knowing his claim to be baseless, puts a defendant into Court and succeeds in getting an ex parte decree, he cannot, in a subsequent suit brought by the latter for cancellation of the decree on the ground of its being obtained by fraud, plead that he was not guilty of fraudulent conduct. That very knowledge of the plaintiff amounts to fraud."

Shortly stated all the cases proceed on the principle, that, if a fraud is practised upon the Court by putting forward a false case, false to the knowledge of the plaintiff, and a decree is obtained then, such a decree is liable to be set aside in a subsequent suit on the ground of fraud. In ex parte *Alice Cockerell* (13), it was observed by Lord Coleridge, C. J. that

"if it can be shown that the order was obtained by fraud or by the suppression of information which it was essential that the Court should have, the Court will undoubtedly set aside the order."

As pointed out by Sundara Ayyar, J. in *Chinnayya* v. *Ramanna* (1) at p. 212 : "this decision cannot be taken to lay down that every party is bound to bring voluntarily before the Court all matters that have a material bearing on the question at issue and that every suppression of information by a litigant would make a decree in his favour liable to be set aside ;"

(11) [1883] 10 Q.B.D. 295=52 L.J. Q.B. 1=47 L.T. 325=31 W.R. 57.
(12) [1891] 25 Q.B.D. 310=63 L.T. 128.
(13) [1878] 4 C.P.D. 39.

but a wilful suppression of information and a deliberate misleading of the Court in circumstances which would show that it was the duty of the party complained against to put the Court in possession of the true state of facts, will, I think, be a sufficient ground for getting the decree set aside on the ground of fraud.

Of course it will be difficult to say in what circumstances a fraud can be said to have been practised on the Court by a party. The conclusion in each case will necessarily depend upon the special facts of the case. A false case supported by false evidence stands on a different footing from a false case in which the allegation relating to the falsehood amounts to the practice of a fraud upon the Court. In this connexion attention may be drawn to the observations of Lord Cairns, L. J., in *Patch* v. *Ward* (14). Referring to the *Duchess of Kingston's* (15) case his Lordship observes :

"the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance."

As observed by Jenkins, C. J. in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (7) at p. 998 :

"Lord Selbourne in *Ochsenbein* v. *Papelier* (16) at p. 698 quotes as sound law the dictum of Chief Justice De Grey in the *Duchess of Kingston's* case (15), that a judgment 'like all other acts of the highest judicial authority is impeachable from without ; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled.' "

As pointed out by the same learned Judge no doubt the unquestioned jurisdiction of a Court to set aside a decree on the ground of fraud is to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. Giving full weight to these observations, I am satisfied that the decree questioned in the present suit should be set aside as the Court was misled and misled deliberately and with fraudulent intent by the present defendants 1 to 4 to the detriment of the present plaintiff 1. I would therefore hold that the decree in O. S. No. 44 of 1921 is not binding on the present plaintiff 1 and consequently an injunction will issue

(14) [1867] 3 Ch. D. 203=18 L.T. 134.
(15) [1776] 2 Sm. Lc. 11th Ed. 731.
(16) [1873] 8 Ch. A. 695=42 L.J. Ch. 861=28 L.T. 459.

in his favour restraining defendants 1 to 4 from executing the said decree against him. In this view, it is not necessary to decide issue 3 in this case.

The second appeal is allowed and the lower Court's decree is set aside with costs here and in the Court below.

P.R.S./B.V. *Appeal allowed.*

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* A. I. R. 1931 Madras 683

REILLY AND ANANTAKRISHNA AYYAR, JJ.

T. S. Ramaswami Ayyar and *another*— Petitioner.

v.

M. A. Rangaswami Ayyar — Respondent.

Civil Revn. Petn. Nos. 1397 and 1613 of 1927, Decided on 31st March 1931, against order of Dist. Munsif, Calicut, D/- 9th March 1927.

*** (a) Court-fee— Administration suit — Preliminary decree passed—Another creditor claimant has to pay no court-fee afterwards.**

No court-fee is required to be paid by another creditor of the estate who comes in with a claim after a preliminary decree for administration has been made in an administration suit : 44 *Cal.* 890, *Expl.* (*Case law discussed*).

[P 683 C 2]

(b) Administration suit—Plaintiff creditor does not represent to full extent other creditors in such suit.

A plaintiff creditor in an administration suit does not represent all the other creditors in the sense that they are in effect parties to the suit from the outset : *Re Graves Bray* v. *Taffield*, 18 *Ch. D.* 551, *Rel. on.* (*Case law discussed*).

[P 684 C 1]

(c) Court-fees Act — It must be strictly interpreted while taxing a subject.

When the State requires the subject to pay a tax of any kind, that must be done by definite enactment strictly interpreted.

The Court-fees Act being a fiscal enactment has to be construed according to well-known rules of interpretation. The Courts are not entitled to strain the wordings of the Court-fees Act with a view to tax the subject.

[P 684 C 2 ; P 687 C 1]

P. S. Narayanaswami Ayyar—for Petitioner.

Government Pleader— for the Crown.

C. V. Harihara Ayyar and *T. S. Anantanarayana Ayyar*—for Respondent.

Reilly, J.—These petitions relate to a suit in which the District Munsif of Calicut made a preliminary decree for the administration of the estate of one Rama Pattar on a creditor's plaint. After that preliminary decree was made, two other creditors put in claims against Rama Pattar's estate. The District Munsif has ordered that on those claims they must pay ad valorem court-fee as if they were plaints. These revision petitions are against those orders.

It will be noticed that we are not concerned here with the question what court-fee should be paid by a creditor who institutes an administration suit. The question is what court-fee, if any, should be paid by another creditor, who comes in with a claim after a preliminary decree for administration has been made in such a suit. The learned Government Pleader has admitted that there is no explicit provision in the Court-fees Act requiring any court-fee to be paid on such a claim. But he has suggested that we should treat such claims as plaints for the purpose of the Court-fees Act. Except throwing out that suggestion he has not shown us, in my opinion, any good reason why we should extend the definition of the word "plaint" in that way. But his more serious argument is that such a creditor's suit for administration is really a suit for an account, the plaintiff creditor representing in it all the other creditors, who, being so represented, are in effect parties to the suit from the outset. His view of the suit is that the plaintiff creditor may fix his own valuation and court-fee in the first instance, but that, before any further amount than that on which he has paid the court-fee can be recovered by any creditor, additional court-fee must be paid in some such way as it is required to be paid in other suits for accounts by S. 11, Court-fees Act.

In a sense a creditor's suit for administration is a suit for an account ; but the analogy between it and an ordinary suit for an account will not in my opinion carry us far enough. First, it must be noticed that in an ordinary suit for an account, if a larger amount is found due to the plaintiff when the account is taken than that on which he has paid court-fee, S. 11, Court-fees Act, provides that the cannot execute his decree for the larger amount without paying additional court-fee on it. That is not exactly what the learned Government Pleader is contending for in this instance. Here it is contended that the creditors other than the plaintiff creditor must pay additional court-fees at an earlier stage, not when they are executing any decree or order which they may eventually obtain in the suit, but when they put in their claims. And does a plaintiff creditor in

such an administration suit really represent all the other creditors ?

In one sense his suit is a suit for the benefit of all the creditors of the estate. But I think it is clear that the other creditors cannot be held to be represented by him in the sense that they are in effect parties to the suit from the outset. It is clear I think that, if during the pendency of the suit, before a preliminary decree for administration is made, a claim of one of the other creditors becomes barred by time, it is gone : it cannot be enforced in the administration suit. That could not be if the other creditor had been represented by the plaintiff creditor and was in effect a party to the suit from the start. On that subject it is useful to compare *In re Graves Bray* v. *Taffield* (1), which explains the English law on the subject ; and I see no reason to suppose that the position in this country is different in that respect. Then it must be noticed that, before the preliminary decree for administration is made, if the person who represents the estate of the deceased pays off the plaintiff-creditor's claim the suit will be dismissed, although none of the other creditors has been satisfied at all. That too shows that the plaintiff-creditor does not effectively represent all the other creditors so as to make his suit a suit for an account on behalf of all, which is really what the learned Government Pleader contends for. We must all remember that in an administration suit the Court takes control of the estate and distributes it among the creditors, and it is no part of the duty of the Court to do that in an ordinary suit for an account. When we examine the matter in that way, it will be seen what a short distance the analogy of a suit for an account takes us in this matter. But, even if it went much further, could analogy help us? The learned District Munsif has relied on some remarks in *Shashi Bhushan Doss* v. *Manindra Chandu Nandy* (2), on the subject. In that case the learned Judges said:

> " After the preliminary decree has been made and the other creditors have been invited to establish their claims, if any, against the debtor, each creditor who puts forward a claim not already transformed into a judgment-debt may well be required to pay court-fees ad valorem on his application, as if it were a plaint in a suit for the recovery of the sum he claims. Such a procedure can be sustained on the analogy of S. 11, Court-fees Act "

In regard to that it must first be noticed that what the learned Judges said was only obiter dictum and in no way necessary for the decision of the case before them. And apart from that with very great respect I may say that I do not understand how any fiscal statute can be applied by analogy. When the State requires the subject to pay a tax of any kind, that must be done by definite enactment strictly interpreted; and that is a principle which we are bound always to defend. In my opinion, there being no enactment requiring court-fee to be paid on such claims as these, the learned District Munsif was wrong in his order: these petitions should be allowed and the claims inquired into without court-fee: if the petitioners have now paid court-fees, they should be refunded.

It may well be that this is a matter for legislation and that creditors should not on principle be allowed to urge their claims in such suits without paying some court-fee on them. But that is a matter for legislation, in connexion with which it would be necessary to consider such questions as what should be done in cases where the deceased's estate was insolvent and what should be done where some of the creditors had already obtained decrees against the deceased or his estate, on which they had already paid court-fee. These questions no doubt would have to be taken into consideration if legislation in the matter was undertaken; but it is unnecessary for us to consider them now.

Anantakrishna Ayyar, J.—I should like to add a few words of my own, as the case involves the decision of a question of law of some importance. The question for decision is as to the amount of court-fee payable on a claim sought to be filed by an alleged creditor to the estate of a deceased person, in respect of whose estate a preliminary decree for administration had been made. One of the creditors filed a suit, purporting to be instituted on behalf of himself and other creditors of the deceased debtor. A preliminary decree for administration was passed. Public notice was given of the preliminary decree for administration of the estate of the deceased person,

(1) [1880-81] 18 Ch. D. 551.
(2) [1917] 44 Cal. 890=38 I. C. 835.

having been passed, and claims from creditors of the estate were invited to be filed within a particular time. The petitioners in the revision petitions be fore us accordingly filed their claims The learned District Munsif directed that before their claims could be inquired into, they should pay ad valorem court-fee on the amounts of their respective claims. The present Civil Revision Petitions have been filed by these claimants against that order of the learned District Munsif.

The suit that was instituted by the creditor, O. S. No. 519 of 1925, has at present ended in this preliminary decree for administration. We are not now concerned with the question as to the exact amount of court-fee payable in respect of such a plaint. Both the Bombay and the Calcutta High Courts had to consider the question of court-fee payable in respect of such a plaint. For purposes of court-fee, both the High Courts have held that such a plaint should be treated as a plaint in a suit for an account: see *Shashi Bhushan* v. *Manindra Chandu* (2) and *Khatiji* v. *Shekh Adam Husanally* (3). The necessary court-fee having been paid by the plaintiff in the suit, and the suit having, as I said, for the present ended in a preliminary decree for administration, the question with which we are now directly concerned is not whether the plaintiff in the suit has to pay any, and if so what, additonal court-fee, but whether the new claimants, who, in obedience to the advertisement caused to be published in pursuance of the preliminary decree for administration passed in the suit, filed their claims, have to pay ad valorem court-fee on the amounts of their claims. It was argued by the learned Government Pleader that such a plaint as the one in O. S. No. 519 of 1925, though filed by a single creditor, should be taken to be filed not in the individual capacity of that creditor of the estate but as filed by him as representing both himself and the other creditors of the estate. But this argument would be correct only in a very limited sense. If the suit should be, taken to have been filed not only on his own behalf but on behalf of other creditors also then no question of any court-fee payable by the other creditors only would arise, since the other creditors would, on that hypothesis, being parties to the suit and the decree not have to pay any court-fee at the time they filed their claims. If however all claimants other than the plaintiff on record have to pay court-fee when filing their claims in pursuance of the preliminary decree for administration then, even creditors who have obtained independent decrees for moneys due to them from the estate would have to pay court-fees afresh on the amount of their decrees, which is of course very unjust. There is no provision of law to which our attention was called which directs the payment of ad valorem court-fees in such circumstances by the claimants against the estate, whether their claims have ripened into a decree or not. Again, it has been decided that a plaintiff in such a suit can have his suit dismissed, compromised, withdrawn or otherwise settled out of Court by an arrangement with those representing the estate, without in any way caring for the interests of the other creditors of the estate. There is a direct observation to this effect by Sir Arnold White, C. J., and Oldfield, J., in *Athalur Malakondiah* v. *Lakshminarasimhalu Chetty* (4) at p. 313 (of 26 *M. L. J.*). There is also English authority to support such a position.

At p. 1631, Vol. 11 of Williams on Executors and Administrators, it is mentioned as follows :

"After the usual administration judgment or order, every creditor has an interest in the suit, and is in a sense deemed to be before the Court ; yet, until such order, the plaintiff is dominus litis, so that he may deal with the action as he pleases ; and he may settle the matter with the executor, by the latter paying the debt and costs of the action, and compromise the action and relinquish proceedings. And indeed the Court will compel the creditor to accept payment of his debt when the executor offers to pay it with the costs of the action."

In para. 392 of Halsbury's Laws of England, Vol. 19, it is observed :

"If administration proceedings under the present practice are commenced by an executor who is also a creditor of the testator, and a claim is brought in by a creditor for a simple contract debt, which was more than six years old at the time of the judgment but not at the time of the commencement of the action, the claim is barred by the statute."

Again in para. 807, at p. 341 of Halsbury's Laws of England, Vol. 14, it is stated as follows :

"A judgment for administration prevents time from running against the claims of all

(3) [1915] 39 Bom. 545=29 I. C. 949.

(4) A. I. R. 1914 Mad. 646=23 I. C. 134.

creditors coming in under the judgment, but the mere institution of administration proceedings is not sufficient to effect this."

Again, at p. 388, para. 798, it is stated that

"the Court may also, where necessary to prevent proceedings by other creditors or by persons beneficially interested, make the usual order for administration, with a proviso that no proceedings are to be taken under the order without leave of the Judge in person. Nothing short of an order for administration will prevent a creditor from suing the representative or the representatives from preferring creditors."

The law in India is also stated to be the same by the learned Judges in the case reported in *Shashi Bhusan* v. *Manindra Chandu* (2). At p. 895 the learned Judges observed:

"The suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors. Creditors other than the plaintiff may come in under the decree and prove their debts and obtain satisfaction of their demands equally with the plaintiff in the suit, and under such circumstances, they are treated as parties to the suit ..... But although such is the nature of the suit, it is well settled that where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action."

Their Lordships follow the observations to the same effect in *Athelur Malakondiah* v. *Lakshminarasimhalu Chetty* (4) where it was held by a Bench of this Court that

"it seems clear that under the English practice, where one creditor sues on behalf of others for the administration of the estate of a deceased person, the defendant may at any time before judgment have the action dismissed on payment of the plaintiff's debts and all costs of the action: see Daniel's Chancery Practice, Edn. 7, Vol. I, p. 195 and the cases there cited."

If such a suit be treated strictly and in all respects as a suit brought by the other creditors also, then it would not be open to other creditors to file independent suits of their own in addition to such a suit when it was pending. On the other hand Courts have held that it is not only open to the other creditors to file suits to enforce their own claims, but that, if their claims should become time barred before the preliminary order for administration is passed, they could not successfully prosecute their claims against the estate. It has also been held that it is open to persons representing the estate to pay off any of the other creditors of the estate even when such a suit is pending, and that when they render an account in respect of the assets that have come into their hands they are entitled to be given full credit in respect of such payments. It has been clearly laid down by Jessel, M. R., in the case in *Re Graves Bray* v. *Taffield* (1), that if the right of the other creditors is barred by limitation when the preliminary order for administration is passed, then such creditors could not take advantage of the order for administration.

There is an early English case reported in *Sterndale* v. *Hankinson* (5), where Sir Anthony Hart, V. C., while discussing the exact nature of suits like the one before us, laid emphasis on the fact that all creditors of the estate are also interested in such a suit; and the learned Vice-Chancellor went to the extent of observing that if the rights of the other creditors be not barred by limitation on the date of the plaint in such a suit, their rights would not be barred at all. That would seem to be the law in Ireland, as seen from the decision in *Harpur* v. *Buchanan* (6). Jessel, M. R., in *Re Graves Bray* v. *Taffield* (1) had to consider how far that view of the learned Vice-Chancellor was sustainable after the Judicature Acts were passed in England. The learned Master of the Rolls remarked that in early days, equity Courts viewed question of limitation only as a matter of laches and delay and as such would only be a guide to equity Courts in the matter of exercising their equitable jurisdiction. It is clear that after the Judicature Acts were passed, pleas of limitation apply to all actions whether tried in the Chancery Division or Common Law Division. It was further observed that the remarks of the learned Vice-Chancellor in *Sterndale* v. *Hankinson* (5) should not be taken as authority on the point. In fact, the learned Master of the Rolls specifically stated as follows: "Creditors had better not rely upon that decision of the Vice-Chancellor." (It may be noted that the Vice Chancellor's name is given in *Re Graves Bray* v. *Taffield* (1) at p. 553 as Sir John Leach, whereas it is given as

(5) 57 E. R. 625.
(6) [1919] 1 Ir. R. 1.

Sir Anthony Hart in *Sterndale* v. *Hankinson* (5) at p. 627). In *Harpur* v. *Buchanan* (6) at p. 3, O'Conner, M. R., observed with reference to *Sterndale* v. *Hankinson* (5), as follows :

"The principle of that case is that a creditor's admininistration suit is one on behalf of all creditors, and that each creditor is entitled to the benefit of it just as if he instituted the suit himself. This may not now be the law in England, but it has always been followed in Ireland."

We also find that text writers have adopted the view of Jessel, M. R. In the circumstances, it must be taken to be settled law in England that the mere filing of such a plaint does not stop the period of limitation running against the other creditors of the estate.

I think the above observations are enough to show that it is not strictly correct to say that the Suit No. 519 of 1925 was a suit to which all the other creditors should be taken to have been parties in the ordinary sense of the term.

Further, when once a decree has been passed, the only provision of the Court-fees Act by virtue of which additional court-fee is payable is that provided for by S. 11, Court-fees Act. Under the terms of S. 11, the petitioners could not be called upon to pay ad valorem court-fees when they filed their claims.

As I said the question of the court-fee payable in respect of the plaint in O. S. 519 of 1925 is not before us at present; the only question which we have now to decide is what, if any, is the court-fee payable on the claims preferred by the other creditors of the estate after an order for administration had been passed. If I understood the learned Government Pleader aright, there does not seem to be any specific provision in the Court-fees Act which exactly covers a case like the present. In fact the difficulty seems to have been felt by the Senior Government Pleader of Calcutta who argued the case reported in *Shashi Bhusan* v. *Manindra Chandu* (2), and he represented to the Court on that occasion that the court-fees due to Government would be largely lost if such claimants are let off without being compelled to pay ad valorem court-fees on the value of their claims. It was in that connexion that the learned Judges, Mookerjee and Cuming, JJ., made the remarks, that were read to us, at p. 897 of the report. I must say that the learned Judges had not to decide the present question in that case. The only question before the Court was as to the amount of court-fee payable in respect of the plaint in such a case. The observations therefore at p. 897, relied on by the learned Government Pleader before us, were therefore only obiter. Further, the learned Judges after observing that the case was not specifically covered by any provision of the Court-fees Act, only threw out an observation, with reference to the remark made by the Senior Government Pleader of Calcutta, that by way of analogy the provisions of S. 11, Court-fees Act, might be applied. It is possible that the learned Judges' observations were meant to be no more than a suggestion that that would be the way in which such cases could be dealt with in any attempt to collect court-fee from such claimants. If the learned Judges purported to go further, and meant to decide that as the Court-fees Act now stands such claimants come within S. 11, Court-fees Act, and that they have to pay ad valorem court-fee on the amount of their claims when filing their claims, then, with all deference to the learned Judges, I am not able to agree with them. The Court-fees Act being a fiscal enactment has to be construed according to well-known rules of interpretation. The Courts are not entitled to strain the wordings of the Court-fees Act with a view to tax the subject. It may be that the present is a case of omission. If that is so, it is not a matter for the Courts but one for the legislature. Again, if argument by way of analogy be permissible, we find that under the provisions of S. 28, Provincial Insolvency Act, on the making of an order for adjudication, the estate of the insolvent vests in the Court or in the Official Receiver. There is a specific provision made in that section that after that event, the money creditors of the insolvent are not entitled to commence an action to enforce their dues, but that, whatever reliefs they are entitled to, they should seek only in the insolvency proceedings. As far as I am aware, no ad valorem court-fee is levied from creditors who prove their claims in insolvency. If the intention was that in respect of administration actions also, ad valorem court-fees should not be levied from the creditors who seek to file their claims in pur-

suance of the order of administration passed by a Court, then, we have got a consistent procedure covering these classes of cases. It was brought to our notice by the learned advocate for the petitioners that O. 20, R. 13, Civil P. C., refers to the procedure to be followed with reference to insolvency; but as I read the rule, it only goes to the extent of providing for the way in which the assets should be distributed among the secured and unsecured creditors, and refers to the Insolvency Act only to that extent and for that purpose; and the rule cannot, as its wordings now stand, be taken to expressly cover the question of court-fee also. It is enough to say for the present, that, if there is an omission in the Court-fees Act, the litigant is entitled to take advantage of the same.

Finally, I take it that when a preliminary order for administration is passed, a receiver is at once appointed. It is a settled rule of practice that no suit can be instituted against a receiver appointed by a Court without the permission of the Court. When the Court has invited claims with a view to have them adjudicated, and to have the estate before the Court administered among the creditors, &c., the Court is not ordinarily likely to refer a claimant to a separate suit. I am not here concerned with a case where for any special reason, the Court may consider that in the circumstances a separate suit should be filed to have the claim properly adjudicated, and may grant permission for the filing of such a suit against the estate in the hands of the receiver. In any event, the present is not alleged to be such a case, and that is not the reason given by the learned District Munsif. I have accordingly come to the conclusion that as the law now stands, Courts are not entitled to demand from claimants like those before us ad valorem court-fee before their claims are entertained by the Court administering the estate of the deceased debtor.

I agree with my learned brother that the orders of the lower Court in these petitions should be reversed and the ad valorem court-fee, if paid, directed to be refunded. We make no order as to costs in the revision petitions in the High Court in the circumstances.

P.R.S./B.V. *Revision allowed.*

A. I. R. 1931 Madras 688

JACKSON, J.

In re *Gopala Menon*—Petitioner.

Civil Misc. Petn. No. 531 of 1931, Decided on 10th February 1931.

Legal Practitioners Act (1879), S. 7—Rules framed under R. 13—Under R. 13 High Court has not delegated to District Judges power to suspend practitioners pending receipt of their renewed certificates.

Under R. 13 the High Court has not delegated to District Judges the power to suspend practitioners pending the receipt of their renewed certificates. Any orders in regard to non-renewal or suspension pending refusal to renew must proceed direct from the High Court.

[P 688 C 2]

S. Duraiswami Iyer for *P. Govinda Menon*—for Petitioner.

Advocate General—for the Crown.

Order. — This is a petition from a legal practitioner practising in the Court of the District Judge of South Malabar to set aside the order of the District Judge dated 21st January 1931 forbidding him to practise pending the receipt from the High Court of his renewed certificate. The petitioner held a certificate for the year 1930 which was to hold good till 31st December 1930. Under S. 7, Legal Practitioners Act:

"at the expiration of such period, the holder of the certificate if he desires to continue to practise, shall, subject to any rules consistent with this Act which may, from time to time, be made by the High Court in this behalf, be entitled to have his certificate renewed by the Judge of the District Court, etc."

The only rule framed in this connexion is R. 13 which provides that pending the receipt of the renewed certificate practitioners may continue to practise subject to such precautions as to identification as the District Judge may think fit to prescribe. It is therefore clear that the High Court has not delegated to District Judges the power to suspend practitioners pending the receipt of their renewed certificates. Any orders in regard to non-renewal or suspension pending refusal to renew must proceed direct from the High Court. In the circumstances, the order of the learned District Judge cannot be supported and is cancelled. With this view the learned Advocate-General agrees.

P.R.S./P.N. *Petition allowed.*

A. I. R. 1931 Madras 689

BEASLEY, C. J. AND
SUNDARAM CHETTY, J.

Venkatasubba Reddi and *others*—Accused.

v.

Emperor—Opposite Party.

Referred Trial No. 111 of 1930 and Criminal Appeal No. 473 of 1930, Decided on 20th January 1931, referred by Sessions Judge, Cuddapah.

(a) Evidence Act (1872), S. 114, Illus. (b)—It is unsafe to convict on uncorroborated testimony of accomplice.

The testimony of an accomplice is doubtless tainted evidence. It is well settled by judicial decisions, that though a conviction on the uncorroborated testimony of an approver is not illegal, it is however unsafe to convict in the absence of independent corroborative evidence as regards material particulars. Such corroborative evidence may be either direct or circumstantial. [P 690 C 2]

(b) Evidence Act (1872), S. 114, Illus. (b)—Corroborative evidence explained.

Corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused. [P 691 C 1]

(c) Evidence Act (1872), S. 114, Illus. (b)—Duty of prosecution is to adduce corroborative evidence—Corroboration not proved—Gaining over of witnesses or suppression of truth by them is immaterial.

The prosecution has to adduce evidence to corroborate a material particular in the evidence of the approver for connecting the accused with the crime, and when witnesses cited for such a corroboration, fail to corroborate, it is no use saying that they were gained over, or are suppressing the truth. The fact however remains, that corroboration is wanting. [P 694 C 2]

(d) Criminal Trial—Mere strong suspicion is not enough—Benefit of doubt must be given to accused—Defence not able to account for murder in any other way is immaterial.

In a criminal case when a set of circumstantial evidence is capable of two constructions, one in favour of the accused, and one against him, he should at least be entitled to the benefit of the doubt. [P 696 C 2]

But where the proof adduced, at best leads to strong suspicion, but falls short of the requisite standard the benefit of the doubt should be given to the accused. In order to convict persons charged with murder there should be unimpeachable evidence of reliable witnesses, bringing home the guilt to the accused beyond reasonable doubt. If the defence is unable to account for the murder in any other way, it cannot be taken, that the prosecution story is necessarily true. It must succeed on the strength of its own case, and not on the weakness of the defence. Neither suspicion nor probabilities can decide cases in the absence of legal evidence. Where there is not the necessary evidence to turn strong suspicion and probability into a reasonable certainty, the prosecution must fail. [P 936 C 1]

(e) Evidence Act (1872), S. 8—Hearsay evidence is not admissible even to prove intention or motive.

If the intention of the person can be proved by direct evidence, then such evidence is clearly admissible to prove the relevant fact of motive but there is nothing in the Evidence Act which renders hearsay evidence of such intention admissible. There is nothing in S. 8 which supports the contention of the prosecution that a relevant fact can be proved by hearsay evidence. Hearsay evidence can never be admitted unless the Evidence Act permits it. [P 697 C 1]

Nugent Grant, V. L. Ethiraj, A. S. Sivakaminathan, N. Somasundaram, D. R. Venkatesa Aiyar, G. K. Damodara Rao and *L. Jayaram*—for Accused.

Public Prosecutor—for the Crown.

Sundaram Chetty, J.—Accused 1 to 7 have been convicted by the Sessions Judge of Cuddapah for the murder of Eddula Sivamma at Chinnadandlur village on 20th February 1930, and all of them except accused 4 were sentenced to death, and accused 4 to transportation for life. Accused 5 to 7 are alleged to be the hired assassins who committed the murder, whereas accused 1 to 4 are said to have abetted it.

The facts of the prosecution case are briefly as follows: Sivamma was a widow aged about 60, in affluent circumstances, without any issue. She was a charitable lady, and many and various were her religious and charitable dispositions. Accused 1 had an elder brother, who was brought up by Sivamma, but he died some years ago, leaving his widow Subbamma (P. W. 7) who is now aged about 23. Accused 1 has two younger brothers, Venkatasiva Reddy aged about 18 (C. W. 2) and a minor aged 12. Sivamma was protecting Subbamma (P. W. 7) in her own house, and treating accused 1 and his younger brothers with affection, they being her paternal uncle's greatgrandsons. They were living in another house, which is two or three doors off Sivamma's house. Her last will is Ex. L which she executed in 1924, whereby, she left the bulk of her estate to accused 1 and his two younger brothers, after making some bequests for charity, and some provisions for Subbamma. Pedda Venkatasubba Reddy (C. W. 3), the paternal uncle of accused 1 was keeping the accounts of Sivamma for several years, till a few months before her death, and she was lending out considerable sums of money on promissory notes and owned also landed property. Accused 2 is the husband

of accused 1's sister, residing at Kothapetta, two and a half miles from Chinnadandlur, while accused 4 who lives in a distant village Pothireddipalli, is accused 1's wife's brother. Accused 3 who is a native of Kothapetta has recently settled at Chinnadandlur to look after his minor nephews. Both accused 2 and accused 4 owed money to Sivamma on promissory notes, whereas accused 3 owed a sum of Rs. 600 on a promissory note to accused 2.

It is beyond doubt that Sivamma was most brutally murdered in the early part of the night of 20th February 1930, between 7 and 8 p. m. when she was sitting on the outer pial of her house chewing betel, after her dinner. According to the prosecution case, it was accused 1 who plotted the murder of Sivamma in a diabolical manner. It is alleged, that about three months before the occurrence, when Subbamma was left alone in Sivamma's house during the latter's absence for a week from the village, accused 1 approached Subbamma and made improper overtures to her, that when she reported this matter to Sivamma on her return, she became enraged and after severely scolding accused 1, told him not to enter her house, and that she was also saying that she would alter her will and settle at Gundlakunta. This threatened disinheritance is said to have supplied accused 1, a motive for bringing about the death of Sivamma, with the aid of hired assassins.

There has been an elaborate trial in this case, and the learned Sessions Judge has written an exhaustive judgment, adverting to the evidence in great detail. As observed by him more than once in his judgment, the case for the prosecution principally depends on the evidence of the approver alone.

P. W. 1 is the approver. He is doubtless a man of disreputable character, addicted to drinking and gambling. About a month before the murder of Sivamma, he came out of the jail, after serving nine months' term of imprisonment for robbing a woman. In connexion with this case, he was arrested by the police on 3rd March 1930, after getting some clue from his associate, one Sanjanna. He was taken before the Stationary Sub-Magistrate of Proddatur on 4th March for remand, and on the next day his confession was recorded (Ex. A). He has given a long narrative. In para. 15 of his judgment, the Sessions Judge has summarised it as follows:

"Briefly it is to the effect that he accompanied accused 2 on the afternoon of the 17th to Proddatur. From there they took a motor bus to Yerraguntla and entrained for Tadpatri that night. At Tadpathri accused 2 inquired for Tirumal Reddi (accused 4) and ultimately found him in the village of Kodur. On the way accused 2 told P. W. 1 that he was going to get men from Tirumal Reddi to murder Sivamma. P. W. 1 and accused 2 returned from Kodur by train from a neighbouring station Vanganur on the night of the 18th. They reached Proddatur on the 19th morning and from there returned to Kothapeta. On the 20th morning accused 2 went to Kalamalla Railway Station which is five miles from Kothepata and met four hired assassins alleged to have been sent by Tirumal Reddi. He brought them to his house in Kothapeta and in the evening they set out for Chinnadandlur. The approver describes the parts played by the accused including himself that fatal evening."

In the detailed narrative of P. W. 1 as regards the parts played by these accused (adverted to in para. 16 of the learned Sessions Judge's judgment), what is it he has ascribed to accused 1? All that the approver says is, that on 20th February, when he, and accused 2 and the four strangers (accused 5 to 7 and another) were lurking after dusk in a hay yard (marked in the plan Ex. JJ), accused 1 came to them and said, that only the strangers should go and beat Sivamma, but those known to Sivamma should merely keep watch. After a while, accused 1 came there again and said: "She is sitting outside. You had better get up." When they came to the potter's lane, accused 1 asked P. W. 1 to stay there, and pelt stones if anyone should turn up, and himself went into a cattle shed opposite to Sivamma's pial. This story of the approver, which connects accused 1 with this murder as the prime abettor is altogether uncorroborated by any evidence, and is left severely alone. Except for the motive there is absolutely no proof as to what part, if any, accused 1 played in connexion with this murder, beyond the uncorroborated statement of the approver.

The testimony of an accomplice is doubtless tainted evidence. It is well settled by judicial decisions, that though a conviction on the uncorroborated testimony of an approver is not illegal, it is however unsafe to convict in the absence of independent corroborative evidence as regards material particulars. Such corroborative evidence may be either direct

or circumstantial. This question has been well discussed in the case of "*King* v. *Baskerville* (1)." Lord Reading, C. J., has laid down the principles of law at p. 667 as follows:

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it..... It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

Applying the aforesaid test, the corroborative evidence as regards the approver's story to connect accused 1 with this crime as an abettor, by the narration of the part played by him just before the murder, must be treated to be nil. Coming now to the alleged motive for accused 1 to plot this murder, there is, of course, the evidence of Subbamma (P. W. 7). It is argued for the appellants that her evidence is suspicious and untrustworthy, as she did not mention to the police the true main details of her evidence, viz., her molestation by accused 1 which resulted in the estrangement between accused 1 and Sivamma, and the rifling by him of Sivamma's iron safe after the cremation. It is admitted by the Circle Inspector (P. W. 31) that he examined Subbamma on 24th February. But she herself admits in her statement given before the Magistrate under S. 146, Criminal P. C., on 10th March 1930 (Ex. K), that she did not state these facts to the police. Conscious of the necessity to account for her omission to state all these to the police, she wound up her statement, with the explanation that owing to fear, and to her having been watched by her brother-in-law (accused 1) she did not mention these facts to the police or to other officials. A belated statement of these important facts, after a delay of nearly 20 days, calls for adverse comment, and at any rate, cannot be accepted without much hesitation. There is still the question, that if the omission to mention these two facts to the police was due to their not having occurred, why should Subbamma subsequently turn hostile and invent them to implicate accused 1? The explanation given by accused 1 is to the effect, that Subbamma came and stayed in his house for 10 or 12 days after the murder and asked him to give her jewels and some cash for her share, and as he refused to give her a share in Sivamma's bonds, she gave false evidence. Be this as it may: Subbamma's evidence as regards the relinquishment deed Ex. M, executed by her, in favour of accused 1 and his two brothers, is mendacious, not to speak of the disingenuous character of the answers given by her, as regards that transaction. She is shrewd enough to shape her answers, to serve her interests and cannot be deemed to be guileless. But, the explanation of accused 1 as to the reason for the subsequent change in her attitude, is not also convincing.

In order to prove the motive for accused 1 to plot this murder, the prosecution relies on the evidence of P. Ws. 7, 14 and 15. They speak to certain statements made by Sivamma, in her outburst, having been enraged against accused 1, by reason of his molestation of Subbamma. As for the molestation, there is only the evidence of Subbamma. P. W. 14 says, that Sivamma told him, that as Subbamma had complained to her that accused 1 molested her, she forbade him to come to her house. She further said, that after Venkatasiva Reddi's marriage, she would cancel her will, and go and live at Gandlakunta. P. W. 15 also speaks to the outburst of Sivamma, and says that she told him that after marrying Venkatasiva Reddi, she would cancel her will and collect all the bonds standing in accused's name. It is argued by the learned counsel for the appellants, that these statements of the deceased are inadmissible in evidence, unless they can be brought under S. 8, Explanation 1, or S. 32 (1), Evidence Act. According to the prosecution, the disclosure of Sivamma's intention to cancel the will (Ex. L) and disinherit him, was the reason for accused 1 to plot the murder of Sivamma. S. 8 says, that any fact is relevant which shows or constitutes a motive for any fact in issue. In this case, the fact in issue is, whether accused 1 caused the murder of Sivamma.

(1) [1916] 2 K. B. 658=86 L. J. K. B. 28=115 L. T. 453 =80 J. P. 446=25 Cox. C. C. 524.

The motive for this can be proved, as a relevant fact. But a fact, though relevant, must only be proved by admissible evidence. What P. Ws. 14 and 15 heard Sivamma say, would be hearsay evidence, and as such inadmissible, unless it can be brought under any recognized exception. I at first thought, that if what Sivamma stated about her intention to cancel the will constituted a motive for accused 1 to devise her murder, that statement can be proved only by those who heard it from her. There is however this difficulty, viz. that though that statement shows a motive for accused 1's act, it does not lose the character of being a statement made by a deceased person. Such a statement will be admissible under S. 32 (1), if it satisfies the requisites mentioned therein. It cannot be deemed to be a statement as to the cause of her death, or as to any of the circumstances of the transaction which resulted in her death, and it would therefore be hearsay and not admissible: vide *Queen-Empress* v. *Surendra Nath Sarkar* (2). Unless such a statement is shown to have accompanied or explained any act of Sivamma, it would not come under Expln. (1), S. 8. It must also be noted that P. W. 15 says that accused 1 was not present when Sivamma said so. It is not shown that Sivamma stated like that in the presence or to the knowledge of accused 1. No doubt, the result will be, that where a statement made by a deceased person is said to constitute a motive for another to commit a crime, it cannot be proved by one who heard the deceased say so. It is contended, that a motive is provable as a relevant fact, but it cannot be proved by hearsay evidence. With some hesitation, I am constrained to accede to the contention that the evidence of these witnesses as to what Sivamma stated to them is inadmissible. That being so, it should be taken, that there is only slender proof in support of the alleged motive, which consists in the evidence of P. W. 7.

In the statement of Sivamma, recorded by the Village Munsif (P. W. 30) shortly after the attack on her, which is filed as Ex. DD, she said that some persons four or three in number came and cut her on her forehead with a hatchet and cut her with an axe on her side and forehead and that as her left arm was cut on the wrist, it fell down. She is alleged to have added at the end, that the keys, etc., which were with her were taken away. In para. 38 of his judgment, the learned Sessions Judge says:

> "The prosecution have based their arguments on the dava being true and the fact that Sivamma did state to the Village Munsif that her keys were lost."

Assuming that this is a correct record of what Sivamma said, as it purports to be, it may be asked, why Sivamma failed to mention her suspicion about accused 1 being the abettor of this crime. The prosecution case is that Sivamma was apprehending some foul play by accused 1 but even if she was fully conscious when she made the statement to the Village Munsif it is doubtful whether she was in a position at the time of physical agony and distress to reflect calmly over the affair and make any such inference. Her omission, the defence would try to rely on. But the prosecution has treated P. W. 30 as a hostile witness and obtained permission to cross-examination. This so-called dava is either wholly true or wholly concocted, and the third alternative is, that it is partly true and partly concocted. If Sivamma should have lost consciousness after such a brutal attack, she could not have made any statement at all to the Village Munsif. In that case, there is good reason to suspect that this dava was got up by accused 1 and his party with the aid of the Village Munsif (P. W. 30).

But it would appear even from the evidence of P. W. 7, that when she questioned Sivamma after opening the door of the house, as to who had beaten her, she said: "Some strangers." This shows, that she was not completely unconscious. Ex. DD is not altogether free from suspicion, if regard be had to the circumstances of this case.

The difficulty in this case is that apart from the evidence of the approver, there is scanty evidence of a direct character. So far as accused 1 is concerned, there is no corroboration of the approver's story regarding the part played by accused 1 on that fatal night, just before the occurrence. The approver has not stated anything else about accused 1, in the whole of his long narrative. I have already dealt with the proof adduced for showing a motive for

(2) [1901] 28 Cal. 397=5 C. W. N. 574.

him to commit this crime. It is suggested by the defence, that this crime might be the work of dacoits or robbers. But, considering the time, place and circumstances of the attack, the most brutal manner in which the poor woman was ruthlessly attacked with a deadly weapon and the absence of any attempt by the culprits to enter into the house for plundering property, I have no hesitation to reject this suggestion as untenable. If the defence is unable to account for the murder in any other way, it cannot be taken, that the prosecution story is necessarily true. It must succeed on the strength of its own case, and not on the weakness of the defence.

Stress has been laid by the prosecution, on the conduct of accused 1, in rifling the iron-safe of Sivamma on 21st February, with the aid of the keys, which Sivamma lost during the attack on her. This is spoken to by Subbamma (P. W. 7) alone in her evidence. Her omission to mention this fact, without suspiciously long delay, is a factor to be counted against her veracity. Granting that accused 1 did meddle with the iron-safe, as alleged, and remove some cash, jewels, and promissory notes, is the inference that he must have brought about the murder irresistible? After Sivamma's death, accused 1 and his brothers would be entitled to her properties under the will (Ex. L) which remained uncancelled. There was really no need for accused 1 to clandestinely open the iron-safe, for removing some of the contents thereof, as he could get possession of those properties, on the basis of the will, in due course. It is difficult to accept the view of the learned Sessions Judge that the opening of the safe by accused 1 on the 21st evening is a tangible piece of corroborative evidence as against accused 1. There is the fact that the keys were voluntarily produced before the police on the 22nd, as having been discovered with the blood-stained cloth. The subsequent conduct of accused 1. in coming to the scene of attack at once along with the Village Munsif and others, in taking the injured woman to the hospital, and attending the cremation etc., just as a cordial relation of hers would do, and in the production of the keys before the police on the 22nd itself, admits of two constructions, according to the angle of vision used. Apart from such conduct, if there is some adequate proof of his complicity in the murder, we can easily deem such conduct as a studious simulation on his part to cover up his guilt. When there is no such proof except the uncorroborated statement of the approver, such conduct which is prima facie indicative of the innocence, cannot be viewed as mere simulation. At any rate, in a criminal case of this kind, when a set of circumstantial evidence is capable of two constructions, one in favour of the accused, and one against him, he should at least be entitled to the benefit of the doubt. In para. 39 of his judgment, the learned Sessions Judge goes on to say:

> "This is a carefully plotted murder in which considerable foresight has obviously been taken by the culprits who successfully covered up all their traces."

The insurmountable difficulties which the prosecution meets with in bringing home the guilt to the accused, owing to the refractory nature of witnesses, who would not disclose what they know, or who have come under the sway of the influence of the accused, are certainly deplorable, but in view thereof, there would be no justification for convicting the accused, on insufficient or inadequate evidence however strong the suspicion may be, giving rise to righteous indignation. The learned Sessions Judge has characterized P. Ws. 6 and 30, as most unsatisfactory witnesses. He is of opinion that they are the confederates of accused 1. P. W. 6 is even suspected by him of complicity in the murder, and he is the man who is said to have been talking to Sivamma on the pial, just before the attack, and to have also received some minor injuries at the hands of some of the assailants. C. W. 2 is a younger brother of accused 1 and C. W. 3 is the paternal uncle of accused 1. They both support the evidence of the Village Munsif (P. W. 30) whom the prosecution discards as a hostile witness. Direct evidence to prove the guilt of accused 1 in connexion with this murder, is practically nil, except that of the approver. The motive for him as disclosed by Subbamma (P. W. 7) leads to suspicion, even strong suspicion against him. The circumstantial evidence, as regards him, is capable of two constructions, and is not consistent only with his guilt. The ques-

tion is, whether it is safe to act solely on the evidence of the approver 'and convict accused 1 for abetment of murder.

If the guilt of accused 1 himself should be deemed to have not been proved beyond reasonable doubt, is there a good basis for convicting accused 2 to 4, who are alleged to have assisted accused 1 in carrying out his design against the life of Sivamma? Accused 2 and accused 4 are no doubt close relations of accused 1, but accused 3 is not a relation. The mere fact that accused 2 and accused 4 are indebted to Sivamma, is hardly sufficient to hold that they would readily consent to procure assassins for murdering Sivamma in order to make a gain for themselves by getting rid of those debts. On the other hand the promissory notes executed by them to Sivamma have not been destroyed after her murder, and are still intact. There is also the fact that accused 4 is a man of considerable property. The only reason for their stopping to join in this nefarious crime can be to oblige their relation (accused 1). There can be no such motive, so far as accused 3 is concerned.

The story of the approver (P. W. 1) has been the subject of much adverse comment by the learned counsel for the appellants. His story is a long narrative and he has on the whole stood the long and searching cross-examination, without committing himself to serious inconsistencies. But on a careful scrutiny of his narrative, it looks as if he studiedly minimized the importance of the part played by him. To be an accomplice, he should have done something more than what he would ascribe to himself. It is urged on behalf of the accused, that the approver, as shown by his narrative was there not as an accomplice in the crime, but more as an incubus to watch others' dealings for disclosing them. It is also contended that this man must have been supplied to the police by Pedda Obula Reddi of Kothapeta (C. W. 1) in whose employ he has been after his release from jail, and in whose cattle shed he used to sleep. Much has been said on both sides about C. W. 1 and each side is urging that he has a leaning towards the other. There is no doubt that P. W. 1, is a man disreputable in character, who may run with the hare and hunt with the hound. In the face of the evidence of C. W. 1, who says he is related to C. W. 3, as also to accused 2, accused 3 and accused 4, it is difficult to accept the suggestion, that he should have supplied the approver to implicate them in this case unless by wild speculation.

Taking the case of accused 2, there is really no corroboration of the approver's story that he was in company with accused 2 from the 17th evening. P. W. 23 (the Village Munsif of Mundanur) do not really corroborate what the approver has said, to connect accused 2 with this affair, as an introductory circumstance. The learned Sessions Judge views the divergence of the evidence of P. Ws. 23 and 25 from that of the approver as suspicious. But this view does not advance the case of the prosecution. What it has to do is to adduce evidence to corroborate a material particular in the evidence of the approver for connecting the accused with the crime, and when witnesses cited for such a corroboration, fail to corroborate, it is no use saying that they were gained over, or are suppressing the truth. The fact however remains that corroboration is wanting.

By the evidence of P. Ws. 27 and 28, we may take it that the approver's statement that he and accused 2, were at Proddatur on the 19th morning is corroborated. It is true as observed by the learned Sessions Judge, that desperate attempts have been made by the defence to show that the man who sent the chit to the hotel-keeper (P. W. 27) was not P. W. 28, but his elder brother. There is however no good reason to doubt that the man who sent the chit is P. W. 28.

According to the approver he was asked by accused 2 on reaching Kodur on the 18th to see whether accused 4 was there. As desired by accused 4, P. W. 1, brought accused 2 to the Kallam Doddi or hay yard, a little before sunset. When accused 2 and accused 4 were sitting near the hay-ricks, two strangers (one of whom is accused 7) came there and joined them. But P. W. 1 did not hear their conversation. The prosecution has let in the evidence of Mooji Obula Reddi (P. W. 19) to corroborate the story of accused 2, accused 4 and accused 7 having met there. This witness speaks to his having gone there to bring a stone roller, and see them all sitting there. But the approver does not speak to his having seen P. W. 19. The credibility

of this witness is attacked on the ground that he is a biassed witness as accused 5 and accused 7 are according to his own admission in a faction opposed to that of his uncle Obula Reddi. It may be that accused 4 has no concern in that faction. In this case it is curious, that even for such slender corroboration, the prosecution has been unable to bring in a witness altogether disinterested.

As regards some of the particulars in the narrative of the approver relating to the date of offence (20th February) the evidence of P. Ws. 20, 21 and 22 is adduced by way of corroboration. P. W. 20 is a resident of Chinnadandlur. On his way to his field at about 9 a. m., on that day, he saw accused 2 going along a footpath, followed by four strangers who were walking one behind the other. A month thereafter he identified two of the strangers as accused 5 and accused 6 and a month later still, he identified accused 7, as one of them at a parade. His evidence looks rather artificial. There was nothing special to attract his attention, when he saw some persons going along a foot path, and it is difficult to believe that by a casual glance at some strangers, without any reason for riveting his attention on them, he would be able to identify them one or two months later. This man is related to Eddula Narsi Reddi (P. W. 15) according to the latter's admission in cross-examination, but when questioned about that relationship, this witness would ignore it. The defence is emphasizing the fact that P. W. 15 is an arch enemy of accused 1, and accused 2 a leader of the opposite faction. Though P. W. 15 says that the disputes of the faction were squared up 20 years ago, he is driven to admit a recent criminal case as also disputes connected with Taluk Board elections, which surely indicate the strained nature of the feelings between him and accused 1 and accused 2 and their relations. P. W. 21 (the Village Munsif of Gopalapuram) who speaks to his having seen accused 3 and accused 7 cross him on the road at about 3 p. m., on 20th February, more than a chain away from Sivamma's house, is a witness to corroborate the approver's story, that it was accused 3 who took accused 7 to Chinnadandlur to point out Sivamma that afternoon. It is urged for the defence, that this witness is a biased witness, belonging to the faction of P. W. 15. He admits that he is a co-accused with the son and brother of P. W. 15 in a criminal case recently filed by one Pulligadu. He is related to C. W. 1 and also to accused 2. He did not tell anyone about his having seen accused 3 and accused 7 passing along, till 5th March 1930, when he was examined by the police. Even when he attested the panchayatnama (Ex. T) on 26th February, he made no mention of this, but this omission is sought to be explained by the prosecution, by stating that the witness could not have suspected accused 3 until the approver was examined by the police on 3rd March. It is unfortunate that the only man whom the prosecution could get to speak to this particular is a person not free from bias and a member of an opposite faction.

There remains the evidence of P.W. 22, who belongs to the village of Thimmapuram, five miles from Kodur. His evidence is fully discusssd by the learned Sessions Judge in para. 24 of his judgment. This witness who was driving a single-bullock cart during the latter part of the night of 20th February, found his cart stranded in the sandy bed of the Pennar, when he noticed 5 or 6 persons coming from Vanganur side. He found accused 4 coming along with accused 6 and accused 7 and others. When he sought for help accused 4 asked them to assist him in pushing the bandy for some distance, and they did so. This witness was examined by the police on 12th March, about 20 days after the occurrence. He is definite in his denial of the presence of accused 5 among the persons whom he saw. By his bungling as to when he sold the cotton for paying for the ragi bought at Kodur he has failed to satisfy our test applied to decide the truth of his version in respect of the incident mentioned by him. In a case of this kind, which shows the murder in question must be the outcome of a cleverly conceived and carefully worked out plot, the task of the police in procuring adequate evidence to prove in a Court of law the guilt of the accused, even if they were able to trace them as the real culprits, is no easy one. The learned Sessions Judge appears to be keenly alive to the fact that the culprits have successfully covered up all their traces, so as to make the task of

detection a herculean one. Some of his observations in weighing the evidence, seem to have been coloured by this impression. But, in order to convict persons charged with murder, there should be unimpeachable evidence of reliable witnesses, bringing home the guilt to the accused beyond reasonable doubt. Such evidence is wanting in the present case, and it need not be reiterated that it is not safe to convict on the sole testimony of an approver, without sufficient corroboration in material particulars, either by direct or circumstantial evidence. We have bestowed our anxious consideration over this case. The learned Sessions Judge has doubtless evinced a commendable anxiety to get at the truth. But if we find that the proof adduced at best leads to strong suspicion, but falls short of the requisite standard, we are constrained to give the benefit of the doubt to the accused. In this case, if the accused escaped, it is certainly not because their innocence is established, but only as the recipients of the benefit of doubt.

In the result, the conviction and sentence of all the accused are set aside. They are acquitted and will be set at liberty.

Beasley, C. J.—I entirely agree with the judgment of my learned brother and do not propose to add anything with regard to the facts of this case but I think it is necessary to say something with regard to the admissibility of some important matters tendered in evidence in the Sessions Court and held to be admissible by the learned Sessions Judge in spite of the objection taken to admissibility by the defence. That evidence relates to the motive for the murder relied upon by the prosecution. It is contended that accused 1 caused Sivamma to be murdered because she intended to alter her will which was in his favour. This it is alleged was because he had made indecent overtures to Subbamma during the absence of Sivamma from her village and that in consequence of a complaint made by Subbamma to her on her return about those overtures Sivamma was very much incensed and expressed her intention of cutting accused 1 out of her will. P. W. 15 states as follows :

"When I asked her about the inferior jewels she was getting made, she began to abuse saying, outcaste is a wretched Mala Madiga caste. There is no caste like this anywhere else. They are eating my properties. They are ungrateful to me. Should I burn more property over them? I am quite sure they will murder me in six months or a year. She was on the pial and abusing like this very loud. She said that after marrying Venkata Sivadu, she would cancel her will and retransfer or collect all the bond standing in accused 1's name and go and settle at Gundalakunta or Kokattam. She said she would give her property to such persons as she liked. She said all this out loud. Accused 1 was not present at the time. All Sivamma's anger was because accused 1 had caught hold of Subbamma".

Subbamma (P. W. 7) in her evidence states :

"In her second will Sivamma left property to me and to accused 1 and his two brothers. Sivamma was not on speaking terms with accused 1 for about three months prior to the murder and he did not come to our house. One day he came and molested me when Sivamma had gone to Nallaballe. Sivamma went there for eight days and I was left alone in the house. He came during the daytime when I was alone. I told him he should come only when Sivamma was at home. He then went away. I complained weeping to Sivamma when she returned home two or three days later. She sent for accused 1 and scolded him and asked him not to come to her house again. Since then we and accused 1 were not on speaking terms."

Then :

"Sivamma also told me after this incident with accused 1 that she would alter her will and that she would go and settle at Gudlakuntla as accused 1 was a bad character."

P.W. 14 also gives similar evidence.

Clearly the statement of Sivamma was not one made as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death and this is conceded by the learned Public Prosecutor. Sivamma's statement therefore is not admissible as one coming within the provision of S. 32, Evidence Act. But it is contended that her statement is admissible under S. 8, Evidence Act, because it shows a motive for the murder. S. 8 makes any fact relevant which shows or constitutes a motive for any fact in issue and the conduct of any party is relevant as proving such motive. It is contended by the prosecution that Sivamma's intention to alter her will is conduct showing such motive, and clearly her intention to alter her will is a relevant fact but the question is how such an intention is proved. The learned Public Prosecutor of Cuddappah who has most ably argued the case contends that because her intention is relevant it can be proved by hearsay evidence. With this contention I can-

not agree. If the intention of a person can be proved by direct evidence then such evidence is clearly admissible to prove the relevant fact of motive but I can find nothing in the Evidence Act which renders hearsay evidence of such intention admissible ; and it seems to me that the learned Sessions Judge has failed to draw a distinction between the relevancy of evidence and its admissibility. I can find nothing in S. 8, Evidence Act, which supports the contention of the prosecution that a relevant fact can be proved by hearsay evidence. Hearsay evidence can never be admitted unless the Evidence Act permits it. S. 32 does, subject to the conditions therein stated, admit hearsay evidence. If the learned Public Prosecutor's contention is correct, then it means that evidence otherwise inadmissible, namely hearsay evidence can be admitted in order to prove any relevant fact. This it seems to me is an utterly impossible contention. It cannot be argued that Sivamma's expressed intention amounted to conduct because Expl. (1) expressly rules out any such contention. That explanation says :

"The word conduct in this section does not include statements, unless those statements accompany and explain acts other than statements ; but this explanation is not to affect the relevancy of statements under any other section of this Act."

What Sivamma said was not in explanation of any act of hers nor did it accompany any act of hers. It is a bare statement unaccompanied by any act and not any explanation of any act. If Sivamma had attempted to tear up her will, that would have been evidence of conduct admissible under S. 8, Evidence Act ; if she had made any statement in doing so, that also would have been admissible under S. 8 ; and if she had explained why she was doing so, that also would have been admissible under the same section. But that is not the case at all and I am unable to see how the statement made by her can possibly be admitted. She has not been called and it is merely the evidence of what other persons heard her say in the absence of accused 1. Therefore in my view, the learned Sessions Judge was wrong in admitting such evidence.

I think it necessary to add that it is quite clear that the police were faced in this case with a very difficult task. I am satisfied that the motive for this murder was not robbery and that no one except one who would benefit financially by Sivamma's death was likely to bring about her death. Judging the case from the probabilities and strong suspicion, the conclusion may well be that it was accused 1 who brought about her death but in criminal cases neither suspicion nor probabilities can decide cases in the absence of legal evidence. In this case in the course of the argument of the learned counsel for the accused the learned Sessions Judge was accused of being obsessed with the belief of the guilt of the accused and to have exhibited unnecessary and unwarranted zeal in convicting them. His task was a very difficult one indeed and I am far from saying that there were not good grounds for the obsession attributed to him. Unfortunately, as my learned brother has pointed out in his judgment, there is not the necessary evidence to turn strong suspicion and probability into a reasonable certainty and the prosecution case fails on that account and I agree that this appeal must be allowed and the conviction and sentence set aside and the accused set at liberty.

P.R.S./K N. *Appeal allowed.*

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* * A. I. R. 1931 Madras 697

Full Bench

BEASLEY, C. J., RAMESAM, JACKSON, ANANTAKRISHNA AYYAR AND SUNDARAM CHETTY, JJ.

Arumugha Solagan — Accused — Petitioner.

v.

Emperor — Opposite Party.

Criminal Misc. Petn. No. 36 of 1931, Decided on 26th January 1931, against sentence of death passed by the Court of Session, East Tanjore.

(a) Criminal P. C. (1898), S. 7 (1)—Object of S. 7 (1) is to lay down rule governing relation between Sessions divisions and districts.

The object of Cl. (1) is not to enable the Local Government to constitute Sessions divisions out of districts but to lay down a rule governing the relation between Sessions divisions and the districts ; that is, a Sessions division shall not consist of half a district or even one and a half districts, but shall consist of one district or plurality of whole districts. [P 698 C 2]

*** * (b) Criminal P. C. (1898), S. 7 (1)—(Per *Full Bench*) "District" means district**

for purposes of criminal administration—(*Jackson, J. contra*).

(Per *Full Bench*).—The word "district" as used in S. 7 and in other sections of the Code is a district for the purposes of criminal administration which shall have a District Magistrate according to S. 10, and that the Sessions division should be the equivalent of one such district or a number of such districts is all that is meant by S. 7 (1), and whatever alteration is made in the limits or numbers of divisions or of districts, it should always conform to the principle in Cl. (1), viz., that a Sessions division should be equivalent to a whole district or number of whole districts without having fraction—(*Jackson, J.* contra). [P 698 C 2]

* (c) **Criminal P.C. (1898), S. 10**—(*Per Full Bench*)—**One officer can be District Magistrate for two districts**—(*Jackson, J. contra*).

(Per *Full Bench*)—One officer can be appointed District Magistrate for two districts : (*Jackson, J.* contra). [P 700 C 2]

(d) **Criminal P. C. (1893), S. 7 (2)—Local Government can alter number and limits both of divisions and districts.**

Under S. 7 (2) the Local Government have got the power of altering the number and limits of divisions as well as the number and limits of districts. [P 700 C 2]

** (e) **Criminal P. C. (1898), S. 7 (2)**—(Per *Full Bench*)—**Notification creating two Sessions divisions of Tanjore held not ultra vires of Local Government** — (*Jackson, J. contra*).

(*Per Full Bench*)—Where a notification issued by the Local Government created two Sessions divisions of Tanjore, East Tanjore Sessions Division and West Tanjore Sessions Division out of one Tanjore Sessions Division which was also a Tanjore District and the Government did not notify that each Sessions division should consist of more than one district.

Held: (1) that after the notification by the operation of S. 7 (1) each Sessions division also became a district creating East Tanjore Sessions division and also East Tanjore District and West Tanjore Sessions division and West Tanjore District : 10 *Bom.* 374, *Ref.* ; (2) that there was nothing wrong in having one District Magistrate for both the districts of East Tanjore and West Tanjore ; and (3) that the constitution of two Sessions divisions each consisting of a full district, viz. East Tanjore and West Tanjore, did not offend any section and was not ultra vires of the powers of the Local Government. (*Jackson, J.* contra) [P 700 C 1, 2]

K. S. Jayarama Aiyar, S. Nagaraja Aiyar and *G. Gopalaswami*—for Petitioner.

Advocate-General—for Local Government.

The Public Prosecutor—for the Crown.

Ramesam, J.—The question arising before us is whether Notifications Nos. 175 and 177 of the Local Government, dated 22nd June 1921, constituting a Sessions division of West Tanjore and a Sessions division of East Tanjore are intra vires or ultra vires of the Local government. The doubt arises because of the language of S. 7, Cl. (1), Criminal P. C., the latter part of which says :

"Every Sessions division shall, for the purposes of this Code, be a district or consist of districts."

Two alternative meanings have been suggested for this clause. According to one, the sentence merely lays down the relation between a Sessions division and a district namely, that either a Sessions division shall be equivalent to a district, or it shall be equivalent to a number of whole districts. The other interpretation is that a Sessions division should be constituted out of a single district or a number of districts. In the latter interpretation a district is already a thing known; but a Sessions division, a new thing, is to be formed out of a district or districts which are known. If Sessions divisions were unknown at the time when the Code was passed, but only districts were known, the second interpretation would certainly be a reasonable interpretation. But, as Cl. (3), S. 7, points out, both Sessions divisions and districts were already known. So the object of Cl. (1) is not to enable the Local Government to constitute Sessions divisions out of districts but to lay down a rule governing the relation between Sessions divisions and districts ; that is, a Sessions division shall not consist of half a district or even one and a half districts, but shall consist of one district or of a plurality of whole districts. Even accepting the second interpretation, it does not follow that the word "district" there is a revenue district. In my opinion, the word "district" as used in S. 7 and in other sections of the Code is a district for the purposes of criminal administration. The word "district" has not one well-known sense which might be described as the ordinary sense. We have revenue districts in the Presidency administered by Collectors. We have got civil judicial districts within the jurisdiction of District Judges. We have also got registration districts. It is because the word "district" has got all these senses, that it is not defined in the General Clauses Act of 1868, 1887 or 1897. Nor is it defined in the Code. It seems to me that, just as there are other kinds of districts, there is also a district for the purposes of criminal administration. Such districts shall have a District Magistrate according to S. 10, and that a Sessions division

should be the equivalent of one such district or a number of such districts is all that is meant by S. 7 (1). Cl. (2), S. 7 enables the Local Government to alter the limits or number of divisions and districts. Though generally a district and a division may be identical in area, they need not necessarily be identical, because a Sessions division may be equivalent to two or more districts. But, whatever alteration is made in the limits or numbers of divisions or of districts, it should always conform to the principle in Cl. (1), viz., that a Sessions division should be equivalent to a whole district or should be equivalent to a number of whole districts without having a fraction. I have already observed that Cl. (3) recognizes Sessions divisions and districts as existing when the Code was passed. Now, what were the districts which were existing then and which the Code recognized ?

To examine this question and not for the purpose of interpreting S. 7 in the light of the corresponding sections of the earlier Codes, a process condemned by the House of Lords, we may look into the earlier Codes to see the history of Sessions divisions and districts.

In the Criminal Procedure Code of 1861 there were no Sessions divisions, but Courts of session were mentioned. The Magistrate of a district was defined. "District" was also defined as the local jurisdiction of the Magistrate of a district. This definition cannot be considered as a logical definition because the term defined also occurs in the definition. But however we may assume that "district" in the Code of 1861, perhaps meant a revenue district which was probably the only district known at that time. Coming to the Code of 1872, we find that the term "Sessions divisions" was first introduced. S. 12 in Ch. 3 refers to Sessions divisions. Apparently it corresponds to S. 7 in the later codes. The whole of Ch. 3 refers only to Sessions divisions and makes no reference to districts. There is no section in that Code like S. 7 (1) of the later Codes laying down any rule regarding the relation between Sessions divisions and districts. The next chapter, that is Ch. 4, refers to districts. In S 22 (b) for the first time we have got reference to the Magistrate of a district and S. 35 enacts that in every district there shall be a Magistrate called the Magistrate of the District. So far, one may assume in favour of the other argument that at the time when the Code of 1872 was enacted the only district known was a revenue district. But by S. 4, Act 11 of 1874 an amendment was introduced into S. 39 of that Code by which the Local Government may, with the previous sanction of the Governor-General in Council, declare any local area to be a district. It seems to me that a district so declared by the power conferred under S. 39 would have been so declared for the purposes of the Code and not for any other purposes, i. e., it would be a district for criminal administration. A revenue district or a registration district could not be "declared" under the power conferred by S. 39, Criminal P. C. Therefore a district created under S. 39 would be district for the purposes of administering the Criminal Procedure Code and, in my opinion, from and after that amendment a new kind of district was created in the presidency, namely, a district for criminal administrative purposes. When the Code of 1882 was passed there were already sessions divisions and also districts for the purposes of criminal administration existing, but no rule governing the relation between them.

Now comes S. 7 of the Code of 1882, which resembles S. 7 of the Code of 1898. Cl. 1, S. 7, for the first time lays down a rule that a Sessions division should for the purposes of the Criminal Procedure Code be equivalent to one district or should be equivalent to a number of whole districts. Sessions divisions had not to be newly constituted then for they were already existing. Cl. 3 of that section enacts that the Sessions divisions and districts existing at the time when the Code was passed shall be recognized as Sessions divisions and districts. Cl. 2 was enacted enabling the Local Government to alter the limits and the number of divisions and districts. The Code of 1898 merely continues the Code of 1882. It is thus seen from the scheme of the Codes of 1882 and 1898 that a district has a different conception from that of a division, though a division may be equivalent to a district. It need not necessarily be so, for it may consist of a number

of districts. The conception underlying a division is that a Sessions Judge is presiding over a division: vide S. 9. The conception underlying a district is that there is a District Magistrate for each district: vide S. 10. So a Sessions division is not identical with a district though territorially one may be (but may not be) equivalent to a district. It seems to me that from 1874 the distinct conception of a district for criminal administrative purposes was introduced. It was made clearer in the Codes of 1882 and 1898 by the use of the words "for the purposes of the Code" in S. 7, Cl. (1). It seems to me that the word "district" has not one ordinary sense. Now, at any rate, it has several ordinary senses. One of them, viz., a revenue district, is perhaps of a longer duration than the other senses at present existing and there is no reason why the word "district" in S. 7 should be taken in a sense alien to the purposes of the Code and not in the sense of a district for criminal administration which is the only proper sense for the purposes of the Code.

Now, according to the above interpretation, let us see what has happened in 1921 when the notification was issued. Before the notification there was one Tanjore Sessions Division. It was also a Tanjore District for criminal administration. The notification creates two Sessions divisions. By the operation of S. 7, Cl. (1), each Sessions division also becomes a district, the Government not having notified that each Sessions division should consist of more than one district. So that, after the notification we have got East Tanjore Sessions Division and also East Tanjore District. We have also West Tanjore Sessions Division and also West Tanjore District. This is in accordance with S. 7. This is supported by the reasoning of Birdwood and Jardine, JJ., in *Queen-Empress* v. *Mangal Tekchand* (1) at p. 383, where they say:

"Perim is a Sessions division. It is also a district under S. 7 of the Code."

We have not got a Sessions division which consists of half a district, but each of the two divisions consists of one district. It is true that S. 10 directs that a District Magistrate shall be appointed for every district; but that section does not say that one officer should not be appointed District Magistrate for two districts.

There is nothing wrong in having one District Magistrate for both the districts of East Tanjore and West Tanjore. Perhaps if any mistake was ever committed it must have been a verbal mistake, that is, the officers who have been District Magistrates in Tanjore from 1921 up to now should be strictly described as District Magistrates of East Tanjore and as District Magistrates of West Tanjore and not as District Magistrates of Tanjore District, because for criminal administrative purposes there are two districts. It may be they are properly described as Collectors of Tanjore, there being one district for revenue purposes. But for the purposes of Criminal Procedure Code there were two districts each having a District Magistrate. It may be that the same officer was the District Magistrate for both. Beyond this possible verbal mistake, namely, that the District Magistrate of East Tanjore District and of West Tanjore District was described as the District Magistrate of Tanjore District, I do not think any mistake has ever been committed by the Local Government. But whatever error might have happened in connexion with S. 10, I do not think that the constitution of two Sessions divisions each consisting of a full district, viz., East Tanjore District and West Tanjore District, offends any section.

Mr. Jayarama Ayyar, the learned advocate who appeared for the petitioner, argued that in S. 7, Cl. (2), the power to alter does not include the power of addition, and he also argued that the word "and" there does not mean "or." I do not think there is anything in this contention. In my opinion, in altering the number, a number can be added. Though "and" may not be the same as "or," still it does not prevent a distributive sense; that is, the Local Government have got the power of altering the number and limits of divisions as well as the number and limits of districts. Nor does S. 531 throw any light on the matter, except that a sessions division connotes a different idea from that of a district which of course I do not deny.

(1) [1886] 10 Bom. 374.

I therefore find that the notifications are intra vires of the Local Government.

Beasley, C. J.—I agree with the judgment just pronounced by my learned brother Ramesam, J., and have nothing to add.

Anantakrishna Ayyar, J.—I agree with the judgment of my learned brother Sir V. Ramesam, J.

Sundaram Chetty, J.—I agree with the judgment of my learned brother Sir V. Ramesam, J.

Jackson, J.—I agree that the question before us turns upon the meaning of 'district' in S. 7, Criminal P. C. In the course of the argument alternative interpretations were suggested. Either "district" is merely a compendious term for "sessions division," the two for the purposes of the Code, being interchangeable and synonymous; or "district" is used in its generally accepted sense of the revenue division in charge (in this presidency) of a Collector.

As regards the first alternative the learned Advocate-General frankly conceded that if district merely means Sessions division it is not compatible with ordinary language to say, as S. 7 says, that a Sessions division shall be a district, or consist of districts. It would always be a district. There are other indications both in this section, and in the rest of the Code that Sessions division and district whatever they may mean, are not regarded as identical terms; but there is no need to go elaborately into the matter because, I think, this first alternative interpretation has found no acceptance.

Then it would seem that the second holds the field.

It is certainly not unnatural to take "district" in its ordinary sense, and if that is done, the word in the various sections of the Code presents no difficulties at all.

It is hardly necessary to labour the point that there is a generally accepted sense. The Simon Commission reports in para. 308 of the preliminary survey:

> "Apart from the exceptional areas such as the Presidency towns every inch of soil in British India forms part of a district, and at the head or every district there is an officer who is in the eyes of most of its inhabitants the Government."

Nor is the point quite uncovered by authority. In *Valia Ambu Poduval* v. *Emperor* (2), two experienced Judges of this Court had to decide, when there are two Sessions divisions in the jurisdiction of one First Class Magistrate to which Sessions Judge appeals from that Magistrate shall go. They began by assuming possibly obiter but still with no hesitation that district meant the well-known revenue district of Malabar; and not that there were two districts one of South and one of North Malabar.

I think too that we are agreed that in the Code of 1872 district had undoubtedly this sense, and I cannot see that the short amending Act of 1874 enabling the Local Government with the previous sanction of the Governor-General in Council to declare any local area to be a district, indicates that a new meaning had been adopted. Because even in the present Code it seems to me that there has been no departure from the accepted sense. S. 11 runs:

> "Whenever, in consequence of the office of a District Magistrate becoming vacant any officer succeeds temporarily to the chief executive administration of the district such officer ..... shall perform the duties imposed by this Code on the District Magistrate."

In that section, to my mind, district in its generally accepted sense is clearly meant.

I should hold therefore that under S. 7 a Sessions division shall either be a district, as for instance in Madura where the jurisdiction of the Sessions Judge and of the District Magistrate is conterminous, or shall consist of districts as in Coimbatore and the Nilgiris where there is one Sessions Judge with two District Magistrates. But (except in Malabar which was validated by sub-Cl. 3 of this S. 7) there may not be a Sessions division consisting of part of a district as in Tanjore. Therefore the notification establishing such Sessions divisions in East and West Tanjore appears to me to be ultra vires.

I have carefully considered whethe it can be said that these divisions so consitituted are also districts, in the sense that when the Local Government made two Sessions divisions it also made two districts; so that we have an East and West Tanjore Sessions Division, and also an East and a West Tanjore District. Of course the Local Government can create new districts, and if that had been done

(2) [1908] 30 Mad. 136=4 Cr. L. J. 443 = 16 M. L. J. 444.

in regard to East and West Tanjore there would be no difficulty. The difficulty to my mind precisely arises because it has not done so. The old unified district of Tanjore still continues intact, and there is one District Magistrate, as provided in S. 10, in that district. He is not in West Tanjore and in East Tanjore and if *Valia Ambu Poduval* v. *Emperor* (2) is good law, appeals from his decisions all go to West Tanjore. How can he then be said to be a District Magistrate in East Tanjore. If the Government had made two districts, East and West Tanjore, it would have appointed a District Magistrate in each district as under S. 10 it is bound to do. So too in Malabar it would have been bound to appoint a District Magistrate for the district of North, and a District Magistrate for the district of South Malabar. If these are all districts under S. 10 grave doubt would seem to arise in regard to the jurisdiction of the present District Magistrates of Malabar and Tanjore who have never been appointed District Magistrates of these distinct moieties of their respective districts. In fact this conception though it may lift one foot from the slough of the Sessions jurisdictions only plunges the other into the slough of the magisterial jurisdictions.

Beasley, C. J.—In the result, the opinion of the majority prevails and the referred trial will come before the Criminal Bench for hearing in due course.

P.R.S./V.B. *Order accordingly.*

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* * A. I. R. 1931 Madras 702

BEASLEY, C. J. AND SUNDARAM CHETTY, J.

K. Dholiah—Petitioner.

v.

Sub-Inspector of Police, Wellington Station—Respondent.

Criminal Revn. No. 715 of 1930 and Criminal Revn. Petn. No. 666 of 1930, Decided on 29th March 1931, from order of Sub-Divisional Magistrate, Coonoor, in Cr. Case No. 52 of 1930.

*** * Criminal P. C. (1898), S. 195 (1) (b) — Complaint stating facts disclosing minor and graver offence — Prosecution should be for graver offence — Penal Code (1860), Ss. 182 and 211.**

When a complaint sets forth certain facts disclosing a minor offence and also a graver offence, the prosecution should ordinarily be for the graver offence. If in entertaining such a complaint there is a legal bar to taking cognizance of the graver offence by reason of the want of a complaint by the Magistrate, the legal consequence should not be allowed to be evaded by confining the case to the minor offence alone and disposing of it accordingly. [P 703 C 1]

Where a case relates to a complaint which disclosed not only a false charge made to the police but also a false charge subsequently made to the Magistrate on the strength of the same facts, such a case could not be taken cognizance of without a written complaint by the Magistrate as required by S. 195 (1) (b), Criminal P. C.: *A. I. R.* 1929 *Mad.* 21; 43 *Cal.* 1152; 44 *Cal.* 650; *A. I. R.* 1927 *Cal.* 95; *A. I. R.* 1925 *Pat.* 483; *A. I. R.* 1925 *Pat.* 717; *A. I. R.* 1928 *Rang.* 254, *Ref.*; *A. I. R.* 1931 *Rang.* 12; *A. I. R.* 1928 *All.* 765 and *A.I.R.* 1927 *Mad.* 851, *Dist.* [P 704 C 2]

K. S. Jayarama Ayyar and *G. Gopalswami*—for Petitioner.

K. N. Ganapathi — for Public Prosecutor.

L. H. Bewes—for the Crown.

Sundaram Chetty, J.—This is a criminal revision petition filed by the accused against the conviction and sentence passed by the Subdivisional Magistrate, Coonoor, under S. 182, I. P. C., imposing on him a fine of Rs. 25. The Subdivisional Magistrate took cognizance of this case on a complaint filed by the Sub-Inspector of Police against the accused. In that complaint it is alleged that the accused gave false information to the Sub-Inspector of Police, Wellington, that three persons, namely, P. Ws. 3, 4 and 5, had broken the seal and lock of a temple in Karteri and entered into the temple. After some investigation, the police reported to the Stationary Sub-Magistrate that the case was false. Thereupon, the present accused pressed the same complaint before the Stationary Sub-Magistrate, Coonor, requesting the Court to make a judicial investigation of the charge. Subsequently the Magistrate discharged the accused persons in that case under S. 253 (2), Criminal P. C., finding the charge against them to be groundless. Embodying these facts in the present complaint and alleging that by reason of these circumstances the accused has committed an offence under S. 211, I. P. C., the present prosecution was launched by the Sub-Inspector of Police against the accused.

A preliminary objection was taken on behalf of the defence before the Magistrate that in the face of the facts alleged in the complaint, the offence is one under S. 211, I. P. C., committed in or in rela-

tion to a proceeding in Court and therefore the Magistrate could not take cognizance of the offence in the absence of a complaint in writing of the Stationary Sub-Magistrate, Coonoor. Overruling this objection, the learned Magistrate considered that the case should be tried under S. 182, I. P. C., and accordingly tried the case which resulted in the conviction of the accused.

It is argued before us that the facts as set forth in the complaint clearly bring the offence under S. 211, I. P. C., alleged to have been committed in or in relation to a proceeding in a Court, and that being so, the learned Subdivisional Magistrate had no jurisdiction to take cognizance of this case in the absence of a complaint in writing of the Sub-Magistrate of Coonoor as required by S. 195 (1) (b), Criminal P. C. In the first place, it must be observed that, if regard be had to the facts disclosed in the present complaint, the charge against the accused is not simply for giving false information to the police (S. 182, I. P. C.), or making a false charge against some persons before the police (S. 211, I. P. C.), but it is also distinctly stated that the false information to the police was followed by a complaint to the Stationary Sub-Magistrate who took cognizance of the case and eventually discharged the accused holding the charge against them to be groundless. When a complaint sets forth certain facts disclosing a minor offence and also a graver offence, the prosecution should ordinarily be for the graver offence. If in entertaining such a complaint there is a legal bar to taking cognizance of the graver offence by reason of the want of a complaint by the Magistrate, the legal consequence should not be allowed to be evaded by confining the case to the minor offence alone and disposing of it accordingly.

A similar question was considered by Curgenven, J. in a recent case reported in *Perianna Muthirian* v. *Vengu Ayyar* (1), and after a review of the case law on the point that learned Judge has held, that if a graver offence is disclosed from the facts stated in a complaint, the condition fixed in S. 195 (1) (b), Criminal P. C., for taking cognizance of such a case cannot be evaded by electing to name the offence under another section which is more general and less grave. The course which the learned Subdivisional Magistrate seems to have adopted in the present case is open to the objection pointed out by Curgenven, J. in the above case.

A number of decisions have been brought to our notice, and there is doubtless a conflict of opinion ; but in the present case, the question on which there is a conflict of judicial opinion does not, in our opinion, necessarily arise for determination. If in the present case the complaint made by the Sub-Inspector of Police against the accused was confined solely to the false information alleged to have been given to the police or the false charge made by him before the police, then a question will arise whether by reason of the fact that this information or charge made to the police was followed up by a complaint to the Magistrate would preclude the Subdivisional Magistrate from taking cognizance of this case without a written complaint from the Sub-Magistrate of Coonoor. The view taken by the Calcutta High Court is that, in such a case, even in respect of the false charge made to the police, it should be taken to be an offence under S. 211 committed in relation to a proceeding in Court and therefore the complaint of the Court itself would be necessary for taking cognizance of such a charge: *Tayabulla* v. *Emperor* (2), *Brown* v. *Ananda Lal Mullick* (3), *Sheik Samir* v. *Sajidar Rahman* (4). In the case decided by a Bench of the Patna High Court in *Muhammad Yassin* v. *Emperor* (5), the view taken by the Calcutta High Court has been followed. The view taken in that decision goes a step further, because it is stated that, even in respect of the false charge made to the police which alone is the subject-matter of the complaint, the complaint of the Court itself would be necessary for taking cognizance of the case, if it is shown that after making a false charge a complaint was also preferred to a Magistrate for judicial investigation, even though that Magis-

(1) A.I.R. 1929 Mad. 21=114 I.C. 360.

(2) [1916] 43 Cal. 1152=18 Cr. L.J. 13=36 I.C. 845.

(3) [1917] 44 Cal. 650=18 Cr. L.J. 25=36 I.C. 857.

(4) A.I.R. 1927 Cal. 95=99 I.C. 118=28 Cr. L.J. 86=53 Cal. 824.

(5) A.I.R. 1925 Pat. 483=86 I.C. 825=26 Cr. L.J. 889=4 Pat. 323.

trate had not investigated the complaint.

In a later decision of that High Court, *Dariga Gopi* v. *Emperor* (6), the principle of the decision in *Muhammad Yassin* v. *Emperor* (5) was upheld, if the prosecution be for an offence under S. 211, I. P. C., in respect of a false charge made to the police, but it is observed that the case can be proceeded with even without a complaint in writing by the Magistrate if the offence is treated to be one falling under S. 182, I. P. C., whereas a contrary view was taken in the case in *Rambrose* v. *Emperor* (7), decided by a single Judge who says that a prosecution under S. 182 (a minor offence) should not be permitted and should be abandoned when the facts amount to a graver offence under S. 211, I. P. C. The view taken by that learned Judge is that the conviction for the minor offence when a charge under the graver offence could not be taken cognizance of without the complaint of the Magistrate would not be legal. But this view has been dissented from in a subsequent decision of the Bench of that High Court in the case reported in *Ma Paw* v. *Emperor* (8). On p. 505 (of 8 *Rang.*) the learned Judges have however observed as follows :

"In the ordinary way, if a prosecution takes place, it should be for the more serious of the two offences committed. This may, no doubt, be a good ground for quashing proceedings under the minor section in their early stages ; but when there has been no prosecution for the more serious offence and a person has been prosecuted and convicted for the minor offence and the whole case is complete, we see no reason for holding that the conviction is illegal and must be set aside."

It is noteworthy that the facts in that case are clearly distinguishable from the facts of the present case. The prosecution in that case was solely in respect of the alleged false information made to the police which would bring the charge under S. 182, I. P. C., and no reference was made in that complaint to any false charge made before a Magistrate subsequent to the giving of information to the police. In fact the complaint subsequently made to the Magistrate was not even disposed of by that time. It was therefore held that the offence disclosed in the complaint put in by the police was a distinct offence under S. 182, I. P. C., which can be tried on the complaint of the police officer himself. The view taken in *Emperor* v. *Prag Datt* (9) and some other decisions of that High Court is in conformity with that expressed by the Rangoon High Court in *Ma Paw* v. *Emperor* (8). The present case relates to a complaint which disclosed not only a false charge made to the police but also a false charge subsequently made to the Magistrate on the strength of the same facts. Such a case could not be taken cognizance of without a written complaint by the Magistrate as required by S. 195 (1) (b), Criminal P. C. The view expressed in the Calcutta decisions has been followed by a learned Judge of this Court in the case in *Murugan* v. *Gutha Rami Naidu* (10). We are not dealing with a complaint by a police officer under S. 182, I. P. C. In such a case alone, it may be doubted, in view of the conflict of judicial opinion pointed out above, whether a complaint by the Magistrate also is necessary ; but much of the ground for conflict has been steered clear, inasmuch as the present complaint disclosed clearly an offence under S. 211 alleged to have been committed in or in relation to a proceeding in Court.

That being so, the want of a complaint in writing by the Magistrate is certainly a bar to taking cognizance of this case by the Subdivisional Magistrate. In this view, the conviction and sentence passed by him should be quashed as illegal, and the fine, if levied, will be refunded to the accused.

Beasley, C. J.—I agree.

P.R.S./K.N. *Order accordingly.*

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(6) A.I.R. 1925 Pat. 717=88 I.C. 1045=26 Cr. L.J. 1269=5 Pat. 33.
(7) A.I.R. 1928 Rang. 254=6 Rang. 578.
(8) A.I.R. 1931 Rang. 12=1931 Cr. C. 28=128 I.C. 886=8 Rang. 499.
(9) A.I.R. 1928 All. 765=111 I.C. 858=51 All. 382.
(10) A.I.R. 1927 Mad. 851=104 I.C. 625.

* A. I. R. 1931 Madras 705

PANDALAI, J.

Manubothula Rama Rao—Defendant—Appellant.

v.

Manubothula Venkayamma and *another*—Plaintiffs—Respondents.

Second Appeal Nos. 1432 of 1927 and 1281 of 1929, Decided on 5th February 1931, from decree of Court of Sub-Judge, Ellore in A. S. No. 44 of 1926.

(a) Hindu Law—Maintenance—Wife.

When the husband deserts his wife and neglects his duty to maintain her the wife is entitled to a decree for maintenance. [P 705 C 2]

*** (b) Civil P. C. (1908), O. 2, Rr. 2 (1) and (3)—Cls. (1) and (3), O. 2, R. 2, operate even where reliefs open to plaintiff taken separately and alone would be cognizable in different jurisdiction—Rules of residence in S. 20 is to limitations of Ss. 16 to 18—Civil P. C. (1908), Ss. 20 and 16.**

Order 2, R. 2, Cls. (1) and (3) are not limited in their operation to cases where of two reliefs open to a plaintiff on the same cause of action both are cognizable by the same Court. They are operative even when those reliefs taken separately and alone would be cognizable in different jurisdictions. [P 706 C 1]

The rules of residence laid down in S. 20 are subject to the limitations as to the place of suing where immovable properties are concerned as laid down by Ss. 16 to 18. [P 707 C 2]

Where a plaintiff in a suit for maintenance against her husband does not ask for the relief that any amount that would be decreed to her should be made a charge on the husband's property for the reason that the husband has no property in the jurisdiction of the Court where the suit is instituted, a second suit by her in the Court within whose jurisdiction the property of the husband is situated, is not competent and she must be held to have relinquished the particular relief which might have been open to her of getting a charge on the husband's property situated in different jurisdiction. To make the husband's property charged for her decree it is obligatory upon her to sue in the Court where it is situated and in such she can ask for a personal remedy against the husband although he resides outside the jurisdiction of the Court. [P 707 C 1]

Ch. Raghava Rao—for Appellant.

Govt. Pleader and *Suryanarayana*—for Respondents.

Judgment.—These are connected second appeals. The main suit out of which the litigation arose was brought by a Hindu wife against her husband. the appellant in S. A. No. 1432 of 1927, for future maintenance and arrears of maintenance. The first Court dismissed the suit, but the appellate Court awarded the plaintiff arrears of maintenance at the rate of Rs. 10 a month and future maintenance at the rate of Rs. 12 a month so long as the defendant remained in his present service in the railway and thereafter at Rs. 10 a month.

Second Appeal No. 1432 *of* 1927.

In this appeal the appellant's main point is that there should not have been any decree for maintenance because the respondent (plaintiff) has not established her right to maintenance according to Hindu law. The facts established are that the appellant married the respondent some 21 years before the suit, of which for the first 13 years they lived in harmony together and for the remaining period of eight years the parties lived separately. The wife accuses the husband of cruelty, abandonment, and domestic infidelity. The husband denies these charges and says that the wife has only herself to blame and that he is willing to take her back. As usual both these charges and explanations were found by the lower appellate Court to be somewhat exaggerated. But the truth as found by the lower appellate Court is that the relations between the spouses have been so estranged for the last eight years that they have found it impossible to live together and have more or less reconciled themselves to that fact. During the period the husband has not maintained his wife. The wife was, it seems seriously ill, for two years at Ellore but the husband who was then employed at Hyderabad made no inquiries and paid no thought to the wife's condition. After she became a little better, she and her maternal uncle went to Hyderabad in 1920 and asked the appellant to take her into the house. He refused and sent them away. Sometime later the husband came to the neighbourhood of the wife's residence on some business but never cared to go to the wife or to make any inquiries of her. He now excuses himself upon the ground of rain and badness of the road which are excuses merely. On the evidence I have not the slightest doubt that the appellate Court came to the correct conclusion that the husband has deserted his wife and neglected his duty to maintain her. In these circumstances the plaintiff was clearly entitled to a decree.

The decree actually awarded Rupees 12 a month after suit so long as the defendant is in railway service and

Rs. 10 after he retires. The respondent asks that the limitation may be removed. I think it right not merely in the circumstances of the husband but also to prevent further estrangement between the parties that this limit should be removed and I consider that a sum of Rs. 12 a month is by no means excessive having regard to the fact that the husband's salary is well over Rupees 120 and that he is supposed to have saved something and will on retirement become entitled to his provident fund money. I therefore modify the decree of the lower appellate Court by removing the limit for the payment of Rupees 12 to the period of the defendant's employment.

The result is that there will be a decree for Rs. 12 a month from the date of plaint. The words in the decree of the lower Court

"until he retires from the railway employment and thereafter at Rs. 10 a month"

will be deleted accordingly.

The only other matter arising in this appeal is that a small error has crept into the decree of the lower Court which makes it discrepant with the judgment. The lower Court awarded the plaintiff her full costs in the first Court and the lower appellate Court which of course includes the institution fees and then gave the Government a charge upon the whole of the decree obtained by the plaintiff for court-fees payable to Government by the plaintiff who brought the suit in forma pauperis. But in the decree of the lower appellate Court the institution fees are not included in mentioning the costs due to the plaintiff. That decree will therefore be amended by adding institution fees, namely, Rs. 179-13-0 to the plaintiff's costs in the first Court and in the lower appellate Court payable by the defendant.

The second appeal (1432 of 1927) substantially fails and is dismissed with costs of respondent (plaintiff).

Second Appeal No. 1281 *of* 1929.

This second appeal arises from a suit brought by the same wife as in the other second appeal against her husband in the Gudivada Munsif's Court for having the amount of the decree awarded to her in the first suit in the Ellore District Munsif's Court made a charge upon certain property of the husband in the Gudivada jurisdiction. This was occasioned by the fact that in the first suit the plaintiff did not ask that any amount decreed to her might be made a charge upon the husband's property and I am told that this was because the husband had no property in the Ellore jurisdiction. However that may be the second suit, the subject of this second appeal, was met by the defence that the suit was incompetent by reason of O. 2, R. 2. That defence has been upheld by both the Courts below.

In second appeal the appellant (wife) urges that those decisions are wrong, The decision in *Rangamma* v. *Vehalayya* (1) is a direct authority which would be binding in this case if the husband's properties sought to be made liable in the second suit were within the same jurisdiction as that in which the first suit was brought. It is argued that, as in this case the property sought to be made liable is in the Gudivada jurisdiction whereas the first suit brought for personal remedy was brought in the Ellore Court, that makes the decision inapplicable. I think there is no such distinction on principle. According to O. 2, R. 2, Cl. (1):

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court."

Clause (3) is:

"A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

There is in my opinion nothing in these rules which limits their operation to cases where of two reliefs open to a plaintiff on the same cause of action both are cognizable by the same Court. On the contrary they are operative even where these reliefs taken separately and alone would be cognizable in different jurisdictions. Several illustrations of this may be given. In the case of a mortgage with a personal covenant the jurisdiction within which the suit must be brought on the mortgage is where the property is situate. If a suit were to be brought on the personal covenant alone, it may have to be brought in a different jurisdiction; but that could not enable

(1) [1888] 11 Mad. 127.

the plaintiff to first sue on the personal covenant and then sue on the mortgage. I do not lose sight, of course, of the provisions of O. 34, R. 14, which makes it plain that, but for that rule, what I have said above about a mortgage would be right. Take again a case where there are two persons liable on a promissory note, each of whom is living in a different jurisdiction. A suit can be brought in either the one or the other but with leave under S. 20 (b). Can a plaintiff bring a suit in one jurisdiction against one debtor without impleading the other or asking for leave and then bring another suit against the other debtor in the other jurisdiction and justify himself on the ground that the prohibition of O. 2, R. 2, only applies to cases where both reliefs are open in the same Court? Clearly not. Therefore it seems to me the argument that because the plaintiff could not have asked the Ellore Court to give her a decree charging the property in the Gudivada jurisdiction she is entitled to bring another suit in the Gudivada jurisdiction for that relief is not right. The answer to the argument is that if the plaintiff wished to make the husband's property in the Gudivada jurisdiction charged for her decree amount it was obligatory upon her to sue in the Gudivada Court, and in that suit there is no doubt upon the rules and orders upon the subject that she could have asked for a personal remedy against her husband, because the rules of jurisdiction based on personal residence laid down in S. 20 are subject to the limitations as to the place of suing where immovable properties are concerned as laid down by Ss. 16 to 18. She having failed to do that, and having brought her suit in the Ellore Court, must be held to have relinquished that particular relief which might have been open to her of getting a charge on her husband's Gudivada property.

The appellant's learned advocate in the latter half of his address argues that in the suit brought in the Ellore Court the plaintiff might have asked for relief against the Gudivada property and on that footing asked me to give that relief in the second appeal which has already been disposed of. But that argument, while it is contradictory to the earlier portion of his own argument is not based upon any authority which is applicable and is directly contrary to the decision in *Sitabai* v. *Laxmibai* (2). The only approach to support for that argument is found in an observation contained in *Sundara Bai Sahiba* v. *Tirumal Rao Sahib* (3). That was a suit brought on the original side of this Court against the defendant who was living outside the original jurisdiction of this Court for maintenance charging it upon property in Madras. The question arose whether such a suit was a suit for land within the meaning of S. 12, Letters Patent. It was held that it was, and in so holding their Lordships made an observation that

"where in a suit for maintenance the plaintiff only prays for a decree charging her maintenance on ancestral property without specifying any particular portion of that property, the suit may not be a suit for land as she does not claim any relief against any specified property."

Apart from the fact that this was an observation merely, it was made in a case which depended upon the meaning of the words "for land" in Cl. 12, Letters Patent, and not upon the Code of Civil Procedure where the words of S. 16 are:

"for the determination of any other right to or interest in immovable property."

Having regard to the difference in language I am not able to say that the learned advocate's first argument on this point was not right or that the second argument is.

The result is that the decision of the lower Courts dismissing the suit as incompetent is right and the second appeal must be dismissed with costs.

P.R.S./R.M. *Appeal dismissed.*

(2) [1916] 40 Bom. 337=32 I. C. 985.
(3) [1910] 33 Mad. 131=3 I. C. 930.

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* A. I. R. 1931 Madras 707

CURGENVEN AND CORNISH, JJ.

(*Puttagunta*) *Ramakotayya*—Plaintiff—Appellant.

v.

(*Puttagunta*) *Sundararamayya* and *others*—Defendants—Respondents.

Appeal No. 327 of 1925, Decided on 1st April 1931, from decree of Court of Sub-Judge, Masulipatam, in O. S. No. 1 of 1923.

*** Limitation Act (1908), Arts. 96, 127 and 144—Partition between two brothers *B* and *C* of family property and maternal grandfather's property in possession of his widow —*B* getting larger share in latter property**

and correspondingly smaller share in ancestral property—Widow surviving *B* and *C* and property of maternal grandfather passing to widow's reversioners on her death and *B's* share taken possession of by them—Suit by *B's* son for re adjustment of shares held to be governed by Art. 96 and not by Arts. 127 or 144.

A partition among two brothers *B* and *C* comprised not only the family property but also certain property which had belonged to their maternal grandfather *D* and was at the time in the possession of his widow. *B* received a larger share of the latter property than *C* and correspondingly smaller share in the ancestral property. But the widow survived *B* and *C* and *D's* property instead of descending to *B* and *C* passed away to certain agnatic reversioners who sued *B's* son *A* and obtained possession of *B's* maternal grandfather's property in *A's* hands. *A* thereupon brought a suit to get the disparity between the shares effected by the partition, by a fresh adjustment of the ancestral property.

Held : that Art. 96 applied to the case and not Arts. 127 or 144. The cause of action arose out of the mistake that was committed and which alone gave *A* a right to sue. [P 708 C 1]

That the latest possible date from which the time ran was that of *A's* dispossession in pursuance of the decree against him : *A. I. R.* 1921 *Bom.* 184; 21 *Bom.* 333; 40 *All.* 374 and *A. I. R.* 1922 *Mad.* 150, *Ref.* [P 710 C 1]

V. Govindarajachariar — for Appellant.

T. V. Muthukrishna Ayyar, *A. Venkatachalam*, *N. Muthuswami* and *N. Ramanatha Ayyar*—for Respondents.

Judgment. — The plaintiff appeals against the dismissal of his suit on the ground of limitation. The suit was filed to reopen a partition which was made between his father Nagayya and his uncle Venkataratnam, father of the defendants in 1901. That partition comprised not only the property that belonged to the family of these two brothers but also certain property which had belonged to their maternal grandfather China Naganna and was at the time in the possession of his widow Akkamma. The plaintiff's father Nagayya received a larger share in that property than Venkataratnam and correspondingly smaller share in the ancestral property. Unfortunately Akkamma survived her grandsons and the property of China Naganna instead of descending to them passed away to certain agnatic reversioners. These persons sued the plaintiff and obtained a decree and eventually possession of the maternal grandfather's property in his hands on 14th December 1916. The plaintiff accordingly brought this suit in order to get the disparity between his and the defendants' shares redressed by a fresh adjustment of the ancestral property.

The first question that arises upon the issue of limitation is whether the plaintiff can claim the benefit of S. 8, Lim. Act, namely, whether his plaint was filed within three years of the attainment of his majority. The plaint is dated 14th December 1922. We have two conflicting versions as to the date on which the plaintiff was born. He himself would put it at 22nd December 1901, whereas the defence case is that it took place on 18th January 1899. It is unnecessary to say that, in order to avail himself of this limitation provision, it lies upon the plaintiff to establish his own version. Has he shown that the suit was brought within three years of his coming of age ? There is oral evidence on both sides, which the learned Subordinate Judge has rightly, we think, declined to rely upon. The witnesses do not include the plaintiff's mother, who would naturally be the best person to speak to the true circumstances. The plaintiff has secured the production of a birth register, Ex. A-3, which purports to contain a record of his birth on the date which he specifies. This register was no doubt produced from the proper custody, the taluk office but we cannot say that it bears any signs which enable us to say that the relevant entry must have been made at the time to which it purports to relate. There is no serial number attached to it and indeed if there had been, it would have been of no probative value because the entry happens to come last in the year to which it relates. Moreover there is no yearly abstract showing the total number of births, such as appears in some subsequent years, and therefore it is impossible to say whether this birth was or was not included.

There are then certain records to show that the plaintiff was treated as a minor in some litigation to which he was a party, notably the reversioners' suit itself and also a small cause suit which was filed in the year 1918. We think that a sufficient explanation of this is that those responsible for the litigation went on treating the plaintiff as a minor after he had in fact attained majority. It is true that in the absence of any counter evidence, some weight might

perhaps have been attached to the evidence furnished by the small cause suit, which was itself not instituted until 1918, after he had emerged from his minority. Further discussion however of the pieces of evidence above mentioned and of the oral evidence appears to us to be rendered quite useless by the existence of a record which to our minds conclusively shows the falsity of the plaintiff's case. This is a school admission register, Ex. 8 dated 9th November 1904, showing his age as six years at that time. There is also entry in this register showing the actual date of birth as 1st July 1898 but this appears to have been a later addition, and it is quite sufficient for our purpose to rely upon the statement of this schoolboy's age. The plaintiff is unable to attack this entry as being spurious, and we think that it is quite impossible to account for it upon any supposition of an unintentional mistake. It is inconceivable that a child under three, as the plaintiff would make out that he then was, could have been mistaken for a child of the age of 6. Nor do we think that the schoolmaster, D. W. 7, has in any way been shown to have been interested in making such a misrepresentation. This piece of evidence we think disposes of this portion of the case as regards limitation.

We have then to inquire what is the appropriate article of the Limitation Act to which this suit should be held to be subject. The learned Subordinate Judge has applied Art. 96, and after hearing arguments with regard to the applicability of that article and some others, we can find no reason to differ from his conclusion, supported as it is by a decision of the Bombay High Court, *Martand Mahadev* v. *Dhondomoreshwar* (1). The terms of the article are perfectly general, the description of the suit to which it relates being one for relief on the ground of mistake and the time from which the period runs being when the mistake becomes known to the plaintiff. The plaint itself in this case is based upon the ground that a mistake was made and we think it is clearly appropriate that time should run from the moment when the circumstances with regard to his title to the property first came to the attention of the plaintiff. Mr. Govindarajachari has endeavoured to urge certain objections to the applicability of this article. He suggests in the first place that a suit for re-partition, as he would call it, is based upon principles of Hindu law and, as far as we understand him, that accordingly some other article would be more appropriate for that reason. There can be no doubt that the claim is based upon equitable principles, whether or not those principles derive from Hindu law or from any other source. We may refer to *Maruti* v. *Rama* (2), where a suit of a similar character came under consideration and the learned Judges quote Sir Thomas Strange with regard to its maintainability:

> "Whenever from any cause not understood at the time the division proves to have been unequal or in any respect defective, it may be set to rights notwithstanding the maxim: 'Once is partition of the inheritance made';"

and they go on to say that

> "the parties had divided under such a misapprehension of the true state of the case that the Hindu law, like common equity, would correct the error."

The nature of such a suit has been very clearly defined by Walsh, J., in *Ganeshi Lal* v. *Babu Lal* (3) where he observes that

> "the right is based simply upon this principle, that where parties arrive at a partition either by agreement, or by a decree, there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties."

We cannot see any reason why an article in the terms of Art. 96, should not apply to a suit of this nature.

It has then been suggested that because it involves a claim to immovable property the lower Court should more appropriately have applied one of those articles which specifically relate to immovable property. We cannot think that Art. 127, which governs a suit brought by a person excluded from joint family property, can have any application; because only upon the footing, that the original partition was void, can it be said that the property remained joint family property. It has been held in the Full Bench case in *Yerukola* v. *Yerukola* (4), that a mere

(1) A. I. R. 1921 Bom. 184=61 I. C. 34=45 Bom. 582.

(2) [1897] 21 Bom. 333.

(3) [1918] 40 All. 374=45 I. C. 4.

(4) A. I. R. 1922 Mad. 150=71 I. C. 177=45 Mad. 648 (F. B.).

division in status will render that article inapplicable. Lastly there is the residuary Art. 144, relating to suits for possession of immovable property not otherwise specially provided for. This should not, we think, be applied unless no more specific article, such as Art. 96, is available. Nor does it seem appropriate to apply Art. 144 to a suit which does not claim any specific immovable property but only compensation in the shape of a share in the original property divided. We cannot see, further, how the cause of action can be traced to the commencement of adverse possession on the part of defendants. The cause of action clearly arose out of the consequence of the mistake that was committed and which alone gave the plaintiff his right to sue. We think accordingly that there are no grounds for differing from the lower Court that the article applicable is Art. 96. That article gives the plaintiff three years within which to bring his suit and the latest possible date from which time would run would be that of his dispossession in pursuance of the decree against him, namely, 14th December 1916. The suit was accordingly out of time and was rightly dismissed.

We dismiss the appeal with costs.

P.R.S./R.M. *Appeal dismissed.*

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* A. I. R. 1931 Madras 710

PANDALAI, J.

Sarangapani Ayyangar and *another*—Defendants—Appellants.

v.

Pichu Ayyar and *others*—Plaintiffs—Respondents.

Second Appeal No. 812 of 1929, Decided on 11th February 1931, against order of Dist. Judge, East Tanjore at Negapatam, D/- 16th November 1930.

*** Court-fees Act (1870), S. 7 (1) and (5) — Suit on mortgage by Hindu father — Father and his sons made defendants—Suit decreed —Sons appealing alleging that their share was not liable—Court-fee must be paid on their share or on decree amount—Method in S. 7 (5) cannot be adopted.**

Where a suit brought on the mortgage bond executed by a Hindu father making the father as well as his two sons as defendants to the suit is decreed, and the sons appeal alleging that their two-thirds share was not liable for the debt, the court-fee must be paid on the two-thirds share of the property or on the decree amount whichever is less. The method of valuation mentioned in S. 7 (5) cannot be adopted in such a case: 4 *Mad.* 339; 10 *Mad.* 187 and 30 *Mad.* 96, *Rel. on*; *A. I. R.* 1927 *Mad.* 825; *A. I. R.* 1925 *Mad.* 323 and *A. I. R.* 1922 *All.* 358, *Dist.* [P 711 C 1]

S. Krishnamachariar—for Appellants.

T. L. Venkatarama Ayyar and *P. Sankaranarayanan*—for Respondents.

Judgment.—The only point in this second appeal is whether the rejection of the appeal for nonpayment of court-fees in the lower appellate Court on the market value of the two-thirds share of the properties mortgaged and belonging to the appellants or on the decree amount, whichever is less, was right.

The respondents-plaintiffs brought a suit on a mortgage executed by defendant 1, the undivided father of the present appellants, who were defendants 2 and 3. They contended that the debt was incurred by their father for illegal and immoral purposes and that their share of the mortgaged property was not responsible for the debt. The first Court found that the appellant's defence was unfounded and gave a decree for the amount sued for against the properties mortgaged. From that decree the present appellants filed an appeal to the lower Court and paid court-fees on the value of their two-thirds share of the mortgaged property valuing it on the footing of ten times the assessment. On objection taken, the lower Court on 1st September 1928 held that this fee was insufficient and made an order as stated at the beginning of this judgment and gave three weeks' time to the appellants to pay the deficient amount. The appellants asked for time to pay the amount on four successive occasions and were granted time, in all about two and a half months. Finally the appellants having neither stated what the market value of the two-thirds share of the mortgaged property was nor paid the deficient court-fee on that amount, the appeal was rejected.

In their appeal against this rejection it is contended that the court-fees in the lower Court were properly calculated upon the value of the property taken at ten times the assessment. The provision for levying court-fees in appeals is Art. 1, Sch. 1, Court-fees Act, according to which on a memorandum of appeal ad valorem court-fee ought to be paid on the amount or value of the subject-matter in dispute. It is not denied,

and cannot be disputed, that in a suit on a mortgage which is governed by S. 7, Cl. (1), Court-fees Act, the amount or value of the subject-matter in dispute is the sum which is claimed by the plaintiff. Therefore the subject matter in dispute in the appellant's appeal to the lower Court was the liability of their property for the mortgage. The value of this subject-matter must be either the whole mortgage debt or the value of the property, whichever is less. So much is admitted. The appellants contended that the value of their property was less than the mortgage debt. If so, the question is what is the method of valuing the property for the purpose of the appeal? The appellant's argument is that the method of valuation to be adopted is the method mentioned in S. 7, Cl. (v), which is mainly based on the annual revenue to Government in cases of revenue-paying lands such as the present.

The obvious objection to that argument is that that is a method of valuation fixed for suits for possession of land. The same method has now been, by the amendment of the Court-fees Act by the Madras legislature, made applicable to suits under S. 7 (iv) (c), that is, declaratory suits where the relief sought is with reference to immovable property, and the same method of valuation has been, by a decision of a Bench of this Court in *Venkatanarasimha Raju* v. *Chandrayya* (1), extended to cases falling within S. 7 (iv) (a) recently added by the Madras Act above mentioned. The appellants' argument is that, wherever for the purpose of court-fees the value of land has to be ascertained and court-fees paid thereupon this method should be adopted. I can find no basis for this in the Act itself or in any decisions that are binding upon me. The appellants relied first upon the decision in *Venkatanarasimha Raju* v. *Chandayya* (1) already referred to but that has no application to this case because that was a case where a suit had been brought for setting aside a decree a case which strictly falls within S. 7, Cl. (iv) (a), and all that that decision can be held to mean is that the value of the property in that clause must be calculated on the same basis as under S. 7, Cl. (5). Reference was also made to a decision of Krishnan, J., reported in *In re Ganapathi Butchi Seethayamma* (2). That again is not applicable because the appeal arose from a suit for possession of land and the decision was that in such a case the value of the subject matter in Sch. 1, Art. 1, means the same thing as the value of the subject matter as set out in the sub-clauses of Cl. (v), S. 7. The other decision cited *Rup Narain* v. *Bishwa Nath Singh* (3), is also not in point. That was an appeal from a suit brought by a Hindu coparcener for possession of property alienated by other co-parceners and in that case it was held that the suit should be valued under S. 7 (v) (a), or (b) and as the plaintiff had asked also for a declaration for the invalidity of the alienation, he must pay fee for that relief also in the first Court. There are a number of other decisions of this Court which have a bearing against the appellant's contention.

In *Krishnamachariar* v. *Srinivasa Iyengar* (4), on the question of jurisdiction, the valuation for which is in most respects the same as that for court-fees it was held that the subject matter of a suit to establish the validity of a charge upon property is, when the property is in excess of the charge, the amount of the charge; when the charge is in excess of the property, the value of the property. In *Venkappa* v. *Narasimha* (5), in a suit on a mortgage bond a decree was passed for the principal and interest and, in default, for sale; some of the defendants who apparently had not executed the mortgage appealed; it was held that the proper stamp to be paid on the appeal was on the value of the debt not exceeding the value of the property. In *Ramakrishna Reddi* v. *Kotta Kota Reddi* (6), a case very like the present, the appellant paid court-fees on the market value of the property, and although the particular question whether the value was to be calculated upon ten times the assessment or the market value was not precisely raised, it seems to have been accepted on all hands to be the proper way of valuing the pro-

(1) A. I. R. 1927 Mad. 825=105 I. C. 171.

(2) A. I. R. 1925 Mad. 323=85 I. C. 405 = 48 Mad. 652.
(3) A. I. R. 1922 All. 358 = 68 I. C. 265 = 44 All. 629.
(4) [1882] 4 Mad. 339.
(5) [1887] 10 Mad. 187.
(6) [1907] 30 Mad. 96.

perty. I am of opinion that the lower Court's opinion as to the proper court-fee was correct. It is now more than two years since the order of the lower Court was made and the appellants are even now not in a position to state what would be the market value of the property and the court-fee payable thereon. They no doubt said in one of the various applications for time that they would have to pay about Rs. 200 but that was only to obtain an extension of time and was not intended to be in any manner correct. I am myself therefore unable to give any further time for payment of the deficient fee and the only order therefore possible is to dismiss the second appeal and with costs.

P.R.S./P.N. *Appeal dismissed.*

A. I. R. 1931 Madras 712

JACKSON, J.

M.M.P. Ramaswami Chettiar—Plaintiff—Petitioner.

v.

A. S. P. L. V. R. Ramaswami Chettiar and *another*—Defendants—Respondents.

Civil Revn. Petn. No. 1281 of 1930, Decided on 9th April 1931, from order of Court of Sub-Judge, Devakottah, D/- 19th August 1930.

Court-fees Act (1870), S. 17—Suit for recovery of three separate deposits is a suit embracing three distinct subjects.

A suit for the recovery of three separate deposits is a suit embracing three distinct subjects. The fact that the plaintiff made one demand for all the three deposits would not make the subjects any the less distinct : 9 *All.* 252, *Ref.*; *A. I. R.* 1924 *Pat.* 596, *Dist.*

[P 712 C 2; P 713 C 1]

K. S. Krishnaswami Iyengar and *S. Ramaswami*—for Petitioner.

S. Varadachariar and *S. V. Venugopalachari*—for Respondents.

Judgment.—Petitioner seeks to revise the order of the Subordinate Judge of Devakottah in O. S. No. 97 of 1927 in regard to the court-fee payable upon the suit.

The plaintiff sets forth that his mother's brothers, and his father's sister's husband managed moneys for him in the capacity of trustees. There are three separate deposits amounting to Rs. 1,38,778-10-3. A demand for the aggregate amount was made on 29th March 1927 which is given as the date when the cause of action arose.

The question is whether court-fee should be paid upon each deposit or upon the aggregate amount; or, in the terms of S. 17, Court-fees Act, whether the suit embraces distinct subjects.

The petitioner contends that the demand of 29th March 1927 gathers all his claims into one cause of action, and therefore the subjects are not distinct. This would turn upon whether the demand was an essential part of the cause of action, and petitioner frankly concedes that it is not. He could have sued for any of the deposits without previous demand, and the plaint would itself have been part of the cause of action in any of such suits. Nor, if he had sued for only one of these deposits, would he be precluded from suing in his own good time for the others. O. 2, R. 2, Civil P. C. would have no application for the precise reason that the notice of demand is not an essential part of the cause of action.

The petitioner relies upon Art. 60, Limitation Act, which is an indirect way of approaching the question and hardly leads to its proper solution. Even assuming that time would run from the date of the demand, that would not make the subjects any the less distinct. It is here perhaps that a subtle distinction may be found between "subjects" in S. 17, and alleged causes of action.

A, I. R. 1924 *Pat.* 596, *E. I. Ry. Company* v. *Ahmadi Khan*, upon which the petitioner relied only brings out the distinction, for in that case, undoubtedly, the demand was essential, and without the demand there could be no cause of action. As observed by Das, J.:

"The notice (of demand) is one of these facts which it was necessary for the plaintiff to prove in order to support his right to the judgment of the Court."

In the case under consideration the proof of demand is not necessary for obtaining judgment. So although the plaintiff has elected to treat the demand as the cause of action, and thereby has a plausible plea that all sums mentioned in that demand are one distinguishable subject, yet nevertheless, because the demand is not really essential to the cause of action, the subjects must be regarded independently of that demand, and are, as a matter of fact, distinct. Thus in *Parshotam Lal* v. *Lachman Das* (1), it is held that a suit upon three hundis payable on maturity is a suit embracing three distinct subjects. If in that case

(1) [1887] 9 All. 252=(1887) A. W. N. 42.

the plaintiff had made a demand it would none the less have been a suit embracing three distinct subjects. Contrariwise as held in *Hiralal Motichand* v. *Ganapat Lahani* (2), a suit on a balance of account is a suit embracing one subject.

For the above reasons the order of the lower Court is confirmed and the petition is dismissed with costs. Petitioner must pay the additional court-fee on the reopening of the lower Court after the summer recess, 1931.

P.R.S./K.N. *Petition dismissed.*

(2) A. I. R. 1922 Bom. 376=64 I. C. 486=46 Bom. 142 (F.B.).

* A. I. R. 1931 Madras 713

WALLACE AND STONE, JJ.

(*Enuga*) *Raghava Reddi* — Plaintiff—Appellant.

v.

(*Bezwada*) *Sundararama Reddi*—Defendant—Respondent.

Appeal No. 167 of 1925, Decided on 18th March 1931.

*** Civil P. C. (1908), S. 144—Judgment-debtor has no other right of action except under S. 144 when sale is not void ab initio—No action lies for getting sales declared void.**

As S. 144 exhausts the remedies which a litigant against whom a decree has been given, has, when his property is sold under the decree and the decree is subsequently varied, to have restored to him the property sold in excess of what should have been sold, no action lies to obtain restitution by getting the sales declared void. He has no other right of action in cases where the sale is not void ab initio. [P 714 C 2]

A. Krishnaswamy Ayyar, K. Umamaheswariah, Ch. Raghava Rao and *M. Venkatasubbiah*—for Respondent.

Stone, J.—This appeal, which was argued before us by appellant-plaintiff 1, a vakil, in person is an appeal without any merits, but one which raises a point of procedure of some importance.

The appeal lies from the judgment of the District Judge, Nellore dismissing the plaintiffs' claim, which was instituted in 1921 and reaches this Court ten years later, for a declaration that certain sales of land are void with consequential relief.

The sales in question were auction sales in execution of a decree made in O. S. 24 of 1911. That action was to recover Rs. 5,663 due on promissory notes and accounts and the defendants to that action admitted Rs. 3,121 and contested the rest. In the result a decree for the amount claimed with interest at 9 per cent from 29th June 1911 to date of realization was given. This decree was passed on 2nd December 1912.

Some time during March or April 1913 the defendants in that action preferred an appeal and on 26th April 1913 prayed for a stay of execution pending appeal. On 30th June 1913 the then District Judge made an order of which the following is the relevant extract :

"I think the best course is to stay the sale for six weeks on condition that the money payable under the decree is paid into Court within that period."

This had the effect of delaying the sale until 11th August 1913. The money was not paid by that date and on 17th August the issue of a fresh proclamation notifying that the sale would take place on 22nd September 1913 was ordered. A petition was then put in stating that an appeal had been filed against the order of 30th June and asking for a stay pending that appeal. On that petition the sale was stayed conditionally upon the amount due under the decree of 2nd December 1912 being paid into Court by 20th September 1913. It was not so paid and the sale took place (after further proceedings and delays) and was concluded on 23rd October 1913. The purchasers as to Rs. 2,719 out of Rs. 10,357 were the decree-holders. There were 19 lots and they purchased five.

The appeal from the decree of 2nd December 1912 was disposed of on 5th June 1917 and the original decree was confirmed subject to the reduction of the interest awarded from 9 % to 6 %.

The unsuccessful defendants having obtained this variation of the original decree next proceeded under S. 144, Civil P. C., for restitution by redelivery of the five items purchased by the decree-holders. The District Judge allowed the claim. The decree-holders appealed to the High Court and judgment on appeal was given on 1st December 1921. In the result the appeal was allowed on the ground that the variation in the decree did not prejudice the appellants.

In the course of those proceedings it appeared that the variation of the decree had the result of altering the decree amount from Rs. 7,695 to Rs. 7,495. It was pointed out that *Syed Nathadu Sahib* v. *Nallu Mudaly* (1), was distinguishable on the ground that that case

(1) [1904] 27 Mad. 93.

was not decided under the present Civil Procedure Code but under S. 583 of the old Code under which the Court was not limited, in granting such restitution as it thought fit, to placing the party in the same position as he would have occupied but for the variation or reversal of the original decree.

Shortly stated therefore that action decided that the sales, granted that the sales took place in the order directed which order had nothing to do with the decree that was subsequently varied, would have taken place exactly as these sales took place even though at the time of the sale the original decree had not been in its original but in its varied form, i. e., for Rs. 7,495 and that therefore no claim for restitution lay.

The plaintiffs now re-litigate this matter and seek to obtain restitution by means of an action to declare these sales void. Obviously no such action lies if S. 144 exhausts the remedies which a litigant, against whom a decree has been given, has, when his property is sold under the decree and the decree is subsequently varied, to have restored to him the property sold in excess of what should have been sold.

That matter is put in two ways :

1. Order 41, R. 6 (2), requires the Court on application made where there is an appeal against a decree to stay execution (though such stay be conditional) until the appeal is disposed of. This rule, it is said, was broken when the sale was stayed only for six weeks and the subsequent stay cannot be treated as curing the invalidity of the first stay. It is therefore argued that the sale was void.

2. The sale being void the aggrieved persons can, it is urged, by a separate suit, claim a declaration (in addition to proceeding under S. 144) despite S. 144 (2), Civil P. C., and notwithstanding S. 47, it being urged that the claim now raised is not "any restitution or other relief" which could be obtained under S. 144 (1) and does not raise a question relating to "the execution, discharge or satisfaction" of a decree.

We consider that both these questions have been carefully considered and correctly answered by the learned District Judge in paras. 63 to 67 of his judgment and we see very little point in an elaborate survey of the numerous authorities cited. It is sufficient to indicate that in our opinion assuming the stay order of 30th June 1913 was not correctly framed it did not render the sale a nullity. The sale took place under the decree, not under the order staying execution. That decree was not vacated but confirmed subject to a minor variation. The stay order did not in the least prejudice the person claiming a stay bearing in mind the subsequent stay order. As to the second point we are of the opinion that the plaintiffs' appropriate remedy, if any, was under S. 144. This remedy he has pursued and has failed. He has no other right of action in cases such as this where the sale is not void ab initio, whatever may be the case when the sale is void ab initio and accordingly this present action does not arise and must fail.

The appeal is accordingly dismissed with costs for two sets: (1) respondents 1, 6 and 8; (2) for the remaining contesting respondents i.e., 12—16, 18—23, 25.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 714

VENKATASUBBA RAO, J.

Raja of Vizianagaram—Appellant.

v.

Padala Appalaswami and *others* —Respondents.

Second Appeal No. 272 of 1928, Decided on 26th March 1931, from decree of Dist. Judge, Vizagapatam, D/- 23rd July 1927.

Madras Estates Land Act (1908), Ss. 137 and 142—Appeal from order of Collector on application of raiyats under S. 135 does not lie to District Court but to Board of Revenue.

A land holder has no right of appeal to the District Court from an order of the Collector made on an application of certain raiyats under S. 135, praying for the issue of an order under S. 137 for the repair by the land holder of a certain irrigation work. The appeal lies to the Board of Revenue under S. 142. [P 715 C 2]

S. Venkatesa Ayyangar—for Appellant.

Y. Suryanarayana—for Respondents.

Judgment. — The learned District Judge has, upholding a preliminary objection, dismissed the appeal of the landholder (the Raja of Vizianagaram) as being incompetent. The question is whether his order is correct or not. The proceedings started before the Collector, by certain raiyats, filing an application under S. 135, Estates Land Act, stating that the tank of their village was out of repair and that the landholder failed to restore it to efficiency and praying for the issue of an order under S. 137 for

the repair of that tank. The Collector, holding that the landholder had grossly neglected his duty, made an order under S. 137, directing him to carry out certain repairs to the tank and take certain other steps within six months of the date ofthat order. It was against this order, that the landholder filed an appeal to the District Court, which as I have said, was rejected on the ground that it does not lie. Under S. 142, from any order issued by a District Collector under Ch. 7 (chapter dealing with repair of irrigation works) other than an order under S. 138, an appeal lies, unless otherwise provided for in Part B of the schedule to the Act to the Board of revenue, whose decision shall be final. The effect of this section is that the appellate authority is the Board of Revenue and not the District Court, unless there is a provision to the contrary in part B of the schedule. Before turning to the schedule, I must refer to S. 189, Estates Land Act. The material portions of that section read thus :

Clause (1) : A Collector or other revenue officer specially authorized under this Act shall hear and determine as a revenue Court all suits and applications of the nature specified in Parts A and B of the schedule.

Clause (2) : Decrees and orders passed under sub-S. (1) shall be subject to appeal as provided in Col. 6 of Parts A and B of the schedule.

I shall now quote Art. 21 (that is the article applicable) of Part B in the schedule to the Act.

Serial Number	Section of Act	Description of application	Period of limitation	Time from which period begins to run	Court, if any, to which appeal lies
21	137	By a landholder against an order under S. 137 for the repair of an irrigation work	None	None	District Court

Now, was the application on which the Collector made his order, of the kind referred to in the article quoted above? Assuredly not. As I have said, the application was one made by the raiyats under S. 135. What this article contemplates is, an application under S. 137 and that made by a landholder. It is only an appeal against an order on such an application that lies to the District Court; otherwise, the appeal lies under S. 142 to the Board of Revenue. It follows from this, that the appeal filed by the landholder to the District Court was rightly rejected as being incompetent. The appellant's counsel suggests, that when the raiyats applied under S. 135, the counterpetition filed by the landholder may be regarded as the latter's application under S. 137 and, viewed in that light, his appeal to the District Court was in order. I cannot accede to this contention, for it implies, that while a landholder has a right of appeal to the District Court from an order made on the raiyat's application, the raiyat himself has no such right. The construction suggested, cannot, in my opinion, be the correct one. Moreover the wording of Art. 21, as it stood before it was amended by Act 4 of 1909, shows that the view suggested cannot prevail. I reproduce below the original article:

Serial Number	Section of Act	Description of application	Period of limitation	Time from which period begins to run	Court, if any, to which appeal lies
21	135	For an order under S. 137 for the repair of an irrigation work	None	None	District Court

That shows that an appeal lay to the District Court from an order under S. 137 for the repair of an irrigation work on an application made under S. 135. That article gave wide power of appeal to the District Court. The intention of the amendment obviously was to curtail that right. It follows that the learned counsel's argument, as I have pointed out, cannot be accepted. There is no decided case on the point, but I find that my view receives support from Mr. Ramdas's note on S. 137 in his work on the Madras Estates Land Act. The following passage from that book contains a terse statement of the law:

"*Appeal.*—A landholder who feels aggrieved by an order under this section for the repair of an irrigation work may apply to the District Collector to set it aside. This is evidently by way of a review of the order made under S. 137. If he is dissatisfied with the order made on

such an application he may appeal to the District Court. This implies that he cannot appeal against the original order under S. 137. But S. 142 seems to give him an appeal to the Board of Revenue against the original order of the District Collector. If the landholder commits default in carrying out the Collector's order, the raiyats may apply to the Collector to authorize them to execute the repair; and if the Collector refuses to authorize them to execute the repair, they may appeal to the District Court."

The second appeal is dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

A. I. R. 1931 Madras 716

JACKSON, J.

(*Wuppuluru*) *Neelachalam* — Plaintiff —Petitioner.

v.

Narasinga Dass—Defendant — Opposite Party.

Civil Revn. Petn. No. 1825 of 1927, Decided on 28th April 1931, against decree of Dist. Judge, Ganjam, in A. S. No. 283 of 1926.

(a) Court-fees Act (1890), S. 10 (2)—Plaintiff can reduce his claim to bring suit within certain court-fee and suit cannot be dismissed under S. 10 (2).

It is open to a plaintiff to relinquish a portion of the claim to bring it within a certain court-fee. He must only set his plaint and fee right within the period prescribed by the Court.

Where therefere a plaintiff being ordered to make up deficient court-fee instead of doing so, reduces his claim and returns the plaint with a correct court-fee within the period prescribed by the Court the suit cannot be dismissed under S. 10 (2). [P 716 C 2]

(b) Civil P. C. (1908), S. 115—Court-fee.

Court-fee questions are open to revision on the plea that the lower Court has erred in refusing jurisdiction. [P 717 C 1]

P. Somasundaram—for Petitioner.

Y. Suryanarayana—for Respondent.

Judgment.—Petitioner seeks to revise the judgment of the District Judge, Ganjam, in A. S. No. 283 of 1926.

He filed O. S. No. 131 of 1926 on 6th January 1925 and he was ordered to pay Rs. 57-15-0 to make up the proper court-fee. Instead of doing so he reduced the claim and returned the plaint with a court-fee of Rs. 37 which was then correct. The District Judge held that he had not obeyed the order of the lower Court and therefore the original plaint could not have the same effect, as if the proper Court-fee had been paid at the outset. The point is important because if the amended plaint is to be treated as a fresh and distinct document it will be time barred. The original plaint could be rejected under O. 7, R. 11, if the plaintiff on being required to supply the requisite stamp paper failed to do so. In this case the plaintiff did supply the correct stamp in the sense that he finally produced a correct court-fee, though it was not the fee that the unamended plaint would have required.

The view of the learned Judge is that the plaintiff ought not to have amended the plaint without permission ; but it is difficult to see why permission is required. A plaintiff may relinquish any portion of his claim to bring it within the Court's jurisdiction (O. 2, R. 2) and it seems equally open to him to relinquish a portion in order to bring it within a certain court-fees.

As the Court returned the plaint to him the plaintiff did it without consulting the Court. If the Court had kept the plaint presumably he would have asked to have the plaint back so as to strike out the portion and there is no reason why the Court should have objected, even if it was entitled to object, which seems very doubtful.

In *Midnapur Zamindary Co. Ltd.* v. *Secretary of State* (1) upon which the learned Judge relies the plaintiff entirely failed to comply with the Court's order under O. 7, R. 11, and then afterwards sought to remedy matters by striking out a plea. As though in this case after the expiry of the allotted time the plaintiff had attempted to get over the difficulty by striking out a portion of his claim. That is entirely a different set of circumstances.

The lower Court lays down as the principle that the plaintiff must not be allowed to evade the proper court-fee. But there is no evasion. The State does not want to charge a court-fee higher than what is payable as a due proportion of the claim ; and if the claim is reduced, the court-fee should naturally be reduced also. It is not as if the plaintiff was getting a relief on payment of an inadequate court-fee. The principle is rather that a plaintiff must set his plaint and fee right within the time prescribed by the Court ; and in the present case this has been done.

The point seems to be covered by *Ram Prasad* v. *Bhiman* (2). There too the

(1) [1917] 44 Cal. 352=40 I. C. 96.
(2) [1905] 27 All. 151=1 A. L. J. 577.

plaintiffs instead of paying the additional court-fee struck out a portion of their claim, and it was held that the District Munsif had erred in dismissing the suit under S. 10 (2), Court-Fees Act.

It is urged that this Court has no jurisdiction under S. 115, Civil P. C. But court-fee questions are invariably brought up on revision, on the plea that the lower Court has erred in refusing jurisdiction.

The petition must be allowed, but without costs. Plaintiff is to blame for leaving things to the last moment, and then raising these debatable questions. The appellate Court's decree is set aside and that of the District Munsif restored. Costs below will be paid to the petitioner.

P.R.S./R.M. *Petition allowed.*

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* A. I. R. 1931 Madras 717

REILLY AND ANATAKRISHNA AYYAR, JJ.

Ramalinga Sethupathi Ambalam—Plaintiff.

v.

Andiappan Ambalam—Defendant.

Referred Case No. 5 of 1930, Decided on 25th March 1931, by the Dist. Munsif, Melur.

*** Court-fees Act (1870), S. 11—Decree for possession with past and future profits—Execution can be taken for possession whether court-fee is paid on future profits or not—Civil P. C. (1908), O. 20, R. 12.**

In a case where the decree gives the following reliefs to a decree-holder, namely, possession with certain amount for past profits and future profits at a certain ascertained rate, the decree-holder would be entitled to execute his decree with reference to possession of immovable property, irrespective of the question whether court-fee has or has not to be paid on the future mesne profits decreed to him by the same decree: 12 Bom. 98, *Rel. on*. [P 717 C 2 P 720 C 1]

P. V. Rajamannar—for Government Pleader.

Anantakrishna Ayyar, J.—In O. S. No. 414 of 1928, on the file of the District Munsif's Court, Melur, the plaintiff obtained the following decree, on 18th December 1929.

(1) "That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

(2) That the defendant do pay to the plaintiff the sum of Rs. 60 on account of mesne profits which have accrued due prior to the institution of the suit, and do also pay future mesne profits at the rate of Rs. 60 per year from the institution of the suit until the delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court or the expiration of three years from the date of the decree whichever event occurs earlier.

(3) That the defendant do pay plaintiff's costs, Rs. 45-2-0, and do bear his own, Rs. 24-8-0."

The decree-holder applied in E. P. 615 of 30 on 23rd September 1930, for execution of the decree so far as immovable property was concerned and for delivery of possession of the property decreed to him. He also mentioned in the execution petition that he would file a separate execution in respect of mesne profits and costs. The plaint had been valued at Rs. 115-10-0, (the same being made up of Rs. 55-10-0 being the value of the relief regarding the land at ten times the annual revenue and Rs. 60 being the value in respect of past mesne profits for one year), and he paid court-fee thereon. Objection was raised before the District Munsif that court-fee should be levied on future mesne profits awarded in the decree before execution in E. P. 615 of 1930 is allowed to proceed. The learned District Munsif referred, under S. 113 and O. 46, Civil P. C., the following points for the opinion of the High Court:

(1) "In a case where the decree gives the following reliefs to a decree-holder,—namely, possession with certain amount for past profits and future profits at a certain ascertained rate, is court-fee payable on the future profits before any portion of the decree can be executed?

(2) If court-fee is payable, up to what date is the future profits to be calculated for the purpose of determining the court-fee?"

When questions arise regarding court-fees payable in respect of mesne profits which have accrued on the property the subject of litigation prior to the institution of the suit or for the period after the filing of the plaint, the same have to be decided, so far as Madras is concerned by reference to S. 11, Court-fees Act (7 of 1870) as amended by Madras Act 5 of 1922 and to the provisions of O. 20, R. 12, Civil P. C.

Section 9, Madras Act 5 of 1922, substituted the following paragraphs for para. 2, S. 11, of the pricipal Act;

"Where a decree directs an inquiry as to mesne profits which have accrued on the property during a period prior to the institution of the suit, if the profits ascertained on such inquiry exceed the profits claimed, no final decree shall be passed till the difference between the fee actually paid and the fee which would have been payable and the suit comprised the whole of the profits so ascertained be paid. If the additional fee is not paid within such time as the Court shall fix, the claim for the excess

shall be dismissed, unless the Court, for sufficient cause, extends the time for payment."

"Where a decree directs an inquiry as to mesne profits from the institution of the suit, and a final decree is passed in accordance with the result of such inquiry, the decree shall not be executed until such fee is paid as would have been payable on the amonnt claimed in execution if a separate suit had been instituted therefor."

Now, reading the provisions of S. 11, Court-fees Act as amended, with O. 20, R. 12, Civil P. C., the procedure should be followed in suits for recovery of possession of immovable property and for mesne profits is the following, when the Court finds that the plaintiff is entitled to the same.

To pass a decree: (a) for the possession of the property; (b) for mesne profits which have accrued on the property during a period prior to the institution of the suit, or directing an inquiry as to such mesne profits—(this may be called "past mesne profits", for convenience); (c) directing an inquiry as to mesne profits from the institution of the suit until: (1) the delivery of possession to the decree-holder; (2) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or, (3) the expiration of three years from the date of the decree whichever event first occurs, (this may be called future mesne profits', for convenience).

Analyzing the above, we find that in such cases: (1) there is a decree for possession of the immovable property. This is a final decree, and, subject to any just objections, is capable of being executed; (2) either a final decree for past mesne profits is passed, or the Court passes a preliminary decree for past mesne profits directing an inquiry as to the amount thereof. (3) There is a preliminary decree directing an inquiry, as to the amount of the future mesne profits. When an inquiry is directed either in respect of past mesne profits or in respect of future mesne profits, a final decree in respect of the said mesne profits is to be passed in accordance with the result of such inquiry.

Coming to the Court-fees Act as amended, under para. 1 newly added (which will be para. 2 out of the existing paragraphs of the amended section), if the amount of the past mesne profits ascertained on such inquiry should exceed the amount claimed in the plaint no final decree relating thereto should be passed till the difference between the court-fee actually paid and the court-fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid; and if the additional fee be not paid within such time as the Court shall fix, the claim for the excess amount shall be dismissed. Reading therefore this paragraph with O. 20, R. 12, Civil P. C., the result is that the Court should not pass a final decree in respect of past mesne profits regarding which an inquiry has been directed, when the amount of the same exceeds the amount claimed in the plaint, unless the extra court-fee be paid.

As regards future mesne profits, under para. 2 of the amended S. 9, Act 5 of 1922 (which will be para. 3 of S. 11 as amended) and under sub-Cl. 2, R. 12, O. 20, a final decree in respect of such future mesne profits is passed in accordance with the result of the inquiry, or in cases coming under the said paragraph of the Court-fees Act, the decree is not to be executed until such fee is paid as would have been payable on the amount claimed in execution if a separate suit had been instituted therefor.

It will thus be noticed that a final decree for the immovable property is passed. A final decree for past mesne profits is passed either straightaway, or, after a preliminary decree directing an inquiry as to the amount of the same; in the latter class of cases, the provisions of the amended S. 11, Court-fees Act, would have operation, with the result, that no final decree shall be passed till the extra court-fee is paid. The wordings of para. 2, S. 11, do not apply to a case where a final decree for past mesne profits is straightaway passed fixing the amount of such past mesne profits and without a preliminary decree directing an inquiry as to the amount of the same. In such a case, and to such a final decree, para. 1, S. 11 (which is para. 1 of the old section also) would apply; that paragraph directs that the decree is not to be executed until the extra court-fee is paid. Why it is provided in para. 2 that when an inquiry is directed, no final decree shall be passed for the extra amount of past mesne profits, and that the claim for the said excess shall be dismissed under para. 2 unless the extra court-fee be paid—and why a different rule is adop-

ted in para. 1 where it is provided that the decree shall not be executed until the extra court-fee is paid—all this, is not quite clear. Why it is not provided in para. 2, S. 11, that a final decree might be passed for a higher amount of past mesne profits found due, but that decree for the excess could not be executed unless the extra court-fee is paid, is also not clear. If the latter alternative had been adopted, there would be no inconsistency of any sort between the provisions of S. 11 and of R. 12; whereas now as regards passing a decree for past mesne profits there seems to be an apparent inconsistency between the two provisions. No doubt the two provisions could be read together and the provisions of R. 12 enabling a Court to pass a final decree straightaway may be said to be governed by para. 1, S. 11, Court-fees Act.

When we go to sub-Cl. (2), R. 12, we find that a final decree has to be passed in respect of future mesne profits when an inquiry is directed under Cls. (b) and (c) of the rule. Here the policy of the Court-fees Act as disclosed by the last paragraph of S. 11 is to prohibit, not the passing of the final decree, but only the execution of the same until the necessary court-fee is paid.

It is a question for consideration whether the same policy should not be adopted also with reference to past mesne profits where a decree directs an inquiry into the same, and whether for the sake of uniformity, if not for other reasons, para. 2, S. 11, should not be amended, enabling the Court to pass a final decree in such cases, but prohibiting execution in respect of the extra amount of such mesne profits unless the necessary court-fee be paid.

It should also be noticed that there is no specific provision to cover cases where a final decree for future mesne profits is straightaway passed, without a preliminary decree directing an inquiry as to the amount of the same. The question would accordingly arise whether para. 1, S. 11, Court-fees Act, would cover the case of future mesne profits in respect of which a final decree was passed straightaway, without a preliminary decree directing an inquiry into the same as aforesaid. In this connexion, the decisions of this High Court reported in *Maiden* v. *Janakiramayya* (1) and *Saminatha* v. *Muthuswami* (2), would be relevant, where this Court followed the decision in *Ram Krishna Bhikaji* v. *Bhimabai* (3), in preference to the decision in *Dwarka Nath Biswas* v. *Debendra Nath Tagore* (4). The decision of the Full Bench in *Parameswara Pattar* v. *Secy. of State* (5), was also mentioned to us. The rule of construction that the words of a taxing statute should not be strained to tax the subject would also be relevant in such a case. However for the purpose of disposing of the reference before us, it is not necessary to go into that question at present.

Difficulties could be avoided if Courts, when called upon to pass decrees relating to mesne profits, follow strictly the provisions of O. 20, R. 12, Civil P. C., read with S. 11 of the amended Court-fees Act. Courts should also remember that it is not now permissible to leave the amount of mesne profits to be ascertained in execution proceedings.

The first point on which our opinion is asked, having regard to the facts of the case, is whether the decree-holder is entitled to execute the decree and claim possession of the immovable property, without paying the court-fee, if any, payable on the future mesne profits. It was held in *Fulchand* v. *Bai Ichha* (6) that a plaintiff who obtained a decree for delivery of a house, and for account books and documents, and also for mesne profits, could execute that part of the decree which ordered delivery of the house, books and documents, without paying the court-fee payable on the amount of mesne profits. The intention of the legislature, as gathered from the amendments made in 1922, would also seem to point out in the same direction; for in cases coming under para. 2, S. 11, as amended, the claim for the excess past mesne profits only shall be dismissed, if the necessary court-fee be not paid; and similarly, under para. 3, a final decree regarding the future mesne profits shall not be executed until the necessary court-fee be paid—(it may be noted that the court-fee payable in respect of such

(1) [1898] 21 Mad. 371.
(2) [1910] 5 I. C. 880.
(3) [1891] 15 Bom. 416.
(4) [1906] 33 Cal. 1232.
(5) A. I. R. 1930 Mad. 833=130 I. C. 742=54 Mad. 1 (F.B.).
(6) [1888] 12 Bom. 98.

future mesne profits is calculated on the basis that a separate suit for the said amount of mesne profits has been instituted—a principle different from that underlying the other paragraphs of S. 11 and which may have relevancy in considering which of the two sets of decisions mentioned above would be more consonant with the amended section.) The penalties therein referred to relate only to the amounts of profits in question in respect of which court-fees has to be paid. The penalty does not extend to the other portions of the decree. Further, at the time of applying for execution of the decree by delivery of possession of the immovable property decreed, it may not be possible to fix the exact amount of future mesne profits due, and therefore it may be impossible at that time to fix the amount of court-fee payable in respect of the same. The decree-holder may apply for possession of the immovable property soon after the decree, and may not know when exactly possession would be delivered to him and for what exact period he would be entitled to claim future mesne profits. In such circumstances it is difficult to say on what amount he is to calculate to pay court-fee in respect of such future mesne profits.

The answer therefore to the first question is that the decree-holder would be entitled to execute his decree with reference to possession of immovable property, irrespective of the question whether court-fee has or has not to be paid on the future mesne profits decreed to him by the same decree.

As our answer to the first question is in the negative, the second question need not be considered and we accordingly record no opinion on the second point referred to us.

Reilly, J.—I agree.

P.R.S./B.V. *Answer accordingly.*

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* A. I. R. 1931 Madras 720

MADHAVAN NAIR, J.

Govinda Kangani— Defendant — Appellant.

v.

Murugesa Mudali—Plaintiff—Respondent.

Second Appeal No. 2323 of 1927, Decided on 17th February 1931, against decree of Court of Sub-Judge, Vellore, in Appeal Suit No. 84 of 1926.

*** Transfer of Property Act (1882), S. 75—Payment by stranger to mortgagee of mortgage debt amounts to transfer of mortgage right to him—Stranger is subrogated to position of mortgagee.**

The doctrine of subrogation is an equitable doctrine. If a stranger pays off a mortgage on an estate he presumably does not intend to discharge the mortgage but to keep it alive for his own benefit,

A payment made by stranger to a mortgagee of the mortgage money prima facie amounts to a transfer of mortgage right, the person making the payment being a stranger is entitled to be subrogated to the position of the mortgagee.

Out of two items of property belonging to *B* he first mortgaged item 1 to *C* and again mortgaged both items to *C*. Subsequently one *S* obtained a decree against *B* and assigned to it to *D*, who executed it and purchased the properties in the execution. While the properties were under attachment a portion of item 1 was sold by *B* to *A*, the purchase money being alleged to have been borrowed to pay the debt due to *C*. *A* paid off Rs. 480 to *C* who already held two mortgages on the properties. Later on the remaining portions of item 1 and item 2 were mortgaged to *A* it being mentioned in the mortgage deed that *A* had discharged the mortgage debt of *C*. It was found by the Court that *A* paid Rs. 480 to discharge the mortgage of *C*. Out of Rs. 480, Rs. 230 represented the mortgage on item 1.

Held: That *A* was entitled to be subrogated to the rights of *C* with respect to item 2 also although at the time he paid off the mortgage debts he had no legal title to the properties: 40 *Bom.* 646 and *A. I. R.* 1929 *Bom.* 139, *Foll.*

[P 723 C 2]

A. Viswanatha Ayyar and *A. Ramaswami Iyer*—for Appellant.

S. Kalyanasundara Mudaliar and *B. Ranganadha Mudaliar*—for Respondent.

Judgment.—Defendant 1 is the appellant. The facts necessary for the disposal of this second appeal may be briefly stated as follows: The plaintiff brought a suit for a declaration of his rights as a charge-holder to the extent of Rs. 480 over the suit properties which consist of two items. Item 2 belonged to defendant 2 and item 1 was purchased in his name and in the name of his concubine, Lakshmi Ammal, but having regard to the findings both the items should be treated as belonging to defendant 2. Item 2 was mortgaged by him on 1st March 1910 to one Shankarappa Mudali. He and his concubine afterwards mortgaged both the items to the same person for Rs. 100 on 2nd May 1910 (see Ex. C-1). On 2nd December 1918 one Shunmugam Chetty and one Narayanaswami Chetty obtained a decree in O. S. No. 530 of 1918, against defendants 2 to 4. Defendant 1

obtained an assignment of this decree. The suit properties were attached in 1919 and sold; and were purchased by defendant 1. On 2nd October 1920 while the properties were under attachment a portion of item 1 was sold to the plaintiff by the mortgagor, i. e., defendant 2: see Ex. A. It mentions that the amount of Rs. 250 mentioned therein was borrowed to discharge the mortgage debts of Sankarappa Mudaly and one Annammal with whose mortgage we are not concerned in the present case. On 10th October 1920 he paid off Rs. 480 to Sankarappa Mudali, who held, as already stated, mortgages over both the items. On 26th October 1920, i. e., 16 days afterwards, the remaining portion of item 1 and item 2 were mortgaged to the plaintiff: see Ex. B. It mentions that the plaintiff discharged the mortgaged debt of Sankarappa Mudaly. " It is clear from the recitals in Exs. A and B " as stated by the learned Subordinate Judge that Lakshmi Ammal borrowed, money " from the plaintiff to discharge the prior mortgage debts " on those properties. As regards the exact amount borrowed, the lower Courts accepted the evidence of the plaintiff that he paid Rs. 480 into the hands of Sankarappa Mudaly and thereby discharged his mortgages over the two items. These facts are not disputed by the appellants. The lower Courts found that inasmuch as the sale and the mortgage to the plaintiff were after the attachment of the properties by the decree-holders in O. S. 530 of 1918, Exs. A and B were void under S. 64, Civil P. C., as against defendant 1. This position is not disputed by the plaintiff-respondent. What he argued was that though the sale and the mortgage are invalid .transactions, since he paid off the mortgrges over the two items in favour of Sankarappa Mudaly, he should be considered in law to be subrogated to the mortgage rights of Sankarappa Mudaly over the suit properties to the .extent of Rs. 480. This argument was accepted by the lower Courts and a declaration was given to that effect in plaintiff's favour. I may here state that the parties agree that of the sum of Rs. 480, Rs. 230 may be taken to represent the mortgage over item 1.

It will be observed from the facts narrated above that at the time when the plaintiff discharged Sankarappa Mudaly's mortgage over items 1 and 2 (that is 10th October 1920) he had purchased only item 1 barring 5 cents of it; and he obtained a subsequent mortgage, Ex. B in his favour over the two items, only 16 days after the actual payment. The sale and mortgage being invalid (and treating the nonpurchase of 5 cents of item 1 on 2nd October 1920 as immaterial for the purpose of his argument). Mr. Viswanatha Aiyer contends that the plaintiff is entitled to be subrogated to the rights of the mortgagee Sankarappa Mudaly only with respect to item 1 (that is, to the extent of Rs. 230) and not with respect to his rights as mortgagee over item 2, inasmuch as at the time when he paid off Sankarappa Mudaly he had not acquired any rights to item 2 at all.

With respect to the mortgage over item 2 the argument of the learned advocate is that the plaintiff should be considered to be a mere volunteer; and that therefore the lower Court was wrong in having given him a decree declaring a charge on the properties to the full extent of Rs. 480. I do not think that this argument was put forward in the lower Court. The first Court gave the plaintiff a declaration stating that he was entitled to the mortgagee's rights of one Annammal also over the properties, and the main question for the appellate Court's decision was whether this was so or not. I have not stated in this judgment the facts relating to the controversy on this point. The lower appellate Court found in favour of the appellant regarding Annammal's mortgage and to that extent modified the decree of the District Munsiff with the result that the plaintiff got a declaration in his favour only to the extent of Rs. 480 relating to one Sankarappa Mudaly's mortgages. However as the question now argued is one of law; arising on undisputed facts and as a general ground was taken in the memorandum of appeal to the lower appellate Court—see ground 4 that the alleged payment made by the plaintiff of the mortgage debts are " all voluntary"—I allowed the appellant to argue the point.

If the basis of the plaintiff's right is clearly understood it will be seen that the appellant's arguments should be rejected. Inasmuch as it should be taken that the sale under Ex. A is invalid and it confers no rights on the plaintiff, his right to recover the money due on the

mortgage on item 1 paid off by him to Sankarappa Mudaly must stand in my opinion on the same fcoting as his right to recover tbe money paid by him to clear off the mortgage on item 2. I am mentioning this not for the purpose of inviting the conclusion that if the plaintiff's right to the mortgage money due on item 1 is conceded it must follow that his rights to the mortgage money on item 2 should also be declared. I am only mentioning this to show that the plaintiff's right as regards the two items must in law stand on the same footing. I shall now explain what that footing is. By the decree in O. S. No. 530 of 1918 and the subsequent execution proceedings the appellant purchased items 1 and 2 subject to Sankarappa Mudaly's mortgage rights over them. It cannot be disputed that defendant 2, the owner of the properties had an interest in paying off the mortgage to Sankarappa Mudaly. He could keep that charge on the mortgage properties alive in his favour by satisfying the mortgage claim if it was in his interest to do so. I think the plaintiff could claim the same benefit by virtue of his having paid that mortgage amount to Sankarappa Mudaly at the instance of defendant 2. If defendant 2 could claim to stand in the shoes of the mortgagee then it must follow the plaintiff claiming through him is also entitled to occupy the same position as defendant 2. In this case there is no doubt that though the actual payment of the mortgage amount to Sankarappa Mudaly was made by the plaintiff it was done at the instance of defendant 2. As stated in the judgment of the lower appellate Court it is clear from the recitals in Ex. A that

"Lakshmi Ammal (identical with defendant 2 as the owner) borrowed . . . . . to discharge the prior mortgage debts."

That this is the true principle, which should be applied to this case appears to be clear from the decision in *Tangya* v. *Trimbak*, (1), which closely resembles the present case. In that case the father of defendant 1 mortgaged two lands, Survey No. 19 and a moiety of Survey No. 172 to one Atmaram for Rs. 2,250. Atmaram obtained a decree upon his mortgage and on 12th June presented an application for the sale of the mortgaged property. On 27th June 1905 defendant 2 in execution of a money decree which he had obtained against Daga brought the properties to sale and purchased them himself on 13th April 1907. When the properties were put up for sale on account of Atmaram's decree defendant 1 borrowed a sum of Rs. 2,463 from the plaintiff in order to pay Atmaram's decretal amount and with the money so borrowed the decree amount was paid off and the sale of the property was averted. On 17th February 1907 Daga executed a sale deed in plaintiff's favour in regard to a moiety of Survey No. 172 for a total consideration of Rs. 4,000 made up of Rs. 2,463 already advanced together with other sums. In 1908 the plaintiff who was in possession was ejected from possession as result of a suit filed by defendant 2. Thereupon the plaintiff brought a suit in which as against defendant 2 he claimed that

"since Atmaram's mortgage had been paid off with his moneys he should be declared to stand in the shoes of Atmaram with the result that his advance of Rs. 2,463 should be recoverable by the sale of the mortgaged land in the hands of defendant 2."

The learned Judges upheld this plea. Shah, J.'s judgment explains the principle on which the plaintiff's claim was allowed. That principle is thus stated by the learned Judge :

"I desire to add a word with reference to Mr. Bhat's argument that neither the plaintiff nor defendant 1 was interested in satisfying the mortgage claim of Atmaram at the time when the sum of Rs. 2,463 was paid by the plaintiff. It is clear that, in spite of the previous purchase by defendant 2 at the Court sale of the two survey numbers, the equity of the redemption in the other property mortgaged to Atmaram was vested in defendant 1 at the time. The mortgage decree in favour of Atmaram was against him and was being executed against him at the time. He was therefore clearly interested in satisfying Atmaram's decretal claim. He could keep the charge on the mortgaged property alive in his favour by satisfying the mortgage claim, if it was to his interest to do so; and the plaintiff could claim the same benefit in virtue of his having paid the whole amount due under the mortgaged decree to Atmaram at the instance of defendant 1."

Batchelor, J. also explained the principle in the same way and then referred to *Butler* v. *Rice* (2) in support of his conclusion. In that case the following observation occurs :

"The statement of claim proceeds on the well-known equitable doctrine that if a stranger

(1) [1916] 40 Bom. 646=35 I.C. 794.

(2) [1910] 2 Ch. D. 277=79 L.J. Ch. 658=101 L.T. 94.

pays off a mortgage on an estate he presumably does not intend to discharge the mortgage but to keep it alive for his own benefit."

The learned Judge observed that the plaintiff's position in the case before him is:

"if there be any difference, somewhat stronger than what was Butler's position ; for while Butler was a mere stranger the plaintiff is claiming through a person with a clear interest in releasing the mortgage."

On one fact the present case is a stronger one in favour of the plaintiff than the one in *Tangya* v. *Trimbak* (1), for here, the plaintiff, when he paid the money had at least an invalid mortgage over one item in his favour while in the *Tangya* v. *Trimbak* (1) case the plaintiff did not have any shred of title, ostensible or real, to support the case. The sale to him of one item of the property was effected only after Atmaram was paid off with the money but by the plaintiff. I should here state that the plaintiff in *Tangya* v. *Trimbak* (1), seems to have been in possession of the property as a lessee for a term of years; but it is clear from the judgment that his position as a lessee had nothing to do with the loan that he paid to defendant 1 to pay off Atmaram's mortgage. Having regard to the special facts of our case it is interesting to note that what was sold to the plaintiff in the case in *Tangya* v. *Trimbak* (1) was only one item off property belonging to defendant 1 and with the money borrowed from him the mortgage on two items was paid off as in the present case. The decision in *Tangya* v. *Trimbak* (1), was followed in *Shankar Mahadev* v. *Bhikaji Ramachandra* (3), wherein the following proposition of law is stated by Baker, J. :

"Now it is manifest that a person who is a stranger to the mortgage and has no right to any part of the equity of redemption cannot redeem, and therefore any payment made by him to the mortgagee of the mortgage money would prima facie amount to a transfer of the mortgage right, and, as has been laid down in *Tangya* v. *Trimbak* (1), being a stranger, he would be entitled to be subrogated to the position of the mortgagee."

I would therefore hold, on the strength of the above decisions and the principle explained in *Tangya* v. *Trimbak* (1), that the plaintiff-respondent is entitled to be subrogated to the rights of the mortgagee Sankarappa Mudaly with respect to item 2 also, even though at the time when he paid off the mortgage debts he (that is, the plaintiff-respondent) had no legal title to the properties. The doctrine of the subrogation on which his right is based is an equitable doctrine and it will be surely inequitable to refuse the plaintiff's relief in this case ; for, if the relief is refused, it will enable the appellant to enrich himself unjustly to the extent of Rs. 250, the mortgage amount due on item 2. He has purchased the property subject to these two mortgages and in the plaint in O. S. No. 958 of 1920 his assignors claimed relief only in respect of the equity of redemption in the properties. If the appellant's argument is accepted the position will be this : namely, that he will be entitled to hold item 2 free of an encumbrance of Rs. 250, "not one rupee of which" to use the language of Batchelor, J., in *Tangya* v. *Trimbak* (1), "he has ever paid himself,"

"but every rupee of which has come from the pockets of the plaintiff."

I think such a result should be avoided if it is legally possible to do so.

For the above reasons, I hold that the decree of the lower Court is right but the lower Court has allowed in favour of the plaintiff interest on Rs. 480. This, he is not entitled to ; he will be entitled to a charge on Rs. 480, the amount paid by him to Sankarappa Mudali together with interest on the total mortgage amount, Rs. 300. The decree of the lower Court will be modified to this extent. In other respects that decree will stand and the second appeal is dismissed with costs. In the view that I take of this second appeal no other question of law arises for decision.

The memorandum of objections is also dismissed with costs.

P.R.S./R.M. *Appeal dismissed.*

(3) A.I.R. 1929 Bom. 139=116 I.C. 225=53 Bom. 353.

A. I. R. 1931 Madras 723

VENKATASUBBA RAO, J.

Rajaram Mehta and *others*—Plaintiffs—Appellants.

v.

Narayanasami Naidu and *others*—Defendants—Respondents.

Second Appeal No. 943 of 1928, Decided on 8th April 1931, against decree of Dist. Judge, Chingleput, in A. S. Nos. 117 to 154 of 1927.

Madras Estates Land Act (1908), S. 59—"Established usage"—Term explained.

A usage need not possess the same degree of antiquity as a custom and the words "established usage" should be construed as meaning that of the particular holding with reference to which the question arises: 15 *Cal.* 714, *Diss. from.* [P 724 C 1]

M. Subbaroya Ayyar—for Appellants.

T. V. Muthukrishna Ayyar, T. K. Ramaswami Iyengar and *K. S. Krishnaswami Ayyangar*—for Respondents.

Judgment.—The decision in this case turns on the question what is the meaning of the expression "established usage" in S. 59, Estates Land Act? It runs thus:

"Rent shall be payable in instalments according to agreement or in the absence of agreement according to established usage."

If the rent claimed was payable, as alleged by the plaintiff, on the last day of the fasli, the suit is within time, if, on the other hand it was payable on the kistbundi dates as alleged by the defence, the suit is barred. In the lower Court, it was argued that as in the case of a valid custom, so in the case of usage, it is essential that it should be ancient. I cannot agree that the two words are synonymous; a usage need not possess the same degree of antiquity as a custom.

It is then contended that the word "usage" must be understood as referring to the entire estate and the appellant relies for this position upon *Hira Lal* v. *Mothura Mohun* (1) a case dealing with S. 53, Ben. Ten. Act. I am unable to agree with that decision. I fail to see why, when the section refers to rent which, of course, must mean the rent of a particular holding, it must be assumed, that "established usage" mentioned, must be the usage of the whole estate. In this case, there is a finding, which cannot be attacked in second appeal, that according to the usage of the village, the rent is payable not at the end of the fasli, but on the four kistbundi dates. But even that finding is, in my opinion, unnecessary for the words "established usage" may be rightly construed as meaning, that of the particular holding with reference to which the question arises.

The second appeal is dismissed with costs (one set).

I have been asked to fix the counsel's fee owing to the fact that numerous appeals have been consolidated and I accordingly fix it at Rs. 150.

The appellant's counsel asks me to leave it open to him to enforce his right, if any against defendant 1, on the ground that the rent properly belongs to him was wrongly received by the latter. I wish to make it clear that my judgment is not intended to affect any such right.

P.R.S./B.V. *Appeal dismissed.*

(1) [1888] 15 Cal. 714.

A. I. R. 1931 Madras 724

RAMESAM, J.

Kootoorlingam Pillai and *others*—Defendants—Appellants.

v.

Sennappa Reddiar and *others*—Plaintiffs—Respondents.

Second Appeal No. 1948 of 1926, Decided on 21st January 1931, against decree of Sub-Judge, Tinnevelly, D/- 5th May 1926.

(a) Madras Estates Land Act (1908), S. 112—Want of notice to raiyat makes sale a nullity.

Want of notice to the lawful raiyat is such an important condition precedent to the holding of sale under S. 112 that the want of it must be regarded as making the sale a nullity: 45 *I. C.* 653, *Expl.*; 34 *Cal.* 811 (*F. B.*) and 34 *Cal.* 241, *Rel. on.* [P 725 C 2]

(b) Limitation Act (1908), Art. 12 (b)—Art. 12 (b) is inapplicable to sales under Madras Estates Land Act, 1908.

Article 12 (b), Limitation Act, does not apply to sales under Madras Estates Land Act: (1927) *M. W. N.* 174, *Foll.*; *A. I. R.* 1924 *Mad.* 278, *Expl.* and *not Foll.* [P 726 C 2]

T. R. Ramachandra Iyer and *S. Srinivasa Iyer*—for Appellants.

K. S. Ramabhadra Iyer—for Respondents.

Judgment.—The facts out of which this second appeal arises may be stated as follows: Plaintiff's father Bogi Reddi and the father of defendants 1 and 2, Valavanda Reddi were brothers. They were the owners of the suit properties. Valavanda Reddi died in 1890. His widow Unnamalai, asserting that the two brothers were divided claimed the suit lands and got into possession. Bogi Reddi questioned her right but ultimately entered into a compromise by which Unnamalai was to enjoy the properties till her death and after her death Bogi Reddi or his heirs should be entitled to the properties. Unnamalai died in 1913. Meanwhile Bogi Reddi died in 1903. Under the terms of the

compromise the plaintiffs became entitled to the suit properties. Out of the properties subject, of the suit, we are now concerned in second appeal only with the properties in Sch. 1 which consist of raiyati interest in certain lands in Uthumalai Zamindari. As to these after the death of Unnamalai the plaintiffs applied to the zamindar for issuing a patta solely in their names, but the patta was not granted to them: vide deposition of P. W. 1. On the other hand it looks as if the suit lands were registered in the names of the three plaintiffs, the first two defendants and their deceased sister Lakshmi. This appears from Ex. 9. This is a copy of the sale notice under S. 112, Estates Land Act. But it does not appear whether the plaintiffs knew that the patta was issued in their names and in the names of their cousins. Their case is that when they attempted to take possession of the lands they were obstructed by the defendants. Afterwards proceedings were taken under S. 112, Estates Lands Act, for selling the holding for default in payment of rent. The plaintiffs thereupon bring the suit. The District Munsif dismissed the suit on the ground that they were bound by the proceedings taken against defendants 1 and 2.

On appeal the Subordinate Judge found that the sale notice was never served upon the plaintiffs and therefore the plaintiffs are not bound to set it aside. He also found that the sale was not duly published by proclamation by beat of tom-tom and that the sale was therefore illegal and fraudulent and he decreed the plaintiff's suit. Defendant 4 was the purchaser in the sale under S. 112. After the purchase he sold the property to defendant 3's husband. That is how defendant 3 is impleaded in the suit. She afterwards died and defendant 7 was brought in as her legal representative. Defendants 4 and 7 are the appellants in second appeal so far as this item is concerned.

In second appeal a question is raised that the suit is barred by limitation as the suit was filed more than one year from the date of sale. The sale was held on 21st March 1917, vide Ex. 2, and the suit was filed on 21st May 1919. The second appeal first came on for hearing before Kumaraswami Sastri, J. He called for a finding as to whether the plaintiffs had knowledge of the rent sale on or before the date of sale. The Subordinate Judge has now returned a finding to the effect that they had no knowledge of the sale on or before its date, but that they became aware of it on 19th January 1918. This finding was arrived at on the evidence of P. W. 3 who states that he was told by plaintiff 1 of the rent sale four or five years before giving evidence. The learned Subordinate Judge taking the figure "5" records the finding already mentioned. After the return of the finding the second appeal comes on before me for disposal, and the question of limitation is again pressed by the learned advocate for the appellants.

On the facts and the findings of the Subordinate Judge already mentioned it is clear that the three plaintiffs only are the lawful pattadars of the suit lands. It does not appear whether they were even aware of the fact that the suit lands were registered in the joint names of the three plaintiffs, the first two defendants and their sister. The action of the zamindar in registering them as pattadars is not binding on the plaintiffs who alone are the lawful owners and the subsequent proceedings therefore do not bind them. Even if they were aware that the suit lands were registered in the names of all the six, as the Subordinate Judge found that the notice was issued only to defendant 1, it cannot bind the plaintiffs. In my opinion therefore the proceedings taken under S. 112, Estates Land Act, amount to a nullity so far as the interest of the three plaintiffs is concerned. It may bind the interest of defendants 1 and 2, but in the present case such interest turns out to be nothing. In my opinion, want of notice to the lawful raiyat is such an important condition precedent to the holding of the sale under S. 112 that the want of it must be regarded as making the sale a nullity. Mr. Srinivasa Iyer appearing for the appellants relied on some decisions under the Revenue Recovery Act. In my opinion they cannot be of any use to decisions under the Estates Land Act. A decision under the Madras Revenue Recovery Act cited before me by the learned advocate *Vadlur Chinna*

Nagi Reddy v. *Devineni Venkataramiah* (1), proceeds on the view that though the actual sale was made without notice to the plaintiff, subsequent proceedings in connexion with it came to his knowledge and it was therefore held that the sale was not without jurisdiction. This seems to imply that if all the proceedings are taken without the knowledge of the defaulter the sale would be without jurisdiction and it is on this ground that the decision in *Purna Chandra Chatterjee* v. *Dinabhandu Mukerjee* (2) was distinguished. This last decision is a decision under the Public Demands Recovery Act (Bengal) by a Bench of five Judges. It was there held that if there is no notice to the defaulter the sale is a nullity, that Art. 12, Lim. Act does not apply and that only Art. 142 applies. To the same effect is the decision in the same volume: *Syamlal Mandal* v. *Nilamony Das* (3). Notice to the defaulter is so important that the want of it renders the sale a nullity. I agree with these decisions and hold that the sale in this case is a nullity. If so it does not matter when the plaintiffs first became aware of the sale afterwards whether in 1918 or in 1919. This view is enough to dispose of the second appeal.

But I cannot abstain from expressing my view upon another point which was discussed by the learned advocate, namely, whether Art. 12 (b), Lim. Act applies to the sale under the Estates Land Act at all. Devadoss, J., in *Venkatasubbayya* v. *Narayan Kristayya* (4). held that Art. 12 (b) does not apply. There is also a decision of this Court by a Bench of two Judges, namely *Kamalammal* v. *Chokalingam Asari* (5) to the effect that it applies. The only question discussed in the latter decision is whether the absence of provisions for confirming the sale under the Estates Land Act prevents the article from applying. The ground on which Devadoss, J., held that Art. 12 (b) does not apply was neither raised nor discussed before the learned Judges. The respondent's vakil in that case withdrew from the case. On the scheme of the Estates Land Act the right to the sale arises immediately the default is committed. This is clear from the language of S. 112, the notice referred to therein informing the defaulter that his holding will be sold. If a suit questioning the right of sale is filed but decided against the defaulter, the landlord may apply to the Collector for sale: S. 114. If no suit at all is instituted such application shall be made within 45 days of the posting by the Collector of intimation of service: S. 115. The application for sale referred to in these sections is really an application for conducting or carrying on the sale, not seeking an order from the Collector that a sale shall be made. This is clear from the next S. 116 section which says:

"Immediately on receipt of such application the Collector shall appoint an officer to conduct the sale."

The scheme of these sections does not contemplate that the Collector shall pass an order directing a sale. If there is no decree or order by the Collector authorizing a sale to be held, Art. 12 (b), Lim. Act does not apply. This is the view of Devadoss, J., with which I agree. If my decision in the second appeal were to rest only on this conclusion, it may be that I would refer the matter to a Bench consisting of myself and another learned Judge. But as my view on the first point is enough to dispose of the second appeal I abstain from doing so though I feel quite clear on the second point.

The second appeal fails and is dismissed with costs.

P.R.S./R.M. *Appeal dismissed.*

(1) [1918] 45 I. C. 653.
(2) [1907] 34 Cal. 811=11 C.W.N. 756 (F.B.).
(3) [1907] 34 Cal. 241=5 C. L. J. 385.
(4) [1927] M. W. N. 174.
(5) A. I. R. 1924 Mad. 278=76 I. C. 840.

A. I. R. 1931 Madras 726

SUNDARAM CHETTY, J.

V. Govinda Panikkar and *others* — Plaintiffs—Appellants.

v.

Vilakkathala Paru's daughter Karthiyayini and *others*—Defendants—Respondents.

Second Appeal No. 1736 of 1927, Decided on 18th November 1930, against decree of Sub-Judge, Ottapalam, in A. S. No. 79 of 1925.

(a) Malabar Law—Karnavan—Hypothecation bond held by tarwad is moveable property.

A hypothecation bond held by a tarwad, as part of the assets belonging to it, should be treated as moveable property for the purpose of determining the powers of disposal over the same, possessed by the karnavan: *A. I. R.* 1922 *P. C.* 356, *Rel. on.*; 37 *Mad.* 51 and 45 *I. C.* 986, *Ref.* [P 727 C 2, P 728 C 1]

(b) Malabar Law— Karnavan— Power of——Karnavan has large and even uncontrolled discretion as to acts of management.

As to acts of management, the karnavan has large and even uncontrolled discretion. Where the hypothecation debt due to the tarwad is made by the karnavan for the discharge of kurichit debt which is found to be binding on the tarwad as well as for the discharge of the karnavan's debt and there is no proof of fraud or collusion, the assignment is not a bare alienation and can even be viewed as a mode of realization of the debt which the karnavan thought fit to adopt in the course of management and the assignment is binding on the tarwad.

[P 728 C 2]

T. V. Muthukrishna Ayyar and *A. Chathu Kutti Nambiar*—for Appellants.

K. Kutti Krishna Menon — for Respondents.

Judgment.—This is a second appeal against the decision of the Subordinate Judge of South Malabar, preferred by some of the junior members of a Nair tarwad, who sued for a declaration that an assignment of a hypothecation debt, by the karnavan (defendant 2) under the original of Ex. A, in favour of defendant 1 is not valid and binding on the tarwad.

The lower appellate Court has found that Ex. A was fully supported by consideration, though there was no tarwad necessity for the assignment. The mortgage debt assigned under Ex. A was due from one Kunhunni Thampan who executed a simple mortgage deed for Rs. 2,000 on 15th May 1914 in favour of defendant 2 and his sister, defendant 3. The plaintiff's suit was dismissed by the learned Subordinate Judge on two grounds, viz., (1), the hypothecation bond which is the subject of the assignment in question has to be classed as one in the nature of moveable property; (2), it was competent for the karnavan to assign the hypothecation bond, even in the absence of any tarwad necessity, as he has full power of disposal in respect of moveables. The correctness of both these propositions is questioned by the appellants.

As regards the first point, we have to see, whether a hypothecation bond held by a tarwad, as part of the assets belonging to it, should be treated as moveable or immovable property, for the purpose of determining the powers of disposal over the same, possessed by the karnavan. If the Customary law of Malabar applicable to tarwads recognized in a karnavan larger powers of disposal in respect of moveables than in the case of immovables, it must first be ascertained whether a particular item of property should be regarded as moveable or immovable.

A debt due under a hypothecation bond has been treated in the Civil Procedure Code for purposes of attachment and sale in execution as moveable property. It has been held in *Nataraja Iyer* v. *The South Indian Bank of Tinnevelly* (1), that such a debt is moveable property within the meaning of O. 21, R. 46, Civil P. C., and R. 54 is not applicable to it, though the General Clauses Act and Transfer of Property Act speak of such debt as an interest in immovable property. In the aforesaid two Acts, even benefits to arise out of land are included within the definition of immovable property. When the question to be decided was whether a transfer of a mortgage bond when effected by an unregistered document is valid and the document whereby the transfer is made is admissible in evidence, it had to be considered, in the light of the definition of immovable property given in the Transfer of Property Act and the Registration Act. The mortgage debt was for the purposes of those Acts treated as immovable property by Richardson, J., in the case reported in *Sankhiuddin* v. *Sonaulla* (2). These decisions are therefore in my opinion not in point in the present case.

The main question in this case is, as I have already stated:

> "Should the hypothecation debt belonging to the tarwad be treated as its moveable or immovable property, for the purpose of seeing whether the karnavan has absolute or only restricted power of disposition in respect of it?"

The pronouncement of their Lordships of the Privy Council in the case reported in *Ramsumran Prasad* v. *Mt. Shayam Kumari* (3) at. pp. 757 and 758, (of 44 *M. L. J*), is, in my opinion, exactly in point. For a similar purpose, while referring to a contention in a suit by reversioners, that the widow of a deceased Hindu has larger power of disposal over the moveable property of her husband, than over the immovable property, their Lordships expressed their

(1) [1912] 37 Mad. 51=13 I. C. 91.
(2) [1918] 45 I. C. 986.
(3) A. I. R. 1922 P. C. 356 = 69 I. C. 71 = 49 I. A. 342=1 Pat. 741 (P. C.).

view, as regards a mortgage decree debt, that

"it would be carrying technicality to an excess to consider this property as immovable property."

Their Lordships add:

"In the hands of the deceased and in the hands of the widow till the sale it was money secured by a mortgage on immovable property."

On this authority I think fit to hold, that for the purposes of deciding the question at issue in the present case, the hypothecation debt, which was the subject of assignment under Ex. A is moveable property.

As regards the second point, there is the decision of a Division Bench of this Court, reported in *Subramania Pattar* v. *Krishna Embranderi* (4), wherein Sadasiva Iyer, J., considered this question and expressed his opinion with some emphasis. The learned Judge is of opinion, that the karnavan has absolute powers over moveables and properties in the nature of moveables, including the power of realization of debts due to the family in any manner he likes and of selling moveables and converting them into money. He further states that a third person who purchases such property for consideration is not bound to inquire into the necessity for the alienation or to see to the application of the purchase money. In Sundara Iyer, J's. Treatise on Malabar law, the learned author says at p. 50, that a hypothecation debt may well be assigned over by the karnavan, without proving necessity for the act.

It is however argued by Mr. Muthukrishna Ayyar for the appellants, that Courts should be slow in applying such a rule though traceable to custom, and it would work great hardship in some tarwads whose bulk of property consists of moveables alone, if an absolute power of the karnavan over moveables is recognized. This aspect of the matter should receive attention, when the unreasonableness of the customary right sought to be set up is patent on the facts of a particular case. Perhaps it may then be for consideration whether Sadasiva Iyer, J., in the said case has not gone too far in recognizing the absolute right of disposal in the karnavan over all the moveables without any sort of qualification or reservation to safeguard the interests of the other members of the tarwad. In the said book on Malabar law, the learned author seems to have felt this difficulty as would appear from the following passages at p. 50:

"This absolute power of disposition must be limited to cases where the customary mode of enjoyment is by disposal. It would be extraordinary if such a power should be recognized in respect of family jewels."

As to acts of management, the karnavan has doubtless large and even uncontrolled discretion.

In the present case the assignment of the hypothecation bond by the karnavan, though not strictly for tarwad necessity, is found to be fully supported by consideration. There is no proof of fraud or collusion. It was open to the karnavan in the course of management, to have collected the amount of this hypothecation bond at his will and pleasure. If he wished to realize the amount, he could have demanded payment from the mortgagor. If the debtor was refractory the karnavan could have assigned the bond to another, and realized the money by that means. Such a course would be more an act of management than a mere alienation. In the present case the discharge of the kuri chit debt (found to be binding on the tarwad) was one of the purposes for which the assignment was made. Instead of himself paying up the kuri debt, out of the amount received as consideration for the assignment in question, the karnavan asked the assignee herself, defendant 1, to pay up that debt. In fact, she has even paid three instalments of that debt, amounting to Rs. 480. No doubt, the discharge of some of the karnavan's own debts, was also undertaken by the assignee, on account of the consideration payable for the assignment: Exs. 2, 3 and 7. I am of opinion, that the assignment of the hypothecation bond, may even be viewed as a mode of realization of that debt, which the karnavan thought fit to adopt, whether quite prudently or not, in the course of management. It cannot be viewed as a bare alienation, ignoring all the surrounding cirumstances. For all the foregoing reasons I find that the plaintiffs are not entitled to the declaration prayed for. The second appeal is dismissed with costs of respondent 1.

P.R.S./P.N. *Appeal dismissed.*

(4) [1920] 60 I. C. 77.

** A. I. R. 1931 Madras 729

REILLY AND ANANTAKRISHNA AYYAR, JJ.

(*Penumetsa*) *China Venkataraju* and *another*—Appellants.

v.

Pulavarthi Lakshmanaswami and *another*—Respondents.

Civil Misc. Appeal No. 105 of 1927, Decided on 11th March 1931, against order of Dist. Judge, West Godaveri, in Civil Misc. Petn. No. 896 of 1926.

** **(a) Provincial Insolvency Act (1920), Ss. 34, 48, 61 and 67—Sufficient surplus left in hands of Official Receiver after payment of debt in schedule—Creditor is entitled to get contract rate of interest although higher than 6 per cent per annum from date of adjudication till date of payment unless rate of interest is reduced for special reasons.**

The rate of interest 6 per cent mentioned in S. 61 (6) is primarily to provide for those cases where the surplus does not admit payment of more than 6 per cent to any class of creditors. The object is not to reduce the rate of interest fixed by the contract between the parties when the assets are enough and there is a surplus. Ss. 48, 61 and 67 should be read together and if possible such construction should be placed on them as would make the said provisions not inconsistent with each other. [P 736 C 1]

A creditor of the insolvent to whom money is due under a promissory note which provides for a higher rate of interest than 6 per cent per annum is entitled to get interest on the principal amount due to him on the date of the adjudication at the contract rate mentioned in the promissory note for the period between the date of adjudication and the date of payment of the principal amount by the Official Receiver, when there is a sufficient surplus of assets in the hands of the Official Receiver after paying the amount of debts included in the schedule unless there is some reason for reducing the contract rate of interest : *A. I. R.* 1926 *All.* 361, *Diss. from.* [P 734 C 1; P 739 C 2]

(b) Interpretation of Statutes—Substantial rights of parties should not be interfered with unless interfered either expressly or by necessary inference.

It is a principle of law that the substantial rights of parties should not be interfered with, except to the extent to which they have been interfered with either expressly or by necessary inference by any enactment. [P 736 C 2]

(c) Interpretation of Statutes — Insolvency Act—Insolvency Acts follow English Bankruptcy Act—In case of difference between Indian Act and English Statute words of "Indian Act" are to be given effect to—Language of both is identical—Guidance and help can be sought from English decisions—Provincial Insolvency Act.

Indian legislature has borrowed from the English Bankruptcy Act when enacting the Insolvency Acts in this country. Courts in India are bound in the first instance to construe the words of the Indian Act, whenever any question arises and in case of difference between the wording of the Indian Act and the English Statute, they are bound to give effect to the words of the Indian Act and confine themselves to the law as enacted in the Indian Act. Where however the language of the Indian Act and English Statutes is identical the Indian Courts are entitled to seek guidance and help from the decisions of English Court in such matters. [P 738 C 2]

(d) Provincial Insolvency Act (1920), Ss. 48 and 61—Court can reduce contract rate of interest.

The insolvency Court has jurisdiction, if a proper case has been made out to reduce the contract rate of interest between the parties : *A. I. R.* 1925 *All.* 400, *Ref.* [P 739 C 2]

G. Chandrasekhara Sastri and *G. Lakshmanna*—for Appellants.

V. Viyyanna—for Respondents.

Reilly, J.—The appellants in this case, who are father and son, were adjudged insolvent on their own petition in 1919. Eventually, when their estate was realized, it was found to leave a large surplus after all the creditors who had proved their debts had been paid off under S. 61 (5), Provincial Insolvency Act. The respondent here, who was one of the creditors, applied to the District Judge for a further amount out of the surplus representing the balance due to him if interest on his claims, which were two, was calculated at the contract rate from the date of adjudication. The District Judge did not allow this subsequent claim in full. There were two debts due to the respondent, on one of which the contract rate was 48 per cent and on the other 19 per cent. The learned District Judge allowed 18 per cent on each debt from the date of the contract to the date of payment. The insolvents appeal against that order.

The answer to the question to what amount is the creditor entitled in these circumstances depends upon the interpretation of several sections of the Provincial Insolvency Act, which at first sight may not be easy to reconcile; but I think when they are examined, their effect becomes clear. Under S. 33 of the Act, when an adjudication is made, a schedule has to be framed showing the creditors and the amounts of the debts due to them as proved by them. S. 34 of the Act provides that provable debts include all debts and liabilities to which the debtor is liable when he is adjudged insolvent. That would include the principal and interest at the contract rate on each debt, where the debtor is really liable to that rate in the absence of reduction by way of relief against penalty or by restriction of interest under the

Usurious Loans Act and so on. That a provable debt includes not only the principal of the debt but interest up to the date of adjudication is shown both by S. 34 of the Act and by S. 48, in neither of which is there any limit to the rate of interest which can be proved. An extreme case of a high rate of interest being provable under the contract will be found in *Kanto Mohun Mullick* v. *John Carapiet Galstaun* (1), where Rankin, C. J., points out that the creditor, having lent one lakh but by his contract being entitled to get two lakhs in six months and interest at 12 per cent on the two lakhs, could prove in accordance with that very harsh-looking contract. So we find that the creditor's proved claim, whether it is described as "entered in the schedule" or is a "debt proved"—those terms as used in the Act being synonymous—will include both the principal and interest at the contract rate, if any, unless that rate is specially reduced under provisions of law such as I have mentioned. But that interest, which is included in the proved debt, the debt entered in the schedule, runs only up to the date of adjudication.

That is in accordance with the long established rule in England, as shown by *Bromley* v. *Goodere* (2) and *In re Savin* (3), and will be clear when Ss. 34 and 48 of our Act are examined. But although interest at the contract rate, unless specially reduced under the provisions of law, will be included in the debt as entered in the schedule, there is a provision in our Act, as in the English Bankruptcy Act, that for purposes of dividend interest will not be calculated necessarily at the contract rate. In S. 48(2) of our Act for the purpose of dividend interest is limited to 6 per cent. The result of that is that, when a dividend is to be distributed to different creditors, the claim of each on which he is entitled to get rateable distribution is not necessarily the principal plus the contract interest up to the date of adjudication but the principal plus interest at 6 per cent up to the date of adjudication where that is less than the contract rate. S. 61 (5) of our Act directs distribution of the assets. After payment of certain specified preferential debts, all other debts entered in the schedule are to be paid off rateably; but that is to be done subject to the provisions of the Act. That will mean, as I have explained, that, if a dividend is being paid, it will not necessarily be the full debt entered in the schedule which is taken for the purpose of calculation but the principal with interest on it not exceeding 6 per cent. But that restriction, it must be noticed, only applies when there is a dividend to be distributed. If the assets are large enough for the whole of the proved debts entered in the schedule to be paid, then there is nothing in S. 61 (5) which places any restriction on paying off the whole of those debts. In fact S. 61 (5) requires them to be paid in full if the assets are sufficient. Any question of dividend of course only arises when there is not enough to pay the proved debts in full.

But, when the proved debts—the debts entered in the schedule—have been paid in full in any case and there is any surplus, S. 61 (6) prescribes what is to be done in those circumstances. It provides that

"where there is any surplus after payment of the foregoing debts it shall be applied in payment of interest from the date on which the debtor is adjudged an insolvent at the rate of 6 per centum per annum on all debts entered in the schedule.".

When that has been done as it has been done in this case there may still be a surplus left over, as there is in this case. S. 67 of the Act provides that, if in those circumstances there is a surplus:

"the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act and of the expenses of the proceedings taken thereunder."

It will be seen that before the insolvent can get any part of the surplus under that provision there must have been payment of the creditors in full. It will be noticed that up to the stage we have now reached the debts entered in the schedule will have been paid in full and under S. 61 (6) 6 per cent interest on those debts will have been paid but that may not be payment of the creditors in full. It will not be payment in full of any creditor whose contract rate of interest not specially

(1) A. I. R. 1930 Cal. 547=126 I. C. 754.
(2) 26 E. R. 49.
(3) [1872] 7 Ch. A 760=42 L. J. Bk. 14=27 L. T. 466=20 W. R. 1027.

disallowed or reduced by the Court exceeds 6 per cent. It is here that the last part of S. 48 (2) must be taken into consideration. S. 48 (2), as I have mentioned, reduces for the purpose of calculating dividend interest at the contract rate if it is above 6 per cent. But it does so subject to a proviso and the proviso is that it shall be done:

"without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full."

Now, if we take the words of S. 67 "after payment in full of his creditors" with this proviso in S. 48 (2), it preserves the creditor's right to get the higher rate of interest to which he may be entitled after all the proved debts have been paid in full. On the face of those words there is no difficulty of interpretation but it has been suggested for the appellants by Mr. Chandrasekara Sastri that we should not take the words I have quoted from S. 48 (2) in their literal sense, that we should read the words as if they were:

"without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled up to the date of adjudication."

I do not think we are entitled to read the words in that way or that there is any justification for inserting the words "up to the date of adjudication" in our interpretation of the section. It will be observed that the creditor is entitled to get that higher rate of interest after the proved debts have been paid in full and as I have already mentioned a proved debt or debt entered in the schedule includes interest at the contract rate unless it has been disallowed by the Court or reduced by the Court up to the date of adjudication. What the creditor is entitled to under the last words of S. 48 (2) is the higher rate of interest after the proved debts have been paid in full. That must be the higher rate of interest for the period subsequent to the date of adjudication on proved debts which will ex hypothesi have been paid in full for the period up to the date of adjudication. But there are some other words in S. 67 which might perhaps be thought to raise a little difficulty in this interpretation which I have indicated. As I have mentioned the provision of S. 67 is that:

"the insolvent shall be entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act."

What do those words "with interest as provided by this Act" mean? Mr. Viyanna for the respondent has suggested that those words refer to the higher rate of interest mentioned at the end of S. 48 (2). I do not think that is at all an impossible interpretation, though perhaps it is not very happy to refer to the higher rate of interest which is preserved for the creditor by S. 48 (2) as being "provided by" this Act. Without definitely rejecting that interpretation I may indicate that there is another possible interpretation, namely, that "interest as provided by this Act" in S. 67 may well refer to the interest which a creditor can prove and get under S. 48 (1) of the Act, where no interest is reserved or agreed upon in his contract subject to provisions very much like those of the Interest Act. And it may also refer to the interest which is to be given in the first instance out of the surplus at 6 per cent on all proved debts under S. 61 (6).

Under S. 61 (6) it will be seen that interest on interest in many cases can be given and given only by virtue of the provisions of the Act. The words "with interest as provided by this Act" may have been inserted in S. 67 to prevent the insolvent from claiming when he asks for the surplus that his creditors have been paid in full even without the interest specially allowed by the Act in S. 61 (6). What Mr. Chandrasekara Sastri asks us to say is that "interest as provided by this Act" in S. 67 refers to the 6 per cent interest in S. 61 (6) and restricts full payment of creditors for the purpose of this Act to that interest and that although in S. 67 the insolvent is said to be entitled to the surplus remaining after payment in full of his creditors with interest as provided by this Act, it does not mean after payment in full really but after payment in full as qualified by S. 61 (6). That interpretation can only be reached by ignoring the proviso in S. 48 (2) "without prejudice to any higher rate of interest" etc. We must take all the provisions of the Act together and in my opinion we have no right to adopt an

interpretation of S. 67 which ignores the words in S. 48.

A suggestion has been made that S. 48 (2) preserves the creditor's right to get the higher rate of interest but not in the insolvency proceedings that he may sue for it after the insolvency proceedings are closed, but that he cannot get out of the assets of the debtor in insolvency the higher rate mentioned in the section. That contention is I think answered by the wording of S. 48 (2). It will be observed that the creditor's right to get the higher rate is preserved not as a right of suit but as a right to get that higher rate out of the debtor's estate. And what can a reference to the debtor's estate in the Insolvency Act mean except to the debtor's estate as administered in insolvency?

As might be expected there have been very few decisions on this question of the disposal of the ultimate surplus in insolvency cases because it is not in many cases that there is a large surplus. But our attention has been drawn to a decision of the Allahabad High Court, which is directly in favour of the appellants, viz. *Ganga Sahai* v. *Mukarram Ali Khan* (4). A Bench of that Court decided that after the 6 per cent on the proved debts had been distributed out of the surplus under S. 61 (6) of the Act, the creditors could get no more, whatever their contract rate of interest was. From what I have said it will be seen that with great respect I find it not possible to agree with that view, and I may point out that the learned Judges do not appear to have given sufficient weight to the words of S. 48 (2). It is true that they refer to the creditor's right to the higher rate of interest being reserved by that section ; but they say it is " not an enabling section " and obviously regard the creditor's right so reserved as one which he must pursue, if at all, in proceedings outside the insolvency. As I have said, the fact that the section preserves his right to get the higher rate out of the debtor's estate in my opinion shows that that interpretation is not correct. And I may mention that there is another decision of the same High Court, to which one of the learned Judges who took part in *Ganga Sahai* v. *Mukarram Alt Khan* (4) was a party, namely *Muhammad Ibrahim* v. *Ram Chandra* (5) where it is implied in the judgment that a debtor who wishes to get his adjudication annulled on the ground of payment of his debts in full under S. 35 of the Act must pay the creditors at the higher rate of interest mentioned in S. 48 (2), if they are entitled to it. With respect, if payment of the debts in full within the meaning of S. 35 of the Act means payment of the higher rate of interest, should the creditors be entitled to it, then it does not appear to be correct that we should interpret " payment of creditors in full " in S. 67 of the Act in a different way.

Mr. Viyanna has drawn our attention to several English cases, which show how this matter has been treated in bankruptcy in England. He has cited four cases which extend from the middle of the eighteenth century to the middle of the nineteenth century, namely, *Bromley* v. *Goodere* (2), *Ex parte Morris* (6), *Ex parte Mills* (7) and *Bower* v. *Morris* (8), all to the effect that a creditor is entitled, if there is eventually a surplus in the debtor's estate, to get interest at the contract rate from the date of the commission, which corresponded to our date of adjudication here, up to the date of payment. Those cases were quoted and followed by Bittleston, J., in *In re Alexander Maclean* (9) which was approved by Scotland, C. J., in *In re Thomas Pareira* (10). Lord Hardwicke in the first of those cases allowed from the surplus of the debtor's estate interest at the contract rate from the date of the commission and found that that was in accordance with the Bankruptcy Law of England from the time of the Statute of 13 Elizabeth. In Act 6 of Geo. 4 in 1825 statutory recognition was given to that practice. That we find repeated in S. 197 of Acts 12 and 13 Vic. in 1849. After the Act of 1849 there were the Bankruptcy and Insolvency Act of 1861 and the Bankruptcy Act of 1869. They do not touch the provision in this respect in S. 197 of the Act of 1849. But, when we come to the Bankruptcy

(4) A. I. R. 1926 All. 361=97 I. C. 556.

(5) A. I. R. 1926 All. 289 = 92 I. C. 514 = 48 All. 272.
(6) 30 E. R. 266.
(7) 30 E. R. 640.
(8) 41 E. R. 525.
(9) [1861] 1 M. H. C. R. 220.
(10) [1863] 1 M. H. C. R. 217.

Act of 1883, we do find a distinct change. In the Act of 1883 there is a provision in S. 40 (5) exactly corresponding to S. 61 (6) of our Act, except that the rate to be paid out of the surplus on all proved debts is 4 per cent instead of 6 per cent and there is also in S. 65 of the Act of 1883 a provision exactly similar to that of our S. 67 entitling the insolvent to get back the surplus after payment of the creditors in full with interest as provided in the Act. If those two provisions were read together, they might be interpreted as purposely departing from the regular course of the English law as shown in the decisions and statutes I have mentioned up to that time and so taking away from the creditor the right to get out of the surplus interest at the contract rate and reducing all the creditors to the same level so that they could only get after the date of adjudication interest at 4 per cent, however large the surplus might be, corresponding to our 6 per cent. But it is to be noticed that soon after the Bankruptcy Act of 1883 came into force it was found necessary to amend it in a number of ways, and so an amending Act was passed in 1890.

That amending Act by its S. 23 introduced into the Act of 1883 exactly the provision which we now find in S. 48 (2) of our Act. What can that mean but that the creditor's right to get out of the surplus the higher contract rate of interest, if he was entitled to it, as he had been able to up to the Act of 1883, was restored to him, if it were thought that it had been taken away by the Act of 1883 ? If the history of the matter is looked at in that way, it is impossible, I think, to avoid the conclusion that by the Act of 1890 it was ultimately intended to affirm the creditor's right to get out of the surplus, if sufficient, what he had been able to get up to the Act of 1883, namely, interest up to the date of payment at the contract rate unless it were disallowed by the Court for some special reason. In the subsequent Bankrutcy Act of 1914 in England we find all those three provisions, corresponding with our Ss. 61 (6), 67 and 48 (2) repeated; and again they appear in our own Act. Although of course we cannot go to the other Acts for the direct interpretation of the Act which governs us here, the history of this matter in England both in statutes and decisions is, I think, enlightening and confirms what appear to me to be the proper grammatical interpretation of the provisions in our own Act. In my opinion the creditor in this case is entitled to get his contract rates of interest on his proved debts from the date of the adjudication to the date of payment unless there is some special reason for reducing those rates.

I may add that the interpretation of the Act which I have adopted appears to me to be in accordance not only with the wording of the Act and the history of the matter but with practical convenience. If the interpretation contended for by the appellants were accepted, then it would be possible for a dishonest person, who happened to be liable to pay very high interest on certain debts but had ample property for doing so to present an insolvency petition praying that he should be adjudged an insolvent and by getting himself adjudged at one stroke to reduce the rate of interest on his debts to 6 per cent from that date. I should be sorry if I were obliged to adopt an interpretation of the Act which gave room for such manoeuvres. In this case what has been found eventually is that the insolvents had a large amount of property, much more than what was necessary to pay all their debts, when they put in their insolvency petition they tried to reduce their ostensible property by a number of transfers which had to be set aside under the provisions of the Act. Their case appears to be one in point.

In my opinion this appeal should be dismissed with costs.

A memorandum of cross-objections has been put in by the respondent. The learned District Judge as I have mentioned, ordered that the respondent should get interest at 18 per cent on his principal out of the surplus. The respondent claims that he should get 48 per cent on one debt and 19 per cent on the other which are the contract rates. Now I have no doubt that when those claims were first put forward for proof, they could have been kept down under the Provincial Insolvency Act in insolvency proceedings to reduced rates of interest which appeared proper in the circumstances. It happens that that was not done. That was in my opinion the

proper time for making the reduction. The learned District Judge has exercised the same jurisdiction at this late stage when the respondent has made a claim to a part of the surplus. Although I think that the respondent's claim should have been dealt with at an earlier stage as the learned District Judge has allowed him 18 per cent interest I see no sufficient reason for interfering with the order which was eventually made in regard to the surplus. In my opinion the memorandum of cross-objections also should be dismissed with costs.

Anantakrishna Ayyar, J. — The question raised in this case is whether a creditor of the insolvent to whom money is due under a promissory note which provides for a higher rate of interest than 6 per cent per annum, is entitled to get interest, on the principal amount due to him on the date of the adjudication at the contract rate mentioned in the promissory note for the period between the date of adjudication and the date of payment of the principal amount by the Official Receiver, or whether he is entitled to interest during that period only at 6 per cent per annum, when there is a sufficient surplus of assets in the hands of the Official Receiver after paying the amount of debts included in the schedule.

To answer this question it is necessary to consider Ss. 33, 34, 48, 61 and 67, Provincial Insolvency Act 5 of 1920. Under Ss. 33 and 34 the creditors are entitled to tender proof of their debts including interest at the rates provided for in the promissory notes, etc. Under S. 48 (2), where a debt which has been proved under the Act includes interest . . . . . "the interest shall, for the purpose of dividend, be calculated at a rate not exceeding 6 per centum without prejudice to the right of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full. Under S. 61, sub-S. (5), subject to the provisions of the Act, all debts entered in the schedule shall be paid rateably according to the amounts of such debts respectively and without any preference. Under sub-S. (6):

"where there is any surplus after payment of the foregoing debts it shall be applied in payment of interest from the date on which the debtor is adjudged insolvant at the rate of 6 per centum per annum on all debts entered in the schedule."

Under S. 67:

"The insolvent shall be entitled to any surplus remaining after the payment in full of his creditors, with interest as provided by this Act, and of the expenses of the proceedings taken thereunder."

The insolvent relies on Ss. 61 and 67; whereas the creditor relies on S. 48 (2). The question is what, on a proper construction of the provisions of the Act are the exact rights of the creditor in respect of the claim for interest in question, the surplus in the hands of the Official Receiver being more than sufficient to pay the creditor the interest claimed, if he be entitled to the same.

The question was elaborately argued before us, and our attention was drawn to the following decisions of the Indian Courts : *In re Alexander Maclean* (9), *Subbarayalu* v. *Rowlandson* (11) at pp. 136 and 139, *Ganga Sahai* v. *Mukarram Ali Khan* (4), *Mohammad Ibrahim* v. *Ramachandra* (5), *In re Mahomed Shah* (12) and *Kanto Mohan Mullick* v. *John Carapiet Galstaun* and *the Official Assignee of Bengal* (1).

When a debtor is adjudged insolvent, the Official Receiver has to frame a schedule of creditors and debts proved under the Act. Creditors, in respect of debts provable under the Act, shall tender proof of their debts, and such proof is to include proof of the interest on such debts claimed by them under the terms of their contract with the insolvent. Neither the Court nor the Official Receiver could disallow proof in respect of such interest. The schedule of debts thus prepared should therefore mention the amount due to the creditor both in respect of the principal and interest under the terms of the document proved by the creditor, up to the date of adjudication. I am not here concerned with the question whether if the contract rate of interest be extortionate or unconscionable, the same could not be reduced and a reasonable rate of interest substituted by the Court. When I speak hereafter, of the contract rate of interest, I mean, for the purpose of this judgment, the higher rate of interest mentioned in the contract between the parties, or the reduced rate of interest substituted by the Court, having regard to the Usurious

(11) [1891] 14 Mad. 133.
(12) [1886] 13 Cal. 66.

Loans Act, or otherwise, both rates being higher than the rate of 6 per cent mentioned in S. 48 of the Act. Under S. 48 (2), when declaring dividend, the principal amount of such debt and only interest at a rate not exceeding 6 per cent, could be taken into account, and on the amounts so arrived at, dividend should be declared. But if there be a surplus after all the debts proved have been paid in full, then the creditor has got right:

"to receive out of the debtor's estate any higher rate of interest to which he may be entitled."

The fixing of the lower rate of interest (which I call 6 per cent) on the principal amount of debt up to the date of adjudication is only for the purpose of declaring a dividend when the assets are not enough to pay the creditors full 16 annas in the rupee. When it is found that there is a surplus, then the creditors are entitled to be paid not only the lower rate of interest mentioned in S. 48 (2), but the higher rate of interest mentioned in their contracts, and of which interest, proof has been given under Ss. 33 and 34. When there is still a surplus left after paying the debts mentioned in the schedule (made up of the principal plus interest at the contract up to the date of adjudication), the creditors would be entitled to interest from the date of adjudication to the date of actual payment by the Official Receiver. It is argued for the insolvent that such rate of interest should only be 6 per cent under S. 61 (6), whereas the creditor claims interest at the contract rate on the principal amount of the debt from the date of adjudication to the date of payment, relying on S. 48 (2), as there is a large surplus in this case in the hands of the Official Receiver.

It is clear that a creditor is entitled to tender proof of the contract rate of interest and that proof claiming such contract rate of interest higher than 6 per cent could not be rejected : *Re-Herbert, Ex parte Jones* (13). No debt (whether principal or interest) which has not been proved could be considered nor paid in the course of proceeding under the Insolvency Act. Therefore a creditor is entitled to prove for principal plus contract rate of interest in respect of his debt; but for the purposes of dividend (when assets are not sufficient to pay the debts in full), interest must in the first instance be calculated at a rate not exceeding 6 per cent under S. 48 (2) ; by reason of interest being calculated at that rate of 6 per cent only, the creditor is however not to be prejudiced or debarred from claiming any higher rate of interest to which he may be entitled; but that higher rate of interest could be claimed only in a case of surplus : see *Re-Herbert, Ex parte Jones* (13) and *Kanto Mohan Mullick* v. *John Carapiet Galstaun* and *the Official Assignee of Bengal* (1).

Section 48 (2) enacts that if there be a surplus after all the debts proved have been paid in full, the creditor is not to be prejudiced in his right to receive out of the debtor's estate any higher rate of interest to which he may be entitled. The expression "the debts proved" connotes the principal plus interest up to the date of adjudication at the contract rate proved under S. 33. Therefore after the principal plus interest at the contract rate proved have been paid, it would seem that such a creditor would be entitled not simply to interest at 6 per cent mentioned in S. 61 (6) from date of adjudication to date of payment, but to interest at the higher rate under his contract, if there be sufficient surplus assets left in the hands of the Official Receiver to satisfy the same. Otherwise, it is difficult to give effect to the last ten words in S. 48 (2). Under S. 61 (5):

"all debts entered in the schedule shall be paid rateably according to the amount of such debts respectively and without any preference."

The expression "all debts entered in the schedule" are wide enough not only to cover the principal plus interest at 6 per cent fixed by the Court under S. 48 (2), but also the principal plus the contract rate of interest proved, if there be assets enough for the purpose. If there be still a further surplus, then, as I understand S. 61 (6) read with S. 48 (2), the same is to be utilized for paying interest on the principal debt at the contract rate proved, from the date of adjudication to the date of payment, when there is a rate of interest fixed in the contract, and at 6 per cent in other cases, as when the contract fixes no rate of interest or fixes only a lesser rate. S. 61 (6) does not, in my view, conclu-

(13) 9 Morrel. 253.

sively operate to cut down the contract rate of interest on the principal amount to 6 per cent for the period between the date of adjudication and the date of payment, when the surplus in the hands of the Official Receiver is more than enough to satisfy the same. The rate of interest, 6 per cent, mentioned in S. 61 (6) is primarily to provide for those cases where the surplus does not admit payment of more than 6 per cent to any class of creditors. The object is not, as I said, to reduce the rate of interest fixed by the contract between the parties, when the assets are enough and there is a surplus. Ss. 48, 61 and 67 should be read together, and if possible such a construction should be placed on them as would make the said provisions not inconsistent with each other.

The learned advocate for the insolvent argued that when creditors prove their debts and proof is accepted, they are in the position of decree-holders, and he urged that after the date of decree, the decree-holder is not entitled to the contract rate of interest, but only to interest at 6 per cent, according to the provisions of the Civil Procedure Code, and also according to the practice of the Courts and he submitted that that is the policy underlying S. 61 (6), Provincial Insolvency Act. Though at first sight that argument looks plausible, yet having regard to the principles laid down in the early English cases, and to the history of legislation in England relating to this matter, (the Indian Acts closely follow the provisions of the English Act in this matter), and also having regard to the express provisions of S. 48 (2), I am of opinion that that argument should not be accepted, when there is a sufficient surplus. The analogy to the case of a decree passed by a civil Court is not complete, and should not be pressed too far. Under the Act the adjudication may be annulled, in which case the creditors are restored to their former position. Again a creditor, if left to himself, is entitled to choose his own time for filing a suit to recover his money; and till the date of plaint, if not till date of decree, Courts ordinarily award the contract rate of interest. In the case of proceedings in insolvency, the creditor has no option as to the time when he will put his claim into Court, but is compelled to prove his claim before a particular period, so that he may share in the very first dividend that may be declared. It is a principle underlying administration in insolvency that no debt which is not proved could be paid or satisfied in insolvency proceedings by the Official Receiver and also that all claims of the creditors who have proved their debts should be dealt with in the insolvency proceedings. S. 61 (6) will have full scope in cases where no interest is fixed in the original contract, or where the contract rate does not exceed 6 per cent thus leaving S. 48 (2) to have full operation in cases where the contract rate is higher than 6 per cent. The two provisions could stand together in cases where there is surplus, and it is a principle of law that the substantial rights of parties should not be interfered with except to the extent to which they have been interfered with either expressly or by necessary inference by any enactment.

When we come to S. 67 we find that the insolvent shall be entitled to any surplus remaining after payment in full of his creditors. The expression "debts proved" or "debts entered in the schedule" do not occur in S. 67. The insolvent's right to any surplus comes in only "after payment in full of his creditors." The addition of the words "with interest as provided by this Act," occurring in S. 67, seems to indicate that payment to a creditor would be full only when he has been paid also interest as provided by the Act. The Act provides for interest at 6 per cent by S. 61 (6) from the date of adjudication on all debts, even though they did not carry interest under the contract, it having already provided for a similar rate till date of adjudication under S. 48 (1). Thus in respect of debts which do not carry interest under the terms of the contract, practically 6 per cent is allowed; but in respect of debts which carry a higher rate of interest under the contract, the right of the creditor to receive out of the debtor's estate the higher rate of interest to which he may be entitled under his contract, is preserved by S. 48 (2), if there be surplus assets available. The words in S. 67 are "with interest as provided by this Act, *not* as provided by S. 61." Therefore questions as to rate of interest would be governed by Ss. 48 and 61, among others,

according to there being surplus or not. This view does not work injustice either to the creditors or to the insolvent. No question of dividend arises, because ex hypothesi assets exceed the debts in whatever way interest is calculated, there being still a surplus. If there be no insolvency proceedings, the creditor would be entitled to the contract rate of interest (the Court's power to reduce unconscionable rates of interest, apart).

The insolvent could not take advantage of his insolvency to cut down the rate of interest agreed to by him when there is such surplus and when no question of the rate being unconscionable arises. Otherwise the debtor could cut down the rate of interest agreed upon, to 6 per cent by getting himself adjudicated insolvent, and benefit himself by prolonging the proceedings. The object and policy of the Insolvency Act do not seem to me to bring about such a result. The object is to distribute the assets rateably among the creditors. If however there be assets enough, then, unless there be any specific provisions in the Act to the contrary, every creditor is entitled to be paid the full amount of his debt principal plus interest agreed upon. Besides the sections already noticed, our attention has not been drawn to any specific provision in the Act which expressly deprives the creditor of such a right; nor even of any provision in the Act which by necessary inference leads to such a result.

The wordings of the above sections of the Provincial Insolvency Act have been borrowed from the English Bankruptcy Act of 1883 as amended by S. 23 of the Act of 1890, and the Act of 1914. Our attention has been drawn by the learned advocate for the creditor to certain very early decisions of the English Courts which lay down the principle that in case of surplus, the creditor is entitled to the principal plus interest at the contract rate till the date of payment. In *Bromley* v. *Goodere* (2), the Lord Chancellor made the following observations at p. 50 :

" All bankrupts are considered in some degree as offenders. They are called so in the old Acts, and all the Acts are made to prevent their defeating and delaying their creditors, and it would be an extraordinary thing that the delay of payment should prevent the creditors from having interest out of an estate able to pay it, when interest in all cases is given for delay of payment."

At p. 51, the learned Lord Chancellor further remarked :

" The surplus to be paid over to the bankrupt is only the surplus after payment of the whole debts; for it would be vain to pay any other surplus, when it might have been recovered from him again by the creditors."

The Court gave directions that upon contracts or notes carrying interest, the interest at the rates therein specified, and where no rate of interest is specified at the rate of 6 per cent until reduced by Act of Parliament to 5 per cent, be calculated and the creditors paid, and the balance only handed over to the insolvent.

In *Ex parte Morris* (6) Lord Chancellor Thurlow decided that :

" upon a bankruptcy, there being a surplus, subsequent interest was to be given to the creditors, and that nothing but want of assets need stop the rate of interest claimed by the creditors", while holding that compound interest should not be allowed, in the absence of specified agreement to that effect. The Court held that "the whole must be computed as running interest."

In *Ex parte Mills* (7), the Lord Chancellor decided that :

" in case of a surplus coming to a bankrupt creditors have a right to interest wherever there is a contract for it appearing either on the face of the security or by evidence."

At p. 643, it was observed :

"It was with surprise, that I heard that case of *Bromley* v. *Child* (14), questioned. It has now been fifty years confirmed by every Judge who has sat in this Court ..... Nothing but an express specific provision to declare that all debts should be taken with a stop as at the time of the bankruptcy would have induced me to make a conclusion against the principle upon which the Act was made for the benefit of the creditors not of the bankrupt. The fund belongs to the creditors. It goes on and produces considerable profits. The surplus after full satisfaction belongs to the bankrupt. Till that in natural justice the creditors have a right to retain it against any claim the bankrupt can set up."

The Court directed the order to be drafted as follows :

"To compute interest upon such debts, as either upon the face of the security or by force of the contract between the parties carry interest: p. 644."

As observed by the Lord Chancellor at p. 643 of 30 *E. R.* [*Ex parte Mills* (7)]: in cases of Bankruptcy a surplus is unfortunately a very rare case; and as further observed in *Bower* v. *Morris* (8), at p. 528:

"Indeed, the instances of there being a surplus are so few that there have not been materials for establishing a practice."

(14) 1 Atk. 259.

At p. 527, it is stated that

"the interest stops at the date of commission, and though subsequent interest becomes due, it is not provable under the commission. The bankrupt's estate is taken from him by the commission; and the law in order to make an equal division amongst the creditors, pays to each a dividend upon the debt proved. But this is merely an arrangement for the convenience of the debtor's creditors. The bankrupt continues indebted for the principal and the interest accrued since the commission, although his certificate, if he obtains one, protects him against the liability to the debt, and being so indebted payments are made out of his estate to the obligee. . . . . Suppose the bankrupt does not obtain his certificate, but afterwards acquires and is sued by the obligee, ought not the obligee to be entitled to compel payment of all he could have demanded if there had not been any bankruptcy? Supposing the assignees realize a surplus of the estate, ought the obligee, in the case supposed, to suffer, and the bankrupt's estate to benefit by the bankruptcy?"

Again,

"interest is stopped at the date of the commission, because it is supposed that the estate will be deficient; it proves to be more than sufficient, why is the creditor to suffer and the bankrupt to benefit . . . ."

These are cases decided in England about a 100 years ago. Our attention was drawn generally to the English statutes relating to bankruptcy, and particularly to the Bankruptcy Act of 1883 as amended in 1890, and to the Bankruptcy Act of 1914. What we have been able to gather therefrom with reference to the question now before the Court, viz., the creditor's right in respect of the contract rate of interest proved, between the date of commission (adjudication) and the date of payment, if there is a surplus, is this: Prior to 1883, the English Bankruptcy Courts gave the creditor interest at the contract rate in such cases, provided there was sufficient surplus. The English Bankruptcy Acts till 1883 either contained provisions which were taken as justifying such a course or did not contain any specific provisions on the point. The statute of 1883 however contained two provisions: S. 40, Cl. 5, and S. 65, which substantially correspond to Ss. 61 (6) and 67 of our Provincial Insolvency Act of 1920. As there was not in the English Act of 1883 any provision corresponding to S. 48 (2) of our Act, evidently difficulty was felt, with the result that in 1890, an amending Bankruptcy Act was passed, S. 23 of which corresponded to sub-S. 2 of S. 48 of our Act.

In Robson on Bankruptcy, it is stated, and no doubt quite correctly, that S. 23 of the Act of 1890 was enacted to give greater benefit to creditors. The provisions of S. 23 of the Act of 1890, found a place in the Provincial Insolvency Act of 1907, (S. 32), and, as already stated, sub-S. 2, S. 48 of the present Insolvency Act of 1920 is a reproduction of S. 23 of the Act of 1890. In the Bankruptcy Act of 1914, S. 66 re-enacted S. 23 of the Act of 1890, and that Act of 1914 further contains Ss. 33 (8) and 69 which correspond to Ss. 61 and 67 respectively of our Provincial Insolvency Act of 1920. It cannot be questioned that the Indian legislature has been borrowing from the English Bankruptcy Act when enacting the Insolvency Acts in this country. No doubt Courts in India are bound, in the first instance, to construe the words of the Indian Act, whenever any question arises, and in case of difference between the wordings of the Indian Act and the English Statute, Courts in India are bound to give effect to the words of the Indian Act, and confine themselves to the law as enacted by the words occurring in the Indian Act. Where however the language of the Indian Act and the English statutes is identical, I think Indian Courts are entitled to seek guidance and help from the decisions of English Courts in such matters.

Cases of surplus in the administration of an insolvent's estate are not matters of frequent occurrence. When such cases occurred in England, learned Judges there have held that the creditor is entitled to interest at the contract rate till date of actual payment, if there were sufficient assets in the hands of the Official Receiver. S. 61 standing by itself is capable of the construction contended for by the learned advocate, Mr. Chandrasekhara Sastri, who appeared for the insolvent; but we have the words of sub-S. 2, S. 48, also. Ss. 48, 61 and 67 have to be read together and, if possible, consistently. The history of S. 48 (2) helps the Court to understand the scope and implication of the words used in that subsection. With that history before us, and in the light of the English decisions, if we consider the meaning of the words:

"without prejudice to the rights of a creditor to receive out of the debtor's estate any higher rate of interest to which he may be entitled after all the debts proved have been paid in full,"

I think it is reasonably clear that the contention urged by Mr. Viyyanna, the learned advocate who appeared for the creditor, should be upheld.

I am glad to have been able to arrive at this result; for otherwise it will be a further inducement to dishonest debtors to apply for their adjudication, so that they could derive undue and unjust benefit by having the rate of interest agreed to be paid to their creditors reduced to six per cent for the period during which the adjudication subsists, though there is surplus in the hands of the official receiver.

The judgment in *In re Alexander Maclean* (9), is a very learned and instructive one. The remarks at p. 843, Edn. 8, of Lindley on Partnership, so far as they go, support the above view. The remarks of Venkatasubba Rao, J., in *Sabapathi Rao* v. *Sabapathi Press Co., Ltd.* (15) at p. 328 (of 54 *Mad.*), also support the general principle that in cases where there are enough assets, the rights of creditors should be worked out "in the ordinary way." In cases of winding up of companies by order of Court, though interest ceases to run from the date of the winding up order, yet interest at contract rate is payable if there are sufficient surplus assets.

The passages referred to at p. 136 of *Subbarayudu* v. *Rowlandson* (11) apply only to cases where there are not assets enough to pay in full the creditors, and a dividend only has to be distributed among the creditors. Having regard to the considerations mentioned above, I feel myself unable to agree with the observations in *Ganga Sahai* v. *Mukarram Ali Khan* (4) at p. 446, that interest at a rate higher than six per cent could not be allowed, after the date of adjudication, though it be the contract rate even in cases where there is surplus.

The learned Judge at p. 446 observes with reference to S. 48 (2) of the Act as follows :

"But this subsection merely reserves the right of a creditor and is not an enabling section."

If the suggestion is that the creditor in such a case would be entitled to obtain relief with reference to the higher contract rate of interest, by filing a suit for the same, then with all respect, I find myself unable to agree to the same. There are two fundamental principles underlying proceedings under the bankruptcy law : one is, that only such debts as are proved could be taken into account and paid and discharged in bankruptcy proceedings ; and the second is, that in respect of debts so proved, the creditor could not so long as the bankruptcy proceedings continue seek relief elsewhere than in the bankruptcy Court. I need not consider the case of a "secured" debt in respect of which there is a specific exception in the Act. Again, that suggestion does not (in my view) give full effect to the words "right of creditor to receive out of the debtor's estate" which occur in sub-S. 2, S. 48, since the reference to "the debtor's estate" prima facie means the estate which is being administered in bankruptcy. Lastly, the English cases and the history that lies behind this provision of law S. 48 (2) as a reference to the old English cases and the several Bankruptcy Acts in England would show, have not been referred to in that case.

For the above reasons, I am of opinion that on a proper reading of Ss. 48, 61 and 67 of the Act, the creditor's right to the contract rate of interest in such a case is not only not taken away, but is preserved by S. 48 (2), and that S. 61 only provides for cases where the contract rate is either less than six per cent or where no rate is fixed in the contract. In any event, unless the creditor's rights to such contract rate of interest is taken away either expressly or by necessary inference by any provision of law, he is entitled to be paid interest at such rate till the date of payment when the surplus in the hands of the official receiver is more than enough to cover such claim.

I accordingly uphold the contention of the learned advocate for the creditor in this respect.

The appeal accordingly fails and is dismissed with costs.

In the memorandum of objections, the creditor claims the contract rate of interest (48 per cent), which has been reduced by the learned District Judge to 18 per cent per annum. It is clear that the insolvency Court has jurisdiction, if a proper case be made out, to reduce the rate of interest 48 per cent mentioned in the promissory note. *Baijnath Pandan*

(15) A.I.R. 1930 Mad. 1012=129 I.C. 40=54 Mad. 324.

v. *The Estate of E. C. Dennet* (16) and *A Debtor In re the debtor Ex parte* (17) are authorities in favour of the view that the insolvency Court has got such power. If a suit had been filed by the creditor claiming 48 per cent per annum, it would be open to the Court in a proper case to reduce the rate of interest. If that be so, there is no reason why the insolvency Court should not have at least that jurisdiction, seeing that the creditor has to tender proof not only of the principal amount but also of the rate of interest claimed by him. Holding that the lower Court had jurisdiction to deal with the matter on the merits, I am not satisfied that any case has been made out for our interference in appeal.

The memorandum of objections is accordingly dismissed with costs.

Before parting with this case, I should like to draw attention to one point. A schedule of creditors and of debts proved has to be framed under S. 33, Insolvency Act. According to the form now in use the columns provide only for names of creditors and the amount of debts proved (principal debt plus interest fixed in the agreement, found by the Court to be proved, and calculated till date of adjudication). While information on these two points is of great use for various purposes under the Act, including the decision of compositions and schemes of arrangement proposed under S. 38, we have to remember that in the practical administration of the insolvent's estates (which in most cases are unable to pay the debts in full), dividends have to be declared in respect of only the principal amount of the debts and interest at rates not exceeding six per cent till date of adjudication, fixed by the Court under S. 48 of the Act.

As things now stand the schedule gives no information as to the amounts so due to the creditors ; the official receiver has to make calculations and keep a separate record of such amounts for the purpose of declaring dividends. As those latter are the real figures that have to be often referred to in insolvency proceedings in connexion with the dividends in most cases of insolvency, it is a question for consideration whether the schedule to be framed under S. 33 should not have also another column which would give information as to the amounts due to the creditors for the purpose of declaring dividend. Further, the Court has to fix a rate of interest for debts proved, for the purpose of declaring a dividend under S. 48. The rate is not to exceed six per cent. In practice I understand that no such rate is fixed. To regularize proceedings, it is necessary that when it is seen that the debts proved exceed the amount of assets, which are expected to be realized, then the Court should in the first instance, fix the rate of interest as contemplated in S. 48 for the purpose of calculating dividend, and thus comply with the instructions contained in S. 48.

P.R.S./R.M. *Appeal dismissed.*

(16) A.I.R. 1925 All. 400=88 I.C. 78=47 All. 745.

(17) [1903] 1 K. B. 705=72 L. J. K.B. 382=88 L.T. 401=51 W.R. 370=10 Manson 130=19 T.L.R. 288.

* A. I. R. 1931 Madras 740

RAMESAM, J.

Zarab Khan —Plaintiff—Appellant.

v.

Lal Bibi and *others*—Defendants—Respondents.

Second Appeal No. 1952 of 1927, Decided on 19th February 1931, against decree of Dist. Judge, Kistna, in A. S. No. 196 of 1925.

*** Mahomedan Law — Marzulmaut gift — Gift in Marzulmant is valid to the extent of its consideration.**

Should a man in his last sickness, acknowledge a debt to be due to his wife on account of dower, the acknowledgment will be good to such extent of the property as amounts to her proper dower, or such as it has been customary for her equals in condition to receive, but to no more. If the amount of dower which is the consideration for the gift is equal to the value of the property, then the gift should be entirely upheld. But if it is inadequate it will be upheld only to the extent of the consideration and no more. The decision in 2 *All.* 851 cannot apply to a case where the amount of dower which is the consideration is far less than the value of the property. Of course to the extent that the dower due supports the gift it is not vitiated at all. [P 741 C 2]

M two or three months before his death, executed a deed of gift in favour of his wife in consideration of dower (Rs. 250) which was far less than the value of the property (Rs. 1,650) gifted to her by the deceased. When *M* died he left behind him a widow, a brother and two sisters. *M's* brother, ignoring the gift, sold his 3/8ths share in the property to the plaintiff for consideration. Plaintiff thereupon sued for a declaration that the gift was not valid and did not bind the heirs and for recovery of his 3/8ths share, sold to him by *M's* brother in the property :

Held : that the gift was valid to the extent of its consideration and that the plaintiff was entitled to the share of the property not covered by consideration in the gift : 2 *All.* 854; 42 *Cal.* 361; 4 *I. C.* 466; 12 *I. C.* 457 and *A. I. R.* 1929 *Oudh* 439, *Dist.* [P 742 C 2]

Y. Govindarajulu—for Appellant.

G. Ramakrishna Ayyar—for Respondents.

Judgment.—In this case the point that arises for decision is one of Mahomedan law. The facts may be stated as follows : One Mohideen Khan died on 11th January 1917 issueless after having suffered from beriberi for two or three months before his death. Before his death he executed two documents (described as gift deeds) namely, Exs. 2 and 3, dated 13th November 1916 and 8th January 1917, respectively. We have nothing to do at present with the second deed in this case. When Mohideen Khan died he left behind him a widow, defendant 1, a brother Dada Sahib and two sisters, defendants 2 and 3. According to Mahomedan law if he had died intestate, the widow would be entitled to ¼th, Dada Sahib to 3/8ths and defendants 2 and 3 each to 3/16ths share of his property. Dada Saheb ignoring the gift deeds sold his 3/8th share in Mohideen Khan's property to the plaintiff by a sale deed dated 28th November 1922: Ex. A. The present suit is filed by the plaintiff for a declaration that the gift deeds are not valid and binding on the heirs and for recovery of 3/8ths share of the property. The District Munsif found that the gift deed, Ex. 2, was made for consideration, the consideration being dower due from Mohideen Khan to his widow. He dismissed the suit so far as Ex. 2 is concerned. On appeal the then District Judge of Masulipatam (now Curgenven, J.) held that Ex. 2 was executed when Mohideen Khan was suffering from death-bed illness and it is therefore vitiated by the doctrine of Marzulmout. He called for a finding as to the value of the property. When the case came back for disposal, another District Judge succeeded Mr. Curgenven and he held, differing from his predecessor, that Ex. 2 is not vitiated by the principle of Marzulmout. He found that the value of the property dealt with by Ex. 2 is Rs. 1,650 and that the dower due from Mohideen Khan to his wife was only Rs. 250. He therefore confirmed the decree of the District Munsif and the plaintiff now appeals.

In second appeal respondent 1's learned advocate made an attempt to question the finding that Mohideen Khan was in death-bed illness at the time of the execution of Ex. 2. Mohideen Khan was suffering from beriberi. He refers to his illness as the reason for the execution of Ex. 2. He was aged 60. He died two months after the execution of the document. Even if there is any apparent improvement during the interval, it does not matter. It is clear that Mohideen Khan died of beriberi and was under the apprehension that he would die of it when he executed Ex. 2. The finding must therefore be accepted. The question next arises how far is a gift for consideration particularly where the consideration is the dower due to the wife affected by the principle of Marzulmout, where the consideration for the gift is inadequate. It is never suggested that so far as it is supported by consideration that portion is invalid. Any attack against the gift can be made only in respect of the portion not supported by consideration. This distinction seems to have been overlooked by the District Judge. The earliest case in the reports is *Ghulam Mustafa* v. *Hurmat* (1) and that case is based upon Case No. 21 in Macnaghten's Precedents of Marriage, Divorce, etc. It was said in the answer:

> "Should a man in his last sickness, acknowledge a debt to be due to his wife on account of dower, the acknowledgment will be good to such extent of the property as amounts to her proper dower, or such as it has been customary for her equals in condition to receive, but to no more."

This answer is very plain. But unfortunately its wording seems to have been ignored by the learned District Judge. If the amount of dower which is the consideration for the gift is equal to the value of the property, then the gift should be entirely upheld. But if it is inadequate it will be upheld only to the extent of the consideration and no more. In the decision in *Ghulam Mustafa* v. *Hurmat* (1) the amount of dower due was far more than the value of the property and therefore the whole of the transfer was upheld in that case. That decision is therefore perfectly correct. It cannot apply to a case where the amount of dower which is the considera-

(1) [1879] 2 All. 854.

tion is far less than the value of the property. That case is therefore distinguishable on that ground and cannot help the respondents. So also in the case in *Esahaq Chowdhry* v. *Abedunnessa Bibi* (2) there was no suggestion that the amount of dower was less than the value of the property. No such question was discussed or raised. We must assume that in that case the amount of dower was equivalent to or more than the value of the property. That in such a case the transaction cannot be affected by the principle of marzulmout is all that that case decided. It is curious that Richardson, J., who agrees with Fletcher, J., does not refer to case No. 21 in the Precedents of Macnaghten relating to Marriage, Divorce, etc. but to case No. 12 in the Precedents of Gifts which was not a case relating to dower. Anyhow the decision in *Esahaq Choudhry* v. *Abedunnessa Bibi* (2) cannot help the respondent or support the lower Court's decision. Two other decisions referred to by the lower Court are *Abbas Ali Shikdar* v. *Karim Baksh Shikdar* (3) and *Bilijambi* v. *Hazrath Saib* (4) and they are not cases of transactions during death-bed illness and are not relevant to our present case. It is true that in *Abbas Ali Shikdar* v. *Karum Baksh Shikdar* (3) it was said:

"Any consideration such as a copy of Koran will support a gift for consideration."

That is true but it is not in a case of a transaction which was affected by marzulmout. It is a simple hiba bil evaz. The principle of marzulmout is stated in Bailie's Mahomedan Law, Vol. 2, p. 212:

"If one in death illness should make a wakf a gift, a muhabat sale . . . and neither of the acts is allowed by his heirs, all are valid if they can be carried into effect out of a third of his estate."

The principle is really a general principle. It applies to wakfs; it applies to a gift even if it is for consideration, when consideration is inadequate so far as the portion not supported by consideration is concerned and to a muhabat sale, that is a contract of sale for inadequate consideration. The principle is also stated at p. 57 of Ameer Ali's Mahomedan Law, Vol. 1. No exception is stated that it does not apply to a case of gift for dower. Of course to the extent that the dower due supports the gift it is not vitiated at all. Any contention in favour of the application of the principle is only in respect of that portion which is not supported by the dower and to that extent no exception has been made by any text-book writer. After all the dower is only one kind of consideration and it does not differ from any other kind of consideration and if the principle applies even to contracts or sales for indequate consideration, it equally applies to a gift in consideration of dower. Ameer Ali, p. 578, Illus. (d), shows that it applies to muhabat sales: vide also Ameer Ali—the illustration stated at pp. 160 and 161. Tyabji's Mahomedan Law, p. 670, Illus. 4 applies the principle of marzulmout to a mohabat sale. The principles are stated in S. 600 at p. 814. Illus. 2 is the case of deathbed gift for consideration which is inadequate. Illus. 4 is the case of muhabat sale. No exception is stated in the section itself in favour of a gift where the consideration is dower. Mr. Ramakrishnier relied on a case from the Oudh Chief Court reported in *Sadiq Ali* v. *Mt. Amiran*, *A. I. R.* 1929 *Oudh* 439.

On a perusal of the judgment I find that none of the reasons adverted to by me were present before the learned Judges who decided that case. Neither the case No. 21 in Macnaghten's Precedents was referred to nor the other text-books. It is therefore of no authority and cannot help the respondent. I am therefore of opinion in this case that Ex. 2 should be supported to the extent of Rs. 250 and as the donee is an heir, the rest of it is invalid. Of the rest of the property worth about Rs. 1,400 the plaintiff will be entitled to three-eighths of it. Three eighths of Rs. 1,400 is equivalent to Rs. 525 and Rs. 525 is seven-twenty-second of Rs 1,650. The plaintiff is therefore entitled to recover seven-twenty-seconds share of the property covered by Ex. 2 besides the share decreed in the property covered by Ex. 3 by partition. There will be a preliminary decree for partition to that effect. The District Munsif will appoint a commissioner to separate the plaintiff's share of the properties and will give a final decree for that share. The plaintiff will also be entitled to mesne pro-

(2) [1915] 42 Cal. 361=28 I. C. 692.
(3) [1909] 4 I. C. 466.
(4) [1911] 12 I. C. 457.

fits from the date of plaint up to three years from the date of the final decree. The appellants will have their proportionate costs throughout.

The appeal having been set down to be spoken to this day, the Court made the following

Order

Defendants 2 and 3 (respondents 2 and 3) will be entitled to a decree for seven-forty-fourths share each on paying the proper court-fees before the passing of the final decree.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1931 Madras 743

PANDALAI, J.

Ramji Das Iyer—Defendant — Petitioner.

v.

A. Nayinar Rowthan and *another*—Plaintiffs—Respondents.

Civil Revn. Petns. Nos. 1364 and 1365 of 1929, Decided on 24th March 1931, against decrees of District Munsif, Dindigul, in S. C. S. Nos. 1530 and 1531 of 1928.

Madras Estates Land Act (1908), Ss. 189 and 213—Suit by tenant for recovery of money unlawfully collected by landlord is one for damages and civil Court has no jurisdiction to try it.

Where money is by abuse of the process provided by the Estates Land Act unlawfully collected as rent by a landlord from a tenant a suit by the latter for its recovery whether it be called one for money had and received, or one for compensation or one to enforce the obligation declared by S. 72, Contract Act, is one for damages under S. 213, and therefore a civil Court has no jurisdiction to try such a suit. 34 *I. C.* 480 and 39 *Mad.* 239 (*F. B.*), *Ref.* [P 744 C 1]

T. R. Venkatarama Sastriar and *T. B. Balagopal*—for Petitioner.

B. Sitarama Rao and *S. R. Muthuswami Ayyar*—for Respondents.

Judgment.—The petitioner in both cases who is a landholder under the Estates Land Act, was the defendant in two Small Cause Suits brought by two raiyats within his estate for recovery with interest of certain sums of money paid by them under protest to the Collector about nine months before the institution of the suits under S. 131 of the Act to set aside sales under the Act of their respective holdings for alleged arrears of rent due by them. Two objections were taken by the defendant-petitioner: (1) that the civil Court had no jurisdiction to entertain the suits by reason of Ss. 189 and 213, Estates Land Act, and (2) that in any case the Small Cause Court has no jurisdiction as the suits were excluded by item 35 (j), Sch. 2, Provincial Small Cause Courts Act. These objections were overruled by the Small Cause Court. The first point in these petitions is whether that view is correct. The petitioner also complains that after hearing the pleaders on the objection as to jurisdiction the Court gave final judgment for plaintiff without going into the merits and giving him (petitioner) an opportunity of showing that the arrears for which the sales were held were legally due as pattas and muchilikas had been previovsly exchanged and that the view of the lower Court that the question was res judicata by reason of the decision of the District Judge in two suits between the parties is wrong as Second Appeals Nos. 250 and 251 of 1929, had been filed in this Court against those decisions on 16th December 1928 before the decision of the lower Court. Those second appeals are still pending and in any view of the case, the cases will have to go back for trial on the merits. But in view of the questions raised as to jurisdiction it is necessary to decide it first.

Reading Ss. 189 and 213, Estates Land Act, together it is clear that if the suits can be described as brought by any person deeming himself aggrieved by any proceedings taken under any colour of the Act to seek redress by way of suits for damages, they should have been filed before the Collector and no civil Court has any jurisdiction in the case. The District Munsif was of opinion that the suits were not for damages because all that is claimed is a refund of the excess rents which plaintiffs were compelled to pay to save their holding. As to the claim for interest he says that it can hardly be said to be one for damages for proceedings taken under colour of the Act. I suppose he meant that the interest arose not out of anything done under colour of the Act but out of unlawful detention by the defendant of the money unlawfully collected under colour of the Act. If so, it is a distinction without a difference. It cannot be that if the money was collected under colour of the Act, a suit for its recovery with the interest lost during its wrongful deten-

tion which is the natural consequence of such detention is not for redress for something done under colour of the Act. The real and the only question is whether a suit for refund of money wrongfully collected as arrears of rent under colour of the Act is a suit for damages within the meaning of the section.

In my opinion it is. Arguments drawn from the old English forms of action and pleading are not in my opinion of much use to interpret the meaning of the expression "suit for damages" in this section. Forms of action are unknown in Indian practice. I therefore do not propose to examine whether these were cases in which the plaintiff might have waived the tort. Nor do I think that the respondents can get any support from the decision of the Privy Council in *Kanhaya Lal* v. *National Bank of India Ltd.* (1), for the distinction sought to be made between a suit for the recovery of the actual sum extorted by illegal prccess and a suit for damages for a larger or smaller amount. In my opinion it is not the amount that matters, whether it be the same as, or more or less than the amount extorted, but the nature of the claim. Where money is by abuse of the process provided by the Estates Land Act unlawfully collected as rent by a landlord from a tenant a suit by the latter for its recovery whether it be called one for money had and received, or one for compensation or one to enforce the obligation declared by S. 72, Contract Act, is in my opinion one for damages under S. 213. This view is all but concluded by the observation of the Judges in *The Rajah of Vizianagaram* v. *Narasimha Raju* (2). That was a suit by the plaintiff, a stranger, whose lands were put up for sale by the landholder, for arrears of rent due by a tenant on the footing that the lands were included in the holding. The plaintiff preferred a claim which was dismissed. Then he paid the alleged arrears under protest under S. 122 of the Act and brought a suit in a civil Court for its recovery. The Judges differed on the question whether the plaintiff being a stranger and not the tenant was bound under S. 213 to bring the suit before the Collector. But they agreed that if the plaintiff were the tenant the claim was such that he would be bound to sue before the Collector. Seshagiri Iyer, J., observed :

"next coming to S. 213, I agree with Mr. Sarma that that section applies only where the relationship of landlord and tenant subsists, and where the landlord has used the remedies given by the Act wrongfully."

He then went on to distinguish the case before him on the ground that the plaintiff was a stranger and continued :

"I take the scope of S. 213 to be to give a speedy remedy as between landlord and tenant in matters in regard to which the landlord, while purporting to invoke the aid of the Act has failed to comply with the provisions enacted therefor. The object is to give a summary remedy to those against whom irregularities in procedure have been committed."

Bakewell, J., was equally clear:

"Clearly respondent 1's remedy was under S. 72, Contract Act, for repayment of money paid under coercion as against respondent 1 and his suit would be one for damages. Under the English Common law an action on the case would lie under these circumstances upon an implied assumpsit and the measure of damages would be the amount paid by the plaintiff."

In the view Seshagiri Iyer, J., took of the rights of the plaintiff in that suit his remarks about suits by tenants were no doubt obiter. But they show that both he and Bakewell, J., entertained no doubt that cases like the present fall within S. 213. Reference may also usefully be made as to the scope and object of S. 213, to the remarks in *Narayanaswami* v. *Venkataramana* (3), at pp. 248 and 250 that Cl. 2 of that section saves the civil Courts' jurisdiction only where the suit is not brought for the relief of pecuniary damages but for other remedies (e. g., injunction, declaration or possession), if any, open to the plaintiff under the ordinary law. I therefore think that the lower Court as a civil Court had no jurisdiction to entertain these suits. The reason why the plaintiffs resorted to the civil Court is probably that they for some reason had exceeded the period of three months allowed under item 21, Part A, of the Schedule of the Estates Land Act to institute the suits before the Collector.

In the view above taken it is not necessary to go into the question whether, if the jurisdiction of the civil Court was not barred the suits were cognizable by a Small Cause Court.

(1) [1913] 40 Cal. 598=40 I. A. 56=18 I. C. 949 (P. C.).
(2) [1916] 34 I. C. 480.
(3) [1916] 39 Mad. 239=31 I. C. 326 (F.B.).

In the result the decrees of the lower Court are set aside and the plaints will be returned to the plaintiffs to be presented to the proper Court. The respective plaintiffs in both suits must pay the costs of the defendant (petitioner) here and in the lower Court.

P.R.S./K.N. *Revision allowed.*

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* A. I. R. 1931 Madras 745

REILLY AND ANANTAKRISHNA AYYAR, JJ.

P. Alagirisubba Naik and *others* — Appellants.

v.

Official Receiver of Tinnevelly and *others*—Respondents.

Letters Patent Appeal No. 114 of 1929, Decided on 8th January 1931, against decision of Curgenven, J., D/- 9th October 1929.

*** (a) Provincial Insolvency Act (1920), Ss. 4, 53 and 75 — Proceedings under S. 53 are not covered by S. 4.**

The legislature did not intend S. 4 to embrace proceedings under S. 53 and the words "subject to the provisions of this Act" in S. 4 mean "excluding questions otherwise provided for by the provisions of this Act." [P 747 C 1]

Before one seeks to apply S. 4 to any case, one should be satisfied that the case is not provided for elsewhere by the Act. S. 53 provides for a particular class of cases mentioned in the section. Therefore prima facie, S. 4 should be taken to have no application to cases coming under S. 53 of the Act : *A. I. R.* 1927 *Cal.* 474 ; *A. I. R.* 1929 *All.* 105 and *A. I. R.* 1928 *Mad.* 531, *Ref.* [P 749 C 2]

The intention of the legislature in enacting S. 4 does not seem to have been to affect the specific provisions contained in the other portions of the Act, but only to provide for other matters arising in insolvency not specifically provided for elsewhere in the Act. In this view it is easy to understand why a right of second appeal is given against decisions passed under S. 4, for, if the Court, in its discretion, referred the parties to litigate in the ordinary Courts in the usual way, then a right of second appeal would exist in respect of decisions relating to title or priority passed by the ordinary Courts ; and the legislature did not think it right to take away such right of second appeal simply because the insolvency Court resolved in the circumstances to adjudicate upon such matters itself. [P 750 C 1]

(b) Provincial Insolvency Act (1920), S. 53 —No second appeal lies.

No second appeal lies from a decision passed under S. 53, Provincial Insolvency Act. [P 751 C 2]

T. L. Venkatarama Ayyar—for Appellants.

T. M. Krishnaswami Aiyar and *V. K. Mahadevan Sastri*—for Respondents.

Reilly, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver, and I entirely agree with his conclusions.

I find myself in some embarrassment in dealing with this appeal. It is an appeal under the Letters Patent against Curgenven J.'s dismissal of a second appeal against an order made by a District Munsif annulling a sale under S. 53, Provincial Insolvency Act. The learned Judge held clearly that no second appeal lay in such a case. It is true that he used the words :

"I am inclined to think that the decision of the District Court is final."

But in spite of that language he appears to have thought the answer to the question so clear that he did not think it necessary to discuss it, and he went on to deal with the case in revision, to which different considerations would apply, and eventually dismissed the revision petition filed by the appellants with their appeal before him. Nevertheless he afterwards granted leave to them to appeal under the Letters Patent against his dismissal of their second appeal. We are therefore left in the curious position of hearing an appeal against the learned Judge's decision that no second appeal lay without the benefit of knowing his reasons for that decision, but with the knowledge that at one stage he thought the answer to the question so obvious that no discussion was necessary and that at another he thought it so doubtful that he granted leave for further appeal. With the greatest respect I venture to express the opinion that, when leave to appeal against a second appellate decision is granted, we should always be placed in possession of the reasons which led to the decision.

However the question whether a second appeal lies in this case has been argued at length before us, and in the circumstances we must deal with it as a new question. This case was instituted as one under S. 53, Provincial Insolvency Act, and was disposed of by annulment of the sale concerned in a manner possible only under that provision. That being so, it is admitted that the Act precludes a second appeal unless a proceeding under S. 53 is also a proceeding under S. 4 of the Act. Mr. Venkatarama Ayyar for the appellants contends that every proceeding under S. 53 involves a question of title, that S. 4 embraces all decisions on questions of title and that

S. 75 allows an appeal on law from every decision of a District Court on appeal from a Court subordinate to it made under S. 4. S. 4 gives an insolvency Court power, subject to the provisions of the Act :

" to decide all questions whether of title or priority or of any nature whatsover."

Mr. Venkatarama Ayyar, in order to minimize his difficulties, wishes to interpret the words " or of any nature whatsoever " as covering only questions ejusdem generis as title or priority. But that is not possible. The words " whether of title or priority or of any nature whatsoever " and especially the words " of any nature watsoever " are plainly and in themselves incompatible with the ejusdem generis rule of interpretation and I have no doubt were deliberately chosen to avoid any possibility of that rule being applied to them. We must take it therefore that S. 4 (1) gives the Court power subject to the provisions of the Act to decide all questions:

" which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

That is a very wide provision, and obviously questions under S. 53 of the Act will come within S. 4 unless they are excluded by the words: " subject to the provisions of this Act." The question before us appears to me to turn upon the interpretation of those words. If I may say so, they do not appear to me to be very happy words, because they are capable of at least two interpretations. They may mean:

" subject to the provisions of this Act in regard to rules of law, procedure and evidence,"

in which case proceedings under S. 53 would be proceedings under S. 4, or they may mean:

" excluding questions otherwise provided for by the provisions of this Act,"

in which case proceedings under S. 53 would be excluded from proceedings under S. 4. An examination of certain provisions of the Act will, I think, show us what meaning was attached by the legislature to the words " subject to the provisions of this Act " in S. 4.

Firstly, S. 4 (3) of the Act provides that the Court need not decide every question within S. 4 (1) which may arise in an insolvency case before it but may decline to go into such a question and yet may sell the debtor's interest in the property concerned, if there is reason to believe that he has any saleable interest. If proceedings under S. 53 are included in proceedings under S. 4, the Court under that provision may decline to go into an application under S. 53. Could such a refusal to exercise jurisdiction under S. 53 have possibly been intended? A transfer covered by S. 53 is voidable against the receiver, and surely the question whether a transfer comes within the section is not one which the Court could decline to decide. That section moreover was in existence in the Provincial Insolvency Act, 1907, in which there was no such provision as those contained in S. 4 of the present Act. When the law had already given the receiver the right to avoid such a transfer, could the new Act by a side wind and without the most explicit language have given the Court the right to decline to decide whether a transfer was of the nature covered by the section? If the Court could decline to decide an application under S. 53 of the Act and send the receiver elsewhere for his remedy, he would be met by a different rule of evidence and some transfers which he could attack under S. 53 would be unassailable elsewhere. The right of the receiver to obtain a decision under S. 53—and I do not doubt that by that section and the corresponding section in the Act of 1907 it was always intended that he should have that right in order to be able to dispose of what is really the debtor's property to the due advantage of the creditors – is incompatible with the Court's right to decline to go into questions under S. 4, unless proceedings under S. 53 are excluded from proceedings under S. 4.

Secondly, it is not disputed that a decision of a Subordinate Judge or a District Munsif under S. 53 or any other section of the Act except S. 4 is subject to appeal to the District Judge, whose decision is final under S. 75 subject to the High Court's power of revision and to Prov. 2, S. 75 (1) (newly added in the present Act.) Under that proviso there is a second appeal on law from

" a decision of the District Court on appeal from a decision of a Subordinate Court under S. 4."

What can be the meaning of introducing those words " under S. 4 " if

S. 4 is all embracing and covers all questions arising under the Act? The only explanation which can be suggested for the appellants is that the legislature has done its work when deliberately introducing this new proviso in a stupid, careless, misleading way—an explanation which we cannot entertain for a moment while any other explanation is available. S. 75 (1), as it now stands, providing that there shall be no second appeal generally, but that there shall be a second appeal on law under S. 4, is to my mind a conclusive indication that S. 4 is not all-embracing.

Thirdly, Sch. 1 of the Act gives a list of classes of cases in which there is an appeal under S. 75 (2) from original decisions of a District Court. That list first mentions decisions under S. 4 and then sets out a number of other classes of cases, including as a separate class orders annulling a voluntary transfer under S. 53. If S. 4 embraces all classes of question, then everything after the first entry in that schedule is stupid surplusage. It is certainly not permissible for the appellants to accuse the legislature of wholesale carelessness and stupidity in framing the schedule, as they have to do in order to maintain the position that S. 4 is all-embracing. Even Mr. Venkatarama Ayyar's modified suggestion which, as I have said, must be rejected that S. 4 includes all questions of title, priority and others ejusdem generis cannot be reconciled with the entry in Sch. 1, first of decisions under S. 4 and later of orders annulling transfers under S. 53.

The three provisions which I have mentioned are, I think, enough to show that the legislature did not intend S. 4 to embrace proceedings under S. 53 and that the words :

"subject to the provisions of this Act in S. 4 mean excluding questions otherwise provided for by the provisions of this Act."

This interpretation I may add is in accordance with the history of S. 4 which was first introduced in the Provincial Insolvency Act of 1920. The previous Act provided for proceedings such as now come under S. 53 of the present Act and for other particular classes of proceedings. But a doubt was felt whether the Court could decide other questions arising in insolvency cases but not specifically provided for, and that doubt led to conflicting decisions. In those circumstances S. 4 was newly introduced in the present Act, and from those circumstances it could reasonably be inferred even if an examination of the provisions of the Act did not make that unnecessary that it was intended, not to affect, override or embrace existing provisions, but to fill what some Courts had felt to be a gap in insolvency jurisdiction. If the new section had been introduced towards the end of the Act instead of near the beginning, its introduction, as supplementary to and not including the other provisions of the Act, would I think have been recognized at once.

In my opinion the annulment of the sale in this case was not made under S. 4 of the Act, and no second appeal lay in respect of it. The dismissal of the second appeal by the learned Judge was therefore right, and this Letters Patent appeal should be dismissed with costs.

Anantakrishna Ayyar, J. — Pethappa Naik filed a petition on 5th October 1920 (I. P. No. 8 of 1920) on the file of the District Munsif's Court of Tuticorin to have himself adjudicated an insolvent, and he was accordingly adjudicated an insolvent by order dated 26th February 1921. On 2nd October 1919, Pethappa Naik had executed a sale deed (Ex. 1) in favour of Alagiri Subba Naik and five others for Rupees 12,500 in respect of his immovable properties. On 28th November 1924, an application was filed in the Court of the District Munsif of Tuticorin under S. 53, Provincial Insolvency Act (5 of 1920), to have the sale deed annulled by the Court. The vendees under the sale deed opposed the application; but the District Munsif allowed the application and annulled the sale, and directed the Official Receiver to sell the properties for the benefit of the creditors. The civil miscellaneous appeal preferred by Alagirisubba Naik and five others to the District Court, Tinnevelly, having been dismissed, they preferred a civil miscellaneous second appeal No. 104 of 1928 to the High Court. They also filed a civil revision petition in the alternative to the High Court, Civil Revision Petition No. 1013 of 1928 against the same order passed by the District Court. Both the civil miscellaneous second appeal and

the civil revision petition came on for hearing before Curgenven, J. A preliminary objection having been taken that no second appeal lay to the High Court against the order passed by the District Munsif under S. 53, Provincial Insolvency Act, the learned Judge disposed of the objection as follows :

"This civil miscellaneous second appeal and civil revision petition arise out of proceedings taken under S. 53, Provincial Insolvency Act, to annul a transfer of property by the insolvent in I. P. No. 8 of 1920 on the file of the District Munsif of Tuticorin. The alternative method of approach has been adopted because the appellant petitioner has doubt whether a second appeal lies. It can only lie if the original proceedings be held to have been taken under S. 4 of the Act. But that is a general provision, and I am inclined to think that a case disposed of under S. 53 is a decision such as is contemplated in S. 75 (1), and accordingly, that subject to the first proviso of that section which in wide terms allows of revision, the decision of the District Court is final. I shall accordingly entertain the matter as a civil revision petition."

The learned Judge then went into the merits of the civil revision petition and finally dismissed the same. He dismissed Civil miscellaneous second appeal No. 104 of 1928, with costs, and civil revision Petition No. 1013 of 1928 without costs. Leave to appeal however was granted in Civil Miscellaneous Second Appeal No. 104 of 1928. The vendees under Ex. 1 Alagirisubba Naik and others, have accordingly preferred Letters Patent Appeal No. 114 of 29 against the decision of the learned Judge in Civil Miscellaneous Second Appeal No. 104 of 28. Of course no appeal lies against the order passed by the learned Judge in the civil revision petition. When this appeal was opened by the learned advocate for the appellant, Mr. T. M. Krishnaswamy Ayyar, the learned advocate, who appeared for the respondent, raised a preliminary objection to the hearing of the Letters Patent appeal on the ground that no second appeal lay to the High Court against an order passed under S. 53, Provincial Insolvency Act, and that the learned Judge himself, who heard the civil miscellaneous second appeal held that no such appeal lay. Though leave to appeal has been granted by the learned Judge under S. 15 of the Latters Patent, yet if no second appeal lay to the High Court, no Letters Patent appeal could lie either, in the circumstances. He drew our attention to a decision of the Lahore High Court, *Ilahi Jan* v *Hari Kishen Das* (1) and he also relied on *Sambamurti Ayyar* v. *Ramkrishna Ayyar* (2).

The learned advocate for the appellant argued that the application filed in the District Munsif's Court should be taken to have been filed really under S. 4, Provincial Insolvency Act, though the application mentions S. 53 as the provision of law. under which it was made. He argued that, having regard to the allegations in the application, it must be taken to come substantially under S. 4 of the Act and not under S. 53; he further argued that even if the application be taken to come properly under S. 53, yet having regard to the very wide wording of S. 4. inasmuch as the District Munsif decided questions relating to the title of the appellants to the properties covered by the sale deed (Ex. 1), a second appeal lies to the High Court under proviso 2 to S. 75 of the Act, which enacts that;

"any such person aggrieved by a decision of the District Court on appeal from a decision of a subordinate Court under S. 4 may appeal to the High Court on any of the grounds mentioned in sub-S. 1, S. 100, Civil P. C., 1908."

He relied on *K. Parambath Parachan* v. *Pothen Kattiali* (3) and *Sheolal* v. *Girdharilal* (4).

I am clearly of the opinion that the application made to the District Munsif was under S. 53 of the Act that it was so treated in both the lower Courts and that we must dispose of the matter before us on the footing that the proceedings were taken under S. 53 of the Act. The allegations necessary to be made in an application under S. 53 have been made in the application in question. The sale impugned took place within the two years mentioned in this section, and the prayer in the application is in the terms of S. 53. We find that an appeal is provided for by S. 75 read with Sch. 1 against the order of the District Munsif annulling the sale under S. 53. No further second appeal to the High Court is provided for specifically in such a case. S. 75 (1) on the other hand, provides that:

"a person aggrieved by a decision come to or an order made in the exercise of insolvency

(1) [1921] 67 I. C. 887.
(2) A. I. R. 1929 Mad. 43=114 I. C. 847=52 Mad. 337.
(3) A. I. R. 1926 Mad. 123=91 I. C. 144.
(4) A. I. R. 1924 Nag. 361=78 I. C. 140.

jurisdiction by a Court subordinate to the District Court may appeal to the District Court and the order of the District Court, upon such appeal shall be final."

There are two provisos added to the section. Under the first proviso:

"The High Court for the purpose of satisfying itself that an order made in any appeal decided by the District Court was accerding to the law may call for the case and pass such order with respect thereto, as it thinks fit."

This does not give a right of appeal but provides for the exercise of powers of revision by the High Court in respect of such orders passed on appeal by the District Court. Reliance however was placed on the second proviso which enacts that:

"Any such person aggrieved by a decision of the District Court on appeal from a decision of a Subordinate Court under S. 4 may appeal to the High Court on any of the grounds mentioned in sub-S. (1), S. 100, Civil P. C ."

The question then is whether the decision passed by the District Munsif in the present case could be said to be a decision passed under S. 4 of the Act; if it is a decision under S. 4, then a second appeal lies to the High Court, if not no second appeal lies.

There was no provision in the Insolvency Act of 1907 similar to or corresponding with S. 4 of the Act of 1920. Under the Act of 1907, decisions passed under S. 36 (which corresponds to S. 53 of the Act of 1920) were open to one appeal only; there was no provision for second appeals to the High Court. Under the Act of 1920, an appeal to the High Court from a decision passed under S. 53 annulling a voluntary transfer is provided for by Sch. 1. The same schedule also provides for such appeals from "decisions of questions of title etc. arising in Insolvency under S. 4."

If decisions under S. 4 include decisions under S. 53 it is difficult to understand why separate provisions for appeal to the High Court have been made by Sch. 1. Further according to the contention of the appellant all decisions of questions of title under S. 4 are appealable to the High Court; whereas Sch. 1 gives such a right of appeal only against orders annulling voluntary transfers—not against orders declining to annul such transfers. The provisions of Sch. 1 relating to Ss. 4 and 53 are thus inconsistent with each other if the contention of the appellant be upheld. Finally, if S. 4 covered the whole field of disputes arising under the Insolvency Act, then one is unable to understand why after providing for an appeal to the High Court from decisions of title, property, etc., arising in insolvency under S. 4, the legislature thought it necessary to provide separately for similar appeal from orders passed under the various other sections, viz., Ss. 25, 26, 27, 33, 35, 37, 41, 50, 53 and 54, mentioned in Sch. 1. The learned advocate for the appellant however argued that the scope of S. 4 was limited to decisions of questions of "title or priority or other questions" "ejusdem generis," and that S. 4 had not any wider scope; but the wordings of the section are:

"The Court shall have full power to decide all questions whether of title or priority or of any nature whatsoever which may arise in any case of insolvency."

The words "of any nature whatsoever" could not be taken as only limiting the operation of the section under the principle of ejusdem generis. The expression "all questions of any nature whatsoever" is too comprehensive to be limited in the way contended for by the learned advocate for the appellants.

Further, the section begins with the words "subject to the provisions of this Act." Before therefore we seek to apply S. 4 to any case, we should be satisfied that the case is not provided for elsewhere by the Act. Turning to S. 53: we find that it provides for a particular class of cases mentioned in the section. Therefore prima facie S. 4 should be taken to have no application to cases coming under S. 53 of the Act. As remarked by the learned Judges of the Calcutta High Court in *Fool Kumari Dasi* v. *Khirod Chandra Das Gupta* (5) at p. 505 (of 31 *C. W. N.*):

"As has been explained in *Mahomed Habibullah* v. *Mushulaq Husain* (6) S. 53, Prov. Ins. Act is in one sense wider in its scope than S. 53, T. P. Act, because under this section all that is necessary to show is that the transfer was made within two years of the adjudication unless it is a transfer made before or in consideration of marriage; and further that under this section it is not necessary to show that the transfer was made with intent to delay or defeat a creditor."

In the case reported in *Anwar Khan* v. *Muhammad Khan* (7) the majority of the learned Judges were of opinion that

(5) A.I.R. 1927 Cal. 474=102 I.C. 115.
(6) [1917] 39 All. 95=37 I.C. 684.
(7) A.I.R. 1929 All. 105=113 I.C. 819=51 All. 550 (F.B.).

provisions relating to appeal contained in the other portions of the Insolvency Act were not in any way affected by the provisions of S. 4, but were saved by the words "subject to the provisions of this Act" occurring in S. 4. It is difficult to imagine that the legislature having specifically provided for particular matters and regulated rights of appeal with reference to the same, intended to have the said specific provisions affected and substantially modified by a general provision like that contained in S. 4, more especially when the legislature has taken care to add the words "subject to the provisions of this Act" to that section. This is in accordance with the view adopted by this Court in *Venkatram* v. *Chokkier* (8).

Section 4 is a re-enactment of S. 7, Presidency Towns Insolvency Act and S. 105, English Bankruptcy Act, 1914, with some modifications. There was a difference of opinion among the Courts in India whether the Court exercising insolvency jurisdiction has got power to decide upon questions of title, priority, etc., which may arise in the course of the administration of the estate, in circumstances which could not be brought under Ss. 36 and 37 of the old Act (corresponding to Ss. 53 and 54 of the Act of 1920). Evidently the legislature in enacting S. 4 of the present Act gave the Courts exercising insolvency jurisdiction a discretion to exercise powers in such matters if they thought fit to do so, while allowing them at the same time a discretion to direct that such matters should be adjudicated by the ordinary Courts in the ordinary way. The intention does not seem to have been to affect the specific provisions contained in the other portions of the Act, but only to provide for other matters arising in insolvency not specifically provided for elsewhere in the Act. In this view it is easy to understand why a right of second appeal is given against decisions passed under S. 4 ; for, if the Court, in its discretion, referred the parties to litigate in the ordinary Courts in the usual way, then a right of second appeal would exist in respect of decisions relating to title or priority passed by the ordinary Courts; and the legislature did not think it right to take away such right of second appeal simply because the insolvency Court resolved in the circumstances to adjudicate upon such matters itself. I am unable to agree with the contention of the learned advocate for the appellant that S. 53 only provides for a special rule of evidence, since it is difficult in that view to understand why a right of appeal should be specifically provided for against decisions passed under that section. Further, I have remarked already about the wider scope of the provisions contained in S. 53, Provincial Insolvency Act.

The reasoning of the learned Judges in *Sambamurti Aiyar* v. *Ramkrishna Aiyar* (2), is in favour of the view I am inclined to adopt. At p. 339 (of 52 *Mad.*) the learned Judges remarked as follows :

"This order is one made under Sch. 1, and quite obviously on the terms of this section there is no second appeal in the matter. It has been sought however to argue from the second proviso to S. 75, that the order can be taken to be one under S. 4 of the Act and a second appeal lies against any order passed under S. 4 on a question of law. To say that this order is passed under S. 4 amounts to saying that every order under the Act can be brought under S. 4 and that therefore a second appeal lies on a question of law against every order passed under the Act. This is to render the schedule and the plain proviso of S. 75 (2) meaningless. A sort of analogy was sought to be drawn from the Civil Procedure Code, but that does not in our opinion apply. There is nothing in the decisions quoted in that analogy which renders one part of that Act inconsistent with another whereas the effect here is to wipe out a definite proviso as to appeal. It is a settled principle of construction that an Act must be construed if possible consistently with itself. We therefore find against the contention."

We have not been referred to any case where the present question has been dismissed by any Court.

The decision in *Seth Sheolal* v. *Girdharilal* (4) does not contain any discussion or reasoning—the learned Judge simply follows a prior unreported ruling of that Court. The remarks in *Parampath Perachan* v. *Kuttiali* (3) are obiter, and the question is not discussed in that case. Further, the question there was not with reference to S. 53 of the present Act. In *Ilahijan* v. *Hari Kishen Das* (1) this point is decided in favour of the respondents' contention but here again there is no discussion of the question and the decision is largely based on the admission of counsel.

(8) A.I.R. 1928 Mad. 531=109 I.C. 516=51 Mad. 567.

The Insolvency Act (both of 1907 and 1920, provides for appeals in a manner different from that provided for by the Madras Civil Courts Act. From the decisions passed by a Subordinate Judge exercising insolvency jurisdiction an appeal lies to the District Court though the value of the property affected might be more than Rs. 5,000. This is now clear under the decisions and in fact was not disputed before us. No right of second appeal was given by the Act of 1907 against decisions passed under S. 53 of the Act, and if the legislature wanted to provide for second appeals in such cases, one should have expected it to do so in a clearer manner. No doubt having regard to the nature of questions that arise for decision for example under Ss. 53 and 54 of the Insolvency Act it is probably advisable that a right of second appeal to the High Court should be provided for against orders passed under Ss. 53 and 54 of the Act; transactions affecting properties of the value of several thousands of rupees could be set aside or upheld under those sections and it would seem to be a matter for consideration whether second appeals from such decisions should not be provided for. At present there is only the remedy by way of filing a revision petition to the High Court on a question of law under S. 75 (1), Proviso 1 in such cases but no right of second appeal. Of course there is substantial differences between revision and second appeal. But that is a matter for the legislature to resolve upon and not for the Courts as the statute now stands.

The appellant relied on *Shikri Prasad* v. *Aziz Ali* (9) but I may remark that the question in *Shikri Prasad* v. *Aziz Ali* (9) related to a right of first appeal and not to a right of second appeal. The case in *Fool Kumari Dasi* v. *Khirod Chandra Das Gupta* (5) related to an application filed by a person claiming certain properties as her own and objecting to the sale of the said properties advertised by the receiver such a case would not come under S. 53 of the Act, but would come under S. 4.

A very recent decision by one learned Judge of the Lahore High Court *Budha Mal* v. *Official Receiver*, *A. I. R.* 1930 *Lah.* 122, supports the view I am inclined to take.

As I construe Ss. 4 and 75 and Sch. 1, Provincial Insolvency Act, I am of opinion that no second appeal lies from a decision passed under S. 53, Provincial Insolvency Act. I accordingly uphold the preliminary objection, and dismiss the Letters Patent appeal with costs.

P.R.S./K.N. *Appeal dismissed.*

(9) A. I. R. 1922 All. 196=63 I. C. 601=44 All. 71.

* A. I. R. 1931 Madras 751

RAMESAM, J.

Notoboro Chowdari Mahapatro — Defendant—Appellant.

v.

Dasari Khambayya Dora—Plaintiff—Respondent.

Second Appeal No. 1216 of 1929, Decided on 9th April 1931, against decree of Dist. Judge, Ganjam, D/- 17th April 1928.

*** (a) Registration Act (1908), S. 17 — Document varying terms of tenancy permanently requires registration—Evidence Act (1872), S. 92 (4).**

An agreement permanently varying the terms of a tenancy to the benefit of the tenant is really a new lease on more favourable terms, and if under the Registration Act, a lease for more than five years or for more than Rs. 50 requires registration, a document giving a new lease permanently at a more favourable rate certainly requires registration. The mere fact that it is a fresh lease does not make it the less a lease. If a lease itself requires registration, a document varying its terms for all time also requires registration under Proviso 4 to S. 92, Evidence Act. Therefore though a document merely varies the terms of a tenancy, it cannot be said that it does not require registration : (*Case law discussed*). [P 752 C 2]

(b) Civil P. C. (1908), S. 100 — Finding of fact—Second appeal.

The High Court cannot in second appeal interfere with a finding of fact arrived at by the lower Court. [P 752 C 1]

C. S. Venkatachariar—for Appellant.

B. Jaganadha Das—for Respondent.

Judgment.—This second appeal arises out of a suit to recover rent under S. 77, Madras Estates Land Act, by a Mustazir under the Sonno (Chinna) Khimidi Zamindar from a ryot. The plaintiff claimed a share of the produce, but the defendant contended that he is only liable to pay a fixed cash rent. Before the Deputy Collector he filed two receipts Exs. 1 and 2, one of which refers to a patta from the zamindar. The patta itself was not filed before the Deputy Collector. He decreed the suit. There was an appeal to the District Judge of Ganjam. While the appeal was pending

a petition was filed for admitting the patta which was said to have been granted by the zamindar in 1905. The District Judge said that it was not likely to be of any use to the defendant and dismissed the petition. On second appeal to the High Court, S. A. No. 902 of 1906, the learned Judge observed that where the District Court rejects a document on a wrong ground the decision of the Full Bench in *Vaithinatha Pillai* v. *Kuppu Thevar* (1), does not prevent the High Court from interfering and sent back the case so that the District Judge may consider the application to admit the document on its merits. The case came on before another District Judge, but he refused to admit the patta provisionally marked as Ex. 3 on two grounds: (1) that it was not genuine and (2) that it required registration. He also observed that if it can be admitted it is liable to penalty as it was unstamped. The tenant files this second appeal.

The learned advocate for the appellant argued that both the grounds of the District Judge are wrong. So far as the first ground is concerned, it may be that there are points that can be urged either way, but I do not see how I can interfere in second appeal. The document bears the seal of the Sonnokhimidi zamindar and also the seal of the Tahsildar of Aska dated June 1921. As the suit itself was in 1922, the latter circumstance does not mean much. The ink does not strike me as very fresh as the District Judge observes, but his other points remain, namely, that the initials of the zamindar are easily capable of imitation. Whatever might be my opinion, I do not see how I can interfere with the finding of fact. This is enough to dispose of the second appeal. But as the second point has also been argued I wish to express my opinion on the matter.

The learned advocate relied upon the decision in *Obai Goundan* v. *Ramalinga Ayyar* (2). In that case it was held by two learned Judges of this Court that Ex. 2 therein did not require registration. The document there granted a permanent cowle remission of half the assessment on the ground that the lands were sandy etc. It may be that the document granting remission out of rent due on the land for a definite number of years may be said to have nothing to do with the land or the rent fixed on it as it merely amounts to a remission of a debt and need not be supported by consideration and need not necessarily be regarded as creating an interest in land; but a document remitting half the rent permanently and not for any definite number of years seems to stand on a different footing. If the promise is to be enforced, the tenant is for all time exempt from payment of the full rent. Practically he gets the lease on payment of half the rent. It will not do to say that the rent is the old rent and he only gets a remission of half the amount. Seeing that it is permanent, the amount remitted is infinite and indefinite. But apart from this, if the ground of the judgment is that it merely remits a debt one can understand it. But the grounds are actually expressed thus ;

"The document only evidences an agreement to vary the terms of tenancy with reference to the amount of rent to be paid. As such it cannot be held to relate to an interest in immovable property, and therefore did not require registration: *Satyesh Chunder Sircar* v. *Dhunpul Singh* (3)."

It seems to me that an agreement permanently varying the terms of a tenancy to the benefit of the tenant is really a new lease on more favourable terms; and if under the Registration Act a lease for more than five years or for more than Rs.50 requires registration, a document giving a new lease permanently at a more favourable rate certainly requires registration. The mere fact that it is a fresh lease does not make it the less a lease. If a lease itself requires registration, a document varying its terms for all time also requires registration under Prov. 4, S. 92, Evidence Act. Therefore though a document merely varies the terms of a tenancy, it cannot be said that it does not require registration. The authority relied on still less supports the reasoning of the learned Judges. In *Satyesh Chunder Sircar* v. *Dhunpul Singh* (3), the document about whose registration a question might have arisen was never produced before the Court and no question of registration actually arose before the Court, nor was any question decided by the learned Judges as a perusal of the head-note and the whole of the judgment

(1) [1919] 42 Mad. 737=53 I. C. 274 (F.B.).
(2) [1899] 22 Mad. 217=8 M. L. J. 256.
(3) [1897] 24 Cal. 20.

shows. What was said there was, as there were other admissions of the contents of the document which reduced the rent it was unnecessary to produce it. The learned Judges say:

"if the fact of the abatement is a matter in issue between the parties and the letter of 18th Jeyt 1296 is produced, then the question of registration would arise, but there was no such issue in the Court below."

They pointed out the fact that it was admitted in that plaint and also in the plaint in a previous suit and so on. The judgment contains no discussion of any provision of the Registration Act. Clearly the decision in *Satyesh Chunder Sircar* v. *Dhunpul Singh* (3), does not support the decision in *Obai Goundan* v. *Ramalinga Ayyar* (2). I am unable to agree with the decision in *Obai Goundan* v. *Ramalinga Ayyar* (2). In *Firm of Karim Baksh Tajuddin* v. *Natha Singh* (4), the decision in *Obai Goundan* v. *Ramalinga Ayyar* (2), was not followed though I am unable to follow the distinction and it was held that the document therein required registration. I agree with the opinion of the Lahore High Court in this decision though not with the way in which they distinguish *Obai Goundan* v. *Ramalinga Ayyar* (2). The learned advocate for the appellant also relied on *Katyayani Debi* v. *Port Canning and Land Improvement Company* (5). The ground on which the learned Judges held that the document in that case did not require registration was that it itself did not demise any property and did not amount to a lease or an agreement to lease; it was only a memorandum containing the terms of a former lease. This is of course a perfectly intelligible ground, but whether in the particular case the document answers to that description or not is another question. All that I can say is that the document before me is certainly not a memorandum and the decision in *Katyayani Debi* v. *Port Canning and Land Improvement Company* (5), does not help the appellant. In my opinion Ex. 3 requires registration and is inadmissible in evidence. If the second appeal has to be decided on this ground I would refer the matter to a Bench because I am dissenting from the judgment of two learned Judges of this Court. But as the first ground is enough to dispose of the second appeal it is unnecessary to do so. The second appeal is dismissed with costs.

P.R.S./K.N. *Appeal dismissed.*

(4) [1922] 66 I C. 904.
(5) [1915] 25 I. C. 274.

* A. I. R. 1931 Madras 753

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Kotla Satyam — Defendant — Petitioner.

v.

Thammana Perraju and *others*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 1292 of 1928, Decided on 13th March 1931, against decree of Sub-Judge, Narasapur, in S. C. S. No. 511 of 1926.

*** (a) Contract Act (1872), S. 72—Person paying money in Court to set aside sale in execution under protest is entitled to get his money back under S. 72—Civil P.C. (1908), O. 21, R. 89.**

Where the record shows that a party made his deposit under protest setting out all the facts and claiming that the house was his and could not be sold in execution of defendant 1's decree against *A* or her estate, the question to be decided is not really whether he made that deposit properly under R. 89, whether he was one of the persons who would come within the meaning of R. 89, whether the District Munsif was right or wrong in accepting his money as paid under R. 89, but whether having paid that money to defendant 1 in the circumstances to avoid the sale of property which has been found to be not *A's* but his, he is entitled to recover it under S. 72, Contract Act, as paid under coercion. [P 755 C 1]

(b) Practice—Pleading—Provision of law stated is not conclusive.

The provision of law quoted in a petition, under which it is purported to be filed, should not be taken to be conclusive as regards the meaning and scope of the petition as against the clear words of the petition itself. [P 758 C 1]

*** (c) Civil P. C. (1908), O. 21, Rr. 58 and 88—If attachment constitutes infringement of rights of real owner he can pay money under protest and seek proper remedy to have same back—Contract Act, S. 72.**

If attachment constitutes an infringement of the rights of a real owner, it would be a curious state of the law if the aggravated form of the infringement of that right caused by the subsequent sale of the property would be placing the real owner in a worse position in the matter of exercise of his rights. The real owner's remedy though it exists when the property is attached, does not disappear the moment the sale takes place. The real owner would be entitled to pay money under protest and seek the proper remedy to have the same back, with any further damages that he might sustain. His rights are not suspended or kept in abeyance to revive and re-appear when steps are taken at the instance of the auction-purchaser to dispossess the owner. If the goods of a third person are

seized by the sheriff and are about to be sold as the goods of the defendant and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid ; it is the compulsion under which they are about to be sold that makes the payment involuntary: (*Case law discussed*). [P 758 C 2 ; P 759 C 1]

G. Lakshmanna—for Petitioner.

V. Viyanna—for Respondents.

Pandalai, J.—I have already explained in the judgment just now delivered that the unsuccessful claimant in addition to bringing a claim suit paid the decree amount and 5 per cent under protest into Court under O. 21, R. 89, and got the sale of the property set aside and that his petition in execution for restitution of the money so paid was unsuccessful on the ground that the petition did not lie in execution and the remedy, if any, was by separate suit. This civil revision petition arises from the judgment in the small cause suit brought by the claimant as plaintiff (respondent 1) for the recovery of the money which he had paid for setting aside the sale. The defence was that the plaintiff-respondent 1, was not legally entitled to recover back the money paid under O. 21, R. 89. The Small Cause Court has given respondent 1 a decree. The petitioner is the legal representative of the decree holder in C. S. No. 279 of 1921. The question involved in this petition is an important one by no means free from difficulty. It raises a question of general application and I think it is better that instead of deciding it myself it should be heard and decided by a Bench. The petition will accordingly be posted before a Bench.

[This petition again coming on for hearing, the Court delivered the following judgment:]

Reilly, J. This is a petition for the revision of the decree of the Subordinate Judge of Narasapur in Small Cause Suit No. 511 of 1926 on his file.

The plaintiff in that suit, one Perraju, who is respondent 1 here, in February 1921 obtained from one Ademma an agreement for the sale of a house to him. Soon after that she died. But on 12th April 1921 her husband as her heir sold the house to Perraju. Defendant 1 in this suit had a money claim against Ademma, and for that he sued Ademma's husband as her legal representative in the Narasapur District Munsif's Court. Having filed his plaint in that suit he obtained an attachment before judgment on 21st April 1921 of the house which had been sold to Perraju. Later on defendant 1 obtained a decree in his suit. Perraju put in a claim petition objecting to the attachment of the house on the ground that it was his property, not Ademma's property, after the sale to him. That claim petition was dismissed. Then Perraju filed a claim suit and, pending that suit, prayed for an injunction to restrain defendant 1 from bringing the house to sale in execution of his decree against Ademma's estate. Perraju's prayer for an injunction was refused. Then the house was brought to sale in execution of defendant 1's decree and was purchased by defendant 2. Within 30 days after that sale Perraju under protest deposited in Court the amount of the decree and 5 per cent on the amount of the purchase money at the Court auction, purporting to do so under R. 89, O. 21 of the Code. The Court sale was set aside, and the money deposited was distributed in accordance with the provisions of R. 89 between defendants 1 and 2. After that had been done Perraju's claim suit went on and ended in a decree in his favour, declaring that the house was his property and was not liable to attachment in execution of defendant 1's decree. That decision in favour of Perraju was confirmed on appeal and again on second appeal. After that eventual and complete success in his claim proceedings Perraju instituted this small cause suit for the recovery with interest of the amount which he had paid ostensibly under R. 89, O 21 to get the sale of the house in execution of defendant 1's decree set aside. The learned Subordinate Judge made a decree in the small cause suit in favour of Perraju for the amount deposited by him with interest, the decree running against defendant 1's representatives alone as he found that defendant 2, the auction-purchaser, had been merely a benamidar for defendant 1, who was closely related to him. This revision petition is presented by defendant 3 in the suit, one of defendant 1's sons, who was brought on record after defendant 1's death.

It is contended for the petitioner in revision that Perraju was not competent to make any deposit under R. 89. O. 21, as he was not one of the persons to whom the rule gives that privilege, and

secondly, that at any rate his payment was a voluntary payment and so he has no right to recover it from defendant 1 or his representatives. We have heard long arguments in this case on the correct interpretation of the provisions of R. 89, O. 21, and on the interpretation of the opening words of the rule, which provide that certain persons may make deposits under it ; but I do not think it is necessary on this occasion to deal with those questions. Perhaps I may say that I am not myself satisfied that a third party purchaser, whose title was obtained before the attachment in a case such as this, is not one of the persons entitled to make a deposit under R. 89.

In *Dulhin Mathura Koer* v. *Bangsidhari Singh* (1) it was decided that such a purchaser did not come within the meaning of the rule, which was to be confined to persons affected by the sale. There was no very elaborate discussion in that case, and I may remark that a Bench of this Court in *Dhanammal* v. *Veeraraghava Naidu* (2), interpreted R 89 so as to include such a purchaser. But without going into those questions we can deal with this case sufficiently for our present purpose. Whether Perraju was a person strictly coming within the words of R. 89, or not, whether the District Munsif was right in accepting his deposit as one made under that rule, the record shows that he made his deposit under protest setting out all the facts and claiming that the house was his and could not be sold in execution of defendant 1's decree against Ademma or her estate. The question we have to decide in this petition is not really whether he made that deposit properly under R. 89, whether he was one of the persons who would come within the meaning of R. 89, whether the District Munsif was right or wrong in accepting his money as paid under R. 89, but whether, having paid that money to defendant 1 in the circumstances to avoid the sale of property which has been found to be not Ademma's but his, he is entitled to recover it under S. 72, Contract Act, as paid under coercion.

Now it cannot seriously be disputed that, if Perraju had paid this amount not after the sale in execution had been held, but after the house had been attached and before the sale in order to prevent the sale, he could have recovered it, and payment made to prevent the sale in those circumstances would have been regarded as payment made under coercion within the meaning of S. 72; Contract Act. In 1868, in *Fatima Khatoon Chowdrani* v. *Mahomed Jan Chowdry* (3), their Lordships of the Judicial Committee decided that money paid under protest by persons who held a charge upon the property concerned to prevent the sale of that property in execution of a money decree against the owner of the property subject to the charge was not a voluntary payment and could be recovered. In *Dulichand* v. *Ramkishen Singh* (4) in 1881 their Lordships decided that a payment under protest to prevent an execution sale of the plaintiff's property for a mortgage amount not due on the property could not be regarded as a voluntary payment and could be recovered from the decree-holder who was bringing the property to sale in execution, adopting the principle of *Valpy* v. *Manley* (5), in that case.

And in *Kanhaya Lal* v. *National Bank of India Ltd.*, (6) their Lordships decided that a payment made in 1902 under protest by a third party to get rid of an attachment of his property would be an involuntary payment made under coercion within the meaning of S. 72, Contract Act, and that the amount could be recovered. In that case a mill was attached by a decree-holder as if it was the property of his judgment-debtor. A third party, claiming that he and not the judgment-debtor was the owner of the mill, paid the decree amount and then sued to recover it under S. 72, Contract Act. It will be observed that, if he had followed the ordinary procedure in the Code, he would have first put in a claim objecting to the attachment, as he was entitled to do, and on the facts he would have succeeded either in the claim petition or in a suit to pursue his claim. But he chose to pay the decree amount at once in order to get rid of the decree-

(1) [1912] 10 I. C. 880.
(2) A. I. R. 1923 Mad. 497=73 I. C. 213.
(3) [1867-69] 12 M. I. A. 65=10 W. R. 29=1 Beng. L. R. 21 (P. C.).
(4) [1881] 7 Cal. 648=8 I. A. 93=4 Sar. 245 (P. C.).
(5) 1 C. B. 594=14 L. J. C. P. 204=9 Jur. 452.
(6) [1913] 40 Cal. 598=40 I. A. 56=18 I. C. 949 (P. C.).

holder's interference with his right to the mill by attaching it. In that judgment their Lordships say:

"A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which sooner or later he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in no wise bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, and under English law he was unquestionably entitled to demand a repayment of that sum because it was an involuntary payment produced by coercion, viz., the wrongful interference of the defendants with his full and free enjoyment of his own property. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act, or estop him from claiming that it was done under coercion."

It is clear that in this case, though no doubt the attachment of the house did not affect Perraju so disastrously as the attachment of the mill was likely to affect the plaintiff in *Kanhaya Lal* v. *National Bank of India Ltd* (6), Perraju was entitled either to proceed by a claim or to pay off the decree amount before the sale. What is suggested against him is that, although it cannot now be disputed that on the authority of those decisions he could have got rid of the infringement of his rights caused by the attachment of the house by paying off the decree amount before the sale, he could not do so after the sale in any way except by a voluntary act, which would not preserve to him the right to recover the money under S. 72, Contract Act. But, if the attachment of the house was a trespass, an infringement of his rights, surely the sale of the house would only be an aggravation of that infringement. It might have consequences very inconvenient to him. It will be observed that in *Dulichand* v. *Ramkishen Singh* (4), the persons who paid off the decree amount and were held entitled to recover it as an involuntary payment were only paying it in order to avoid a sale under a mortgage decree. There was no question of getting rid of an attachment there; it was only to get rid of the danger of a sale. But they were held to be entitled to recover the money which they paid to avoid the sale. It is urged for the petitioner here that Perraju might well have ignored the sale, which could not really affect his interests, because the purchaser under defendant 1's decree could only get his judgment-debtor's right, title and interest, and that Perraju might therefore well have waited until some attempt was made to eject him from the house. But a sale of his house would have been an infringement of his rights even before it had been followed by the purchaser evicting him.

It will be noticed that in *Fatima Khatoon* v. *Mahomed Jan* (3) the persons who paid off the decree amount and who were held to have paid it involuntarily under coercion and therefore were entitled to recover it, were only charge holders. That is a rather extreme case, because it might be said that the sale could not affect their charge in any way. But their Lordships of the Privy Council said that a sale might have most mischievous consequences and that they were entitled to pay the decree amount off to prevent that sale and then to represent themselves as having been compelled to do it by legal coercion within the principle now embodied in S. 72, Contract Act. And, if in the execution sale in this case defendant 1 had with permission himself become the auction-purchaser and Perraju had done nothing until defendant 1 came with a delivery warrant to take possession of the house and then Perraju, instead of offering physical obstruction or relying upon his other legal remedies in order to get the delivery to defendant 1 set aside after it had been made, had paid defendant 1 the decree amount at that stage, I do not see how Perraju could then have been held to have made anything but an involuntary payment, made under coercion within S. 72, Contract Act. I think it must be admitted that, if Perraju had made his payment to defendant 1 in those circumstances, he would have been entitled to recover it as an involuntary payment made to protect his rights. Now, if Perraju could have made this payment before the sale

in order to get rid of the attachment and to prevent the danger of a sale and could have made it at the last stage to prevent the delivery of the house and get rid of the injurious results of the sale to him and in either case would have had a right to recover the amount, how could it be contended that at any intermediate stage, when the sale had taken place, he could not make the payment with the same effect ? The only basis for such a contention would be that at that intermediate stage, whatever might be Perraju's rights at an earlier stage or a later stage, no payment could be made except within the borders of R. 89.

Consistently with the principles in the decisions of the Judicial Committee which I have quoted, I do not see how that position could be maintained. Perraju had a right to this house and had a right to defend his possession and ownership by all lawful means. Paying off the decree-holder and getting the sale set aside, even if that did not come strictly within the words of R. 89, could not be regarded, I think, as has been suggested, as an unlawful means. As pointed out by the Judicial Committee he had a right tc choose his own means, and defendant 1, being the wrongdoer in this case, cannot dictate to him and say that he ought to have adopted some other procedure. In my opinion, without deciding whether Perraju had any right to come to Court within the provisions of R. 89, O. 21, I have no doubt that he has the right to recover the amount of this decree, which he paid to defendant 1 to avoid the inconvenience of the sale of his own property in execution of defendant 1's decree against someone else.

The learned Subordinate Judge has given Perraju a decree not only for the recovery of the decree amount deposited by him and interest thereon but also for the return of the 5 per cent deposit for payment to the auction-purchaser; and he has made that decree for both the amounts run against defendant 1's representatives on his finding that defendant 1 was really himself the auction-purchaser. It might perhaps have been thought proper that Perraju, though entitled to recover the decree amount from defendant 1, should not recover also in this suit the 5 per cent for the auction-purchaser on the ground that he might well have made his payment a few days earlier, before the attached property had been brought to sale. But I do not think that in this case we need interfere in revision on this minor matter in favour of defendant 1, because it is clear that he was the real auction-purchaser at the execution sale, although he had got no permission to bid. In these circumstances he does not deserve any special consideration from us.

In my opinion this revision petition should be dismissed with costs.

Anantakrishna Ayyar, J.—I agree.

In execution of the decree in O. S. 279 of 1921, which defendant 1 had obtained against the estate of one Ademma, he proceeded to attach a house. The present plaintiff, Perraju, filed a claim petition, stating that the house belonged to him and not to the estate of Ademma. The orders passed on the claim petition having been adverse to him, he filed an original suit, O. S. No. 232 of 1923, for establishing his title to the house. Pending that suit he applied for a temporary injunction preventing the present defendant 1—the decree-holder in Suit No. 279 of 1921—from proceeding with the sale of the house in execution of that decree. The present defendant 1 having opposed that application, the prayer for temporary injunction was not granted. That was on 8th September 1923, and on that very day the house seems to have been sold and purchased by the present defendant 2. Perraju succeeded in the suit which he filed for establishing his title to the house, not only in the trial Court but also in the appellate Courts to which that litigation was carried. But pending the decision of his suit, No. 232 of 1923, he put in an application, purporting to be under R. 89, O. 21, Civil P. C., tendering the amount mentioned in the proclamation of sale in O. S. 279 of 1921 and also the 5 per cent mentioned in R. 89. The sale was set aside; the moneys paid into Court were drawn by the auction-purchaser; and after success in his suit, Perraju has filed the present small cause suit to recover the amount so paid by him into Court. On the finding that defendant 2 is a name-lender, and that the purchase was really for the benefit of defendant 1, the decree-holder in suit O. S. 279 of 1921, the learned Subordinate Judge has given the plaintiff a decree for the amount claimed in his plaint. Defendant 1 having died, one of his sons,

brought in as his legal representative, has preferred the present civil revision petition.

For the disposal of this revision petition, I do not think it necessary to go into the exact scope of O. 21, R. 89, Civil P.C. A perusal of the application filed by Perraju in Suit No. 279 of 1921 when making the deposit makes it absolutely clear that, far from acquiescing in the rights put forward by defendant 1 as attaching decree-holder, Perraju disputed his right, paid money into Court for the purpose of preventing further injury to himself and his property, and made it absolutely clear that

"money has been paid into Court under protest, and defendant 1, counter-petitioner, may take the money for the present."

The provision of law quoted in a petition, under which it is purported to be filed, should not be taken to be conclusive as regards the meaning and scope of the petition, as against the clear words of the petition itself. On these facts, and on the findings, it seems to me that the plaintiff's case comes within the principle of the decisions of the Privy Council, reported in *Fatima Khatoon Chowdrani* v. *Mahomed Jan Chowdry* (3), *Dulichand* v. *Ramkishen Singh* (4) and *Kanhaya Lal* v. *National Bank of India Ltd.* (6). It having been now found that the house did not belong to the judgment-debtor but belonged to the present plaintiff Perraju, the proceedings by way of attachment taken by the present defendant 1 were unwarranted and they constituted a legal injury so far as the real owner, the present plaintiff, was concerned. The real owner's rights being thus infringed, it was open to the real owner to seek any one of the modes by which he could get rid of the inconvenience to him. As pointed out by the Privy Council in *Kanhaya Lal* v. *National Bank of India Ltd.* (6), claim proceedings are rather dilatory and may not meet the exact justice of particular cases in time. The Privy Council held that in such circumstances it is open to a person whose rights are infringed by an illegal attachment of his property to pay the money under protest, and that in a suit to recover the same from the person to whom it was paid it could not be said that the payment was "voluntary." The finding of the learned Subordinate Judge in the present case that the payment was not voluntary is amply supported by the facts and circumstances in evidence in the case. As I have already said, the petition filed by the present plaintiff when depositing the amount stated in so many words that it was deposited under protest, and it also gave clear information to the present defendant 1 of the steps that the person depositing the money was proposing to take in respect of the matter. If attachment constitutes an infringement of the rights of a real owner, it would be a curious state of the law if the aggravated form of the infringement of that right caused by the subsequent sale of the property would be placing the real owner in a worse position in the matter of exercise of his rights. The Privy Council has remarked that a sale would cause more mischievous consequences to the real owner, and if the contention of the learned advocate for the petitioner (if I understand him rightly in this part of the case) be correct, the real owner's remedy, though it exists when the property is attached, disappears the moment the sale takes place. To test that proposition, I should like to consider what the real owner's position would be when subsequently the auction purchaser takes steps to dispossess the real owner of the property. It could not for a moment be doubted that to avoid this most serious of consequences, dispossession, the real owner would be entitled to pay money under protest and seek the proper remedy to have the same back with any further damages that he might sustain. If that be so, to say that the real owner's rights would be suspended or kept in abeyance, or that the same might even temporarily vanish when once there has been a sale but only to revive and re-appear when steps are taken at the instance of the auction-purchaser to dispossess the owner is to say something which is not only not logical but is really contrary to the decisions of the Privy Council in the three cases that I have mentioned.

In *Fatima Khatoon Chowdrani* v. *Mahomed Jan Chowdry* (3), Lord Romilly observed at p. 78 :

"In order to prevent that sale, which would have been mischievous and prejudicial in the highest degree to the rights of the now appellants, they, upon a proceeding which they instituted, and under the authority of the Court, not voluntarily, but under protest, and because they were compelled to take that step in order

to prevent the sale of the estate, paid the sum of (money) into Court .... The money that had been paid into Court, not voluntarily, but under this species of compulsion, and for the purpose of preventing this injurious sale of the property, was paid over accordingly."

Again, at p. 79 :

"It was deposited under protest, for the purpose of preventing an injurious sale of the whole property ..... The depositor has expressly stated: I will bring a regular suit for setting aside the summary order rejecting the claim, but the sale cannot be stayed unless the amount recoverable by the decree-holder is deposited ; I therefore deposit the amount for the purpose of its being paid to the decree-holder and pray that the said sum be paid to the decree-holder and the sale be stayed."

In these circumstances, the Privy Council held that

" the payment being clearly no voluntary payment, the suit having been determined on the merits in favour of the appellants, they are clearly entitled to recover this money back."

In *Dulichand* v *Ramkishen Singh* (4), at p. 653, their Lordships observed as follows :

"The payment was made to prevent the sale which would otherwise inevitably have taken place of the mauza which the respondents had purchased, and was made therefore under compulsion of law, that is, under force of these execution proceedings. In this country, if the goods of a third person are seized by the sheriff and are about to be sold as the goods of the defendant, and the true owner pays money to protect his goods and prevent the sale, he may bring an action to recover back the money he has so paid; it is the compulsion under which they are about to be sold that makes the payment involuntary:" see *Valpy* v. *Manley* (5).

In *Kanhayal Lal* v. *National Bank of India Ltd.* (6), the real owner of certain mills was dispossessed by virtue of attachment proceedings taken by the defendant against a stranger. To prevent injury and loss, the plaintiff paid the amount under protest, and the Privy Council held that he was entitled to recover. At p. 609, their Lordships observed:

"A wrongful interference with the plaintiff's lawful enjoyment of his own property is alleged. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings. by which sooner or later, he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in no wise bound to submit. He was free to choose a course which did not involve any such prolongation of the trespass. Accordingly he paid under protest the sum demanded, and under English law he was unquestionably entitled to demand a repayment of that sum, because it was an involuntary payment produced by coercion, viz., the wrongful interference of the defendants with his full and free enjoyment of his own property. By English law it is not open to the wrongdoer to prescribe by which of two lawful alternatives the injured man puts a stop to the wrong under which he is suffering. His choice of any one alternative does not make it as between him and the wrongdoer a voluntary act, or estop him from claiming that it was done under coercion."

Finally, they observed at p. 614:

"But it is evident that the greater or less probability of a sale taking place does not affect the ratio decidendi of their Lordships in that case: *Dulichand* v. *Ramkishen Singh* (4), which is that the payment was made under the force of the execution proceedings, and that in India, as in England, such a payment is regarded by the law as being made under compulsion."

On a reading of the application filed by the present plaintiff on 2nd October 1923, it is absolutely clear that though the application was purported to be filed under O. 21, R. 89, Civil P. C., the whole history of the various proceedings up to that stage was mentioned, that the applicant was the real owner of the property, that the attachment and sale were unwarranted and constituted an injury and a grievance to the applicant, that the applicant tried his best to avoid further injury but was unsuccessful, that the judgment debtor had no right in the property, that the decree-holder's action was entirely unjustifiable, and that the applicant's suit, No. 232 of 1923, for declaring his title to the property was pending. It wound up by saying:

"Money is paid under protest. The decree-holder (first counter-petitioner) may take the money for the present."

The decree-holder chose to accept money on those terms; he did not choose to object to the application on the ground that it contained conditions which were not agreeable to him or open to the petitioner. In the circumstances, the present case must be held to be governed by the decisions of the Privy Council already quoted, and that the plaintiff is entitled to recover the amount from the defendant, the subsequent litigation having established that the plaintiff's allegations are correct and that the title to the property was in the plaintiff at the date of the attachment.

It is not necessary in this case to state what exactly is the scope of O. 21, R. 89, Civil P. C., because we are not now asked

to revise the orders passed under that section.

Though the wordings of O. 21, R. 89, are very general, the question will have to be decided when it properly arises as to whether it governs or covers cases of third persons (owners) whose properties are attached long after they became owners, or whether the rule is applicable only to cases where the right, title and interest in the attached property of persons who apply would be legally affected by the sale if the sale had been confirmed. I need not therefore in this case consider the various decisions quoted, as regards the scope of O. 21, R. 89, Civil P. C., including a very recent decision of the Privy Council in the case reported in *Seth Nanhelal* v. *Umrao Singh* (7).

It is open to the real owner to prevent further injury to his property in the circumstances. He has got this right under the general law. He could tender such payment to the wrongdoer even outside Court. The circumstance that he made the tender through the Court which was moved to effect the attachment could not really operate to the prejudice of the person making the payment when the payment was accepted by the decree-holder in question. The circumstance that it might not be open to a person whose rights in the property attached would be affected by the sale, to make a conditional tender and payment in Court in execution department, would not affect the rights of persons in the position of plaintiff in the present case. The question whether a stranger, a real owner of properties, could, after making payment to avoid attachment or sale, file a fresh suit to recover the money so paid, had not to be decided either in *Dilhin Mathura Koer* v. *Bhansidhari Singh* (1) or *Dhanammal* v. *Veeraraghava Naidu* (2) and, as I already remarked, we are not now dealing, by way of direct attack in revision or appeal, with such an order passed under O. 21, R. 89, Civil P. C.

So far as the present plaintiff is concerned, his cause of action is based on the allegation that, when his property was attached wrongfully by the first defendant, and when the same was persisted in in spite of his best efforts to have the attachment removed he was compelled to pay the money on protest to avoid the more serious consequences of the sale being completed and further steps being taken. I think that the plaintiff was within his rights in having taken that course, and that it is not open to a person in the position of a wrongdoer as defendant 1 is in the present case who (without any demur or protest) accepted the plaintiff's money in the circumstances mentioned above, to urge the contentions put forward before us in the present case. I agree that for the disposal of the present revision petition it is not necessary to go beyond the principles laid down in the three Privy Council cases I have mentioned above.

As regards the 5 per cent, I assume that prima facie defendant 1 may be taken to be entitled to dispute the plaintiff's rights to get back the same. But we are dealing with this matter in revision, and having regard to the conduct of defendant 1 and also having regard to the circumstances that this point has not been specifically raised either here or in the lower Court, I do not think this is a case in which we should, in the particular circumstances, interfere on behalf of defendant 1, in respect of that portion of the amount decreed to the plaintiff.

I agree that this civil revision petition should be dismissed with costs.

P.R.S./K.N. *Petition dismissed.*

(7) A. I. R. 1931 P. C. 33=130 I. C. 686=58 I. A. 50=27 N. L. R. 95 (P.C.).

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* A. I. R. 1931 Madras 760

REILLY AND ANANTAKRISHNA AYYAR, JJ.

G. Gurumurthi Ayyar—Appellant.

v.

Ramaswami Chettiar—Respondent.

Appeal No. 227 of 1930, Decided on 19th March 1931, against order of Sub-Judge, Dindigul, D/- 24th February 1930.

*** (a) Civil P. C. (1908), O. 40, R. 3—R. 3 provides for duties of receiver—Receiver is responsible to Court—No appeal lies from the directions given by Court to receiver under R. 3.**

The provisions of R. 3 make it clear that a receiver has certain duties and that he is responsible to the Court for those duties. He cannot say that he is appointed to look after the interests of the parties and is responsible only to the parties. Part of the ordinary duties of a receiver is to pay into Court or to some one else, as the Court may direct, amounts which he has in his hands or has collected. That would include periodical payments which he is directed to make or amounts which on investi-

gation of his accounts he is directed to pay. Amounts which he is directed to pay in connexion with his accounts may include amounts which those accounts show he has in his hands, amounts which those accounts show should have been in his hands and amounts which his accounts, if properly kept, would have shown he ought to have in his hands. The payment of those amounts into Court or into a bank or otherwise, as the Court directs, is all part of the ordinary duties of the receiver as laid down in R. 3, and he has to pay those amounts under the ordinary control of the Court, which can direct the general conduct and administration of the estate. The Code has provided no appeal against any of the ordinary directions which a Judge may give a receiver in the course of his administration and no appeal against an order that such amounts as he has or are found due from him on investigation of his accounts should be paid into Court or elsewhere : *A. I. R.* 1922 *Mad.* 234 ; 4 *P. L. J.* 636 and *A. I. R.* 1925 *Rang.* 266, *Dist.*

[P 762 C 1, 2]

* **(b) Civil P. C. (1908), O. 40, R. 4—Order of attachment of receiver's property and not order of arrest of receiver is proper order under R. 4—Appeal lies against order under R. 4—An appeal will lie although illegal order is made under R. 4.**

Where there is no money found due from the receiver on investigation of any accounts, but it is found that he has caused loss to the estate by wilful default or gross negligence, the amount of the loss must be estimated and fixed by the Court, and then R. 4 provides that that amount may be recovered by the attachment and sale of the receiver's property. Against that the Code provides an appeal.

The fact that R. 4 provides for the enforcement of such an order by attachment implies that that is the only way it is to be enforced. Arrest and imprisonment are not to be the methods of enforcement. If the Court has proceeded under R. 4 to decide that the receiver has caused loss to the estate by gross negligence and then instead of ordering attachment, which he could legally do in such circumstances, has made an order enforcing the recovery of compensation from the receiver by some illegal means, that cannot save his order from appeal.

[P 763 C 1, 2]

(c) Civil P. C. (1908), O. 40, R. 4—Receiver asked to pay into Court certain sum as compensation for loss caused to estate by his gross negligence or in alternative party asked to realize amount from receiver's security—Receiver can appeal against such order.

The party made an application to the Subordinate Judge alleging that the receiver was responsible for great loss to the estate. The Subordinate Judge held an inquiry into the matter and found that the receiver had caused loss to the estate by his gross negligence. On that he made an order that the receiver should pay into Court a certain sum on account of the loss which he had caused to the estate, and that, if he failed to do so the party should realise the amount from property given by the receiver as security for the performance of his duties.

Held : that the receiver had a right to appeal against such an order, it really being one under R. 4.

[P 767 C 1]

(d) Appeal—Appellant has to show that right of appeal is expressly given by statute.

No appeal should be taken to lie as a matter of course; the appellant has to show in every case that a right of appeal has been expressly given to him by statute : 11 *Mad.* 26 and 40 *Cal.* 21 (*P.C.*), *Ref.*

[P 766 C 1]

T. M. Krishnaswamy Ayyar and *C. K. Viswanath Ayyar*—for Appellant.

K. Rajah Ayyar—for Respondent.

Reilly, J.—This appeal relates to the receivership of the property of one Nagappa Chetty, who died in February 1926. On his death one of his two widows adopted plaintiff 1 in the suit and then with plaintiff 1 instituted a suit against the other widow and the other widow's daughters for a declaration that the adoption of plaintiff 1 was valid and alternatively for a partition of Nagappa Chetty's properties between her and the other widow. Pending that suit, a receiver of all Nagappa Chetty's estate was appointed. Eventually the suit was compromised in October 1928, and the receiver's appointment was terminated in April 1929. After that plaintiff 1 made an application to the Subordinate Judge alleging that the receiver was responsible for great loss to the estate. The Subordinate Judge held an inquiry into the matter and found that the receiver had caused loss to the estate to the extent of Rs. 500 by failing to execute in a proper way a decree for money, which Nagappa Chetty had obtained. On that he made an order that the receiver should pay into Court Rs. 500 on account of the loss which he had caused to the estate and that, if he failed to do so, plaintiff 1 should realize the amount from property given by the receiver as security for the performance of his duties. Against that order the receiver appeals.

A preliminary objection has been raised that no appeal lies in this case. Under the Code of Civil Procedure, as now framed an appeal is allowed against an order made under R. 4, O. 40. But it is contended for plaintiff 1, the respondent here, that this order, made by the learned Subordinate Judge, was not one under that rule. Under that rule an order can be made that a receiver's property be attached and sold to recover compensation for loss caused by him ; but in this case, as I have mentioned, the order was not for attachment of the receiver's property. It is therefore contended for

plaintiff 1 that this was not an order under R. 4 and so not an order against which any appeal is provided in the Code. In support of that contention three cases have been quoted ; but before discussing them I think it will be better to set out the rules with which we are concerned. R. 1, O. 40 provides for the appointment of receivers. R. 2 provides for the fixing of their remuneration. R. 3 prescribes their duties or some of their duties and lays down that every receiver shall furnish security to the extent the Court thinks fit, shall submit his accounts at such periods and in such form as the Court directs, shall pay the amount due from him as the Court directs and shall be responsible for any loss occasioned to the property by his wilful default or gross neglect.

The provisions of that rule make it clear that a receiver has certain duties and that he is responsible to the Court for those duties. He cannot say that he is appointed to look after the interests of the parties and is responsible only to the parties. Then we come to R. 4, which provides for the enforcement of the receiver's duties and for making good any loss caused by his wilful default or gross negligence. There is an appeal provided against orders made under R. 4 ; but there is no appeal provided against any order made under R. 3, the explanation of that being that R. 3 does not provide for any order being made as it is concerned with prescribing the receiver's duties. Now part of the ordinary duties of a receiver is to pay into Court or to some one else, as the Court may direct, amounts which he has in his hands or has collected. That would include periodicial payments which he is directed to make or amounts which on investigation of his accounts he is directed to pay. Amounts which he is directed to pay in connexion with his accounts may include amounts which those accounts show he has in his hands, amounts which those show should have been in his hands and amounts which his accounts, if properly kept, would have shown he ought to have in his hands. The payment of those amounts into Court or into a bank or otherwise, as the Court directs, is all part of the ordinary duties of the receiver as laid down in R. 3, and he has to pay those amounts under the ordinary control of the Court, which can direct the general conduct and administration of the estate. The Code has provided no appeal against any of the ordinary directions which a Judge may give a receiver in the course of his administration and no appeal against an order that such amounts as he has or are found due from him on investigation of his accounts should be paid into Court or elsewhere. That is the stage, I think, to which the cases referred to by Mr. Rajah Ayyar in support of his preliminary objection really relate. The Madras case he quoted is *Palaniappa Chetty* v. *Palaniappa Chetty* (1). In that case there had been, it appears, some investigation of the receiver's accounts by the Subordinate Judge ; but the inquiry into the accounts had not been completed and the accounts had not been settled. But at that intermediate stage the Subordinate Judge found that in any case Rs. 31,000 was due from the receiver, and he said : "Pay it into Court." The receiver, who was one of the parties to the suit, tried to appeal to this Court; but the learned Judges before whom the appeal came said that it was incompetent, that he had no right to appeal against such an order. That decision, if I may say so with respect, appears to me to be quite correct, and it also appears to me to be of no avail to plaintiff 1 in this case. In another of the cases quoted, *Ganesh Lall* v. *Satya Narayan Singh* (2) a receiver's accounts were investigated and the result was that he was found liable to pay a certain amount to the estate. He was directed apparently to pay that amount into Court. The learned Judges held that there was no appeal against such an order, which they said did not amount to an order under R. 4, O. 40. The other case quoted was *Arunachallam Chettiar* v. *U Po Lu* (3) There a receiver was ordered to pay Rs. 4,760 after inquiry into his accounts. One of the parties to the suit appealed to the High Court, urging that the receiver ought to be ordered to pay a larger amount.

The decision was that no appeal lay against that order. The learned Judges say that there was no order made "under the operative part of the section," by

(1) A.I.R. 1922 Mad. 234=65 I.C. 403.
(2) [1920] 4 Pat. L.J. 636=54 I.C. 207.
(3) A.I.R. 1925 Rang. 266=92 I. C. 631=3 Rang. 318.

which I understand them to mean that no order was made under R. 4 enforcing the direction to the receiver. All those cases appear to me to relate only to the stage when in the ordinary course of administration or at the close of administration the Court in the exercise of its control over the receiver directs him to pay into Court or to somebody else an amount which it is found he has or ought to have in his hands. But a receiver may not obey that order either because he is dissatisfied with it or for some other reason. Then R. 4 provides that, if he does not do so, the order may be enforced by attaching his property and selling it if necessary. Against such an order of attachment the Code provides an appeal ; and, if the receiver appealed against the order of attachment, no doubt he could then dispute the grounds upon which the order was made. But R. 4 also provides for quite a different case, the case with which we are concerned, where there is no money found due from the receiver on investigation of any accounts, but it is found that he has caused loss to the estate by wilful default or gross negligence. If the Court finds that, it is obvious from the rule that the amount of the loss must be estimated and fixed by the Court, and then the rule provides that that amount may be recovered by the attachment and sale of the receiver's property. Against that the Code provides an appeal. The cases quoted by Mr. Rajah Ayyar have no application to such orders as that ; and it is not necessary for the appellant in this case to dispute the correctness of those decisions, which do not apply to him.

But it has been contended by Mr. Rajah Ayyar that, although, if it is found by the Court that a receiver has caused loss through wilful default or gross negligence and an order of attachment is made in consequence against him, he can appeal, yet, if it is found that he has caused loss in the same way but some other order is made against him, then he cannot appeal. But, when we examine the rule, can any other order be made against a receiver when it is found that he has occasioned loss to the estate by wilful default or gross negligence except an order of attachment ? Mr. Rajah Ayyar contends that an order can be made like a decree in a money suit that he is to pay a certain amount and that can be executed by arrest, by attachment or by sale exactly as a money-decree can be executed ; and he suggests that that is the kind of order which the learned Subordinate Judge has made in this case, an order which he maintains he is entitled to enforce by arresting the receiver. I do not think it can be disputed that the rules imply not only that a receiver can be required to give security for the performance of his duties but that, if he occasions loss to the estate, the amount of compensation due from him can be recovered by proceeding against the security, though that is not explicitly provided for. But apart from proceeding against the security the only provision for taking action against him under the rules is that his property can be attached. We must not only notice that that is the only provision made but we must notice that that provision is specifically inserted in the rules. Now if as Mr. Rajah Ayyar contends, such an order against a receiver could be executed like a money decree by arrest and by attachment, what is the point, what is the use of specifically providing that it can be executed by attachment ? Surely this is a case where we must apply the ordinary rule of interpretation that the expression of one thing excludes others. The fact that the rule provides for the enforcement of such an order by attachment implies that that is the only way it is to be enforced, that arrest and imprisonment are not to be the methods of enforcement; and I have no doubt that that is the historical explanation of the rule having been made in the form in which it is.

But Mr. Rajah Ayyar, as I understand him, went further and contended that although if the learned Judge had ordered the receiver's property to be attached in this case, there would have been an appeal, as he has not done so and has chosen to make some other order then whether that order is a legal order or not there is no appeal against it. That appears to me if I may say so, quite an unreasonable contention. Could it be contended that if a Magistrate who had power to convict a man of theft and to sentence him to imprisonment, which conviction and sentence would be subject to appeal chose instead

of sentencing the man to imprisonment to sentence him to death there would be no appeal against that sentence? If a Court acting within its jurisdiction in an appealable case makes a decision but embodies it in a decree or order which is illegal, is the case no longer subject to appeal? If that were so many wrong decrees and orders would be saved from appeal merely because they were wrong. In the present case, if the learned Subordinate Judge has proceeded as I think it is clear he must have proceeded under R. 4 to decide that the receiver in this case has caused loss to the estate by gross negligence and then instead of ordering attachment, which he could legally do in such circumstances, has made an order enforcing the recovery of compensation from the receiver by some illegal means that cannot save his order from appeal. I doubt myself whether the learned Subordinate Judge ever intended to make the order which Mr. Rajah Ayyar represents that he made, an order such as a money decree which plaintiff 1 could execute by arrest.

The learned Subordinate Judge, as I understand his order, has found that the receiver ought to pay a certain amount of compensation for the result of his gross negligence, has given him an opportunity of paying it into Court, has ordered that if he does not do so, plaintiff 1 may proceed against the security and has kept his power to attach the receiver's property in reserve for use later if necessary. But whether that was what the learned Subordinate Judge really intended or not, the fact that he has not made an explicit order for attachment in this case but has worded his order differently cannot in my opinion make it immune from appeal. In my opinion the learned Judge's order is one under R. 4, O. 40 of the Code, and the preliminary objection that no appeal lies should be overruled.

I may add that though I feel no doubt about the application of R. 4, O. 40 to this case, in my opinion the wording of the rule might well be improved by amendment in order to make clear exactly what orders it covers and what orders are therefore subject to appeal under R. 1 (s), O. 43.

The neglect of which the Subordinate Judge has found the receiver guilty in this case is that he has not recovered by execution Rs. 500 or thereabouts on a money-decree obtained by Nagappa Chetty in 1915, but still unsatisfied when he died in 1926. The debtor in that case was one Muthuswami Chetty. I cannot see in the learned Subordinate Judge's judgment any express finding that the estate has suffered loss to the extent of Rs. 500 through failure to execute that decree but we must take it, I think that it is implied in the judgment.

The learned Subordinate Judge appears to accept the view that the debtor, Muthuswami Chetty had land which the receiver might have attached in order to obtain the balance due under that decree. The receiver's explanation is that from his inquiries he learnt that the land was so much encumbered that it was not worthwhile spending money on attaching it in execution of the decree. The learned Subordinate Judge appears to be of opinion that there was sufficient property of Muthuswami Chetty unencumbered which could have been attached for the recovery of what was due on the decree. But there again there is no explicit finding in his judgment. His view appears to me to be that the receiver has not shown that there was no property of Muthuswami Chetty available for the recovery of the decree-debt. This is not a case in which the receiver did nothing. The decree was nearly 11 years old when he was appointed. Before the 12 years rule could come into force he applied for execution and in all made seven applications for the arrest of the judgment-debtor. The charge against him is not that he overlooked the decree or did nothing in regard to it at all, but that he failed to attach the judgment-debtor's property. If he is to be found guilty of gross neglect in that in my opinion it should first be shown that it would have been profitable to the estate for him to have attached that property. But the learned Subordinate Judge appears to have looked at the matter the other way round and to have held that unless the receiver could prove definitely that there was no property of Muthuswamy Chetty available for the satisfaction of this decree then he must be regarded as grossly negligent because he only applied for Muthuswamy Chetty's arrest and not for the attachment of his pro-

perty. The receiver a man of experience indeed we are told the senior member of the Periyakulam Bar says that he did make inquiries in this matter and he was informed that there was no property of Muthuswamy Chetty worth attaching. Some evidence has been produced that Muthuswamy Chetty owned about 12 acres of land and some houses but the receiver says that his information was that all the property was encumbered. He says also that he questioned plaintiff 1's natural brother and agent P. W. 1 about it and also another of the parties to the suit and they told him that it was not worthwhile proceeding against Muthuswamy Chetty's property and it would be only waste of money to do so. P. W. 1 in his evidence denies that he told the receiver anything of the sort and the learned Subordinate Judge appears to believe P. W. 1. Allowing the greatest weight to the learned Subordinate Judge's appreciation of the oral evidence given before him I doubt whether P. W. 1's word in this matter should be preferred to that of the receiver. P. W. 1 is a very interested party and he has given very unsatisfactorily vague evidence about Muthuswamy Chetty's property and the extent to which it was encumbered and besides denying that he told the receiver that it was not worthwhile proceeding against that property though he now maintains that there is and always was plenty of property of Muthuswami Chetty available for attachment, he says that he never went to the receiver nor said a word to him about it during the period in question. He was the person conducting plaintiff 1's suit and if he did not trouble to bring to the receiver's attention the fact that there was property of Muthuswami Chetty available, it appears to me very doubtful whether we should believe his statement about that property now.

The receiver's account that he had information that it was not worthwhile proceeding against that property receives very considerable confirmation from Nagappa Chetty's conduct in connexion with the decree during the eleven years he held it before he died. During all that time Nagappa Chetty never applied for the attachment of Muthuswamy Chetty's property at all. Muthuswamy Chetty made three comparatively small payments towards the decree and Nagappa Chetty kept it alive only by applying for Muthuswamy Chetty's arrest. Now he must have known the condition of Muthuswamy Chetty's affairs or could have ascertained them during all the time he held that decree against him but he did not think it worthwhile to attach any property. It was suggested that he preferred to proceed against Muthuswamy Chetty by arrest because Muthuswamy Chetty was his friend, an absurd suggestion which nobody has attempted to justify here. It has been urged against the receiver and the Subordinate Judge thought it of importance that he took no statement from P. W. 1 or any other party to the suit when they told him as he says that it was not worthwhile to proceed against Muthuswamy Chetty's property though he had taken statements in regard to other matters in connexion with his receivership. That certainly is not a matter to be overlooked. And I think myself it would have been wiser for the receiver when he came to the conclusion that it was not worthwhile to proceed against Muthuswami Chetty's property and that the only thing to do was to try again and again to arrest him to inform the Subordinate Judge that he had reached that conclusion and to ask approval of the course which he proposed to take. But the question before us is:

> "Was the receiver guilty of gross neglect in adopting the course of execution by arrest instead of execution against the property in the circumstances ?"

When we remember the history of the case during Nagappa Chetty's life and the fact that P. W. 1 never told the receiver, never according to his own account suggested to the receiver that there was any property worth attaching and the receiver a man of responsibility and position says that he made inquiries and then on the information he could obtain came to the conclusion that it was not worthwhile proceeding against the property can he be said to have been guilty of gross negligence? In my opinion that charge is not made out against him and therefore the learned Subordinate Judge's order was wrong.

I may mention that there is one other subsidiary matter in the appeal.

It was alleged against the receiver that he should have recovered Rs. 93 from a certain lessee. The learned Subordinate Judge said that there was still time to sue that lessee and plaintiff 1 could do it himself. But he made a conditional order that if plaintiff 1 did not receive that amount from the lessee, then the receiver should pay it. It has not yet been found that there has been any loss to the estate in connexion with that amount. No one yet knows whether there is going to be any loss. If there were any loss, it would still have to be determined whether that loss was due to any neglect on the part of the receiver. The learned Subordinate Judge in my opinion was clearly not justified in making a hypothetical and conditional order that if the amount was not recovered in further proceedings from the lessee, the receiver should pay it.

In my opinion this appeal should be allowed with costs in this Court and the order of the learned Subordinate Judge, so far as it is against the receiver, should be set aside.

Anantakrishna Ayyar, J.—I agree.

On the merits I agree with my learned brother and have nothing to add.

On the preliminary objection taken by the learned advocate for the respondent that no appeal lies in this case, I should like to add a few words of my own, having regard to the importance of the question. I think that the learned advocate for the respondent is correct in his contention that no appeal should be taken to lie as a matter of course and that the appellant has to show in every case that a right of appeal has been expressly given to him by statute: see *Meenakshi* v. *Subramania* (4) and *Rangoon Botatoung Company Ltd.* v *The Collector, Rangoon* (5). The question then is whether O. 40, R. 4 read with O. 43, R. 1 (s), gives a right of appeal in a case like the present. Now, the learned advocate for the respondent argued that it is only in cases where the Court directs the property of the receiver to be attached with a view to be sold that a right of appeal is given under O. 43, R. 1 (s). I am unable to agree. The wording of O. 43, R. 1 (s) is to this effect: "An appeal shall be from an order under R. 4, O. 40." If therefore the order in question is an order passed under O. 40, R. 4, then it follows an appeal lies under the express provisions of O. 43, R.1 (s), Civil P. C. The learned advocate for the respondent argued that the present case comes under O. 40, R. 3. I am again unable to agree. Order 40, R. 3, only declares the duties of a receiver appointed by Court. A receiver in one sense would be the representative of the party who finally succeeds in the litigation, and it is possible that receivers may get into their heads the idea that their only obligations are to account to the party who would be finally successful in the litigation ; and there are statements in the reports to the effect that the receiver is the receiver of such a party.

Inorder to make it clear that the Court that appoints receivers has got certain rights of control over the receiver and that the receiver has certain duties to the Court, O. 40, R. 3, provides in four clauses, particular heads of duties of the receiver in that connexion, the enforcement of the duties of the receiver being worked out by orders passed under O. 40, R. 4. The learned advocate for the respondent argued that Cl. (d), R. 3, provides for the present case, which is a case where a receiver is sought to be made liable for loss alleged to be occasioned to the estate by his wilful default or gross negligence. Reading R. 3 (d) I am not able to find anything there which fixes the exact amount of loss or damages which the receiver is liable to pay to the estate by reason of his wilful default or gross negligence. As I said, R. 3 only declares the duties and it is under R. 4 that the liabilities are worked out and enforced. Then it was argued that there is no specific provision in R. 4 which enables the Court to fix any particular amount which the Court finds to be due from the receiver in respect of his management of the estate as receiver. No doubt there is no such specific provision in R. 4, and it may be desirable to insert such a specific provision ; but reading R. 4, I find that it by necessary implication makes provision for the Court determining the amount due by the receiver under the several heads specified in R. 3; for the rule proceeds further to point out how in cases of non-payment by the receiver of the amount so found, the amount is to be realized

(4) [1888] 11 Mad. 26=14 I.A. 160 (P.C.).
(5) [1913] 40 Cal. 21=39 I.A. 197=16 I.C. 188 (P.C.).

by the Court. I am clear that the Court has first to determine and find out, under R. 4, the amount due by the receiver. Against any order made by the Court fixing such amount, an appeal lies, because, in my view such an order is an order passed under O. 40, R. 4, and according to the express wordings of O. 43, R. 1 (s), an appeal lies in such a case. Then the learned advocate argued, and he submitted that he is supported in that argument by some reported decisions, that according to the above view, we are not giving due effect to the last portion of R. 4. I think the answer to that argument would be clear if one looks into the history of that provision. There was no such provision in the Code of 1882, S. 503, relating to the enforcement by the Court of payment of the amount found due from the receiver. Having regard to the fact that in S. 18 (4), Provincial Insolvency Act of 1907, the legislature thought it proper, with reference to Official Receivers, to point out the mode by which amounts found due by them should be realized, the legislature (probably for uniformity, and, possibly, also on grounds of policy) made similar provisions that the amount found due by the receiver appointed under the provisions of the Civil Procedure Code should be realized (in addition to the mode prescribed by O. 40, R. 3, namely, by proceeding against the security which he might have already furnished) by attaching and selling his property. The wordings of R. 4, O. 40, are similar to those in sub S. 4, S. 18, Provincial Insolvency Act 1907. Evidently it was thought that other modes of realizing amounts ordered by Courts viz., by arrest &c., should not be resorted to in such cases, as the history of the legislation on this point indicates.

We find a similar provision repeated in sub-S. 4, S. 56, Provincial Insolvency Act, 1920. Of course, our decision should rest on the wordings of the section applicable to the case on hand ; but to understand and properly appreciate the meaning and effect of the words, it will be useful to remember the history of the matter. If we remember this aspect of the question, then the last portion of R. 4 does not, in my view, give any trouble at all, in considering the question of appeal. Otherwise, it is surely curious that the legislature should provide for appeals only when the property of the receiver is attached to realize the amount found due by the receiver (when, it is not disputed, the question of liability, and the amount found due, could also be agitated), without providing for direct appeal from orders fixing such amounts. I am of opinion that one is not driven to such a conclusion as I read the provisions of the Code.

Turning to cases cited by the learned advocate for the respondent the first case that should receive our careful consideration is the case in *Palaniappa Chetty* v. *Palaniappa Chetty* (1). But on reading the judgment as a whole, I find that the learned Judges state there that the amount due from the receiver had not been finally fixed by the Court. In fact, I find that a lump sum of Rupees 36,100 is directed to be paid by the receiver into Court. It therefore seems to me that, reading the judgment as a whole, it is only a case of the Court issuing directions to the receiver, its officer as to how the money in his hands should for the time being be safe guarded or disposed of. I do not understand that to be a case where the Court after going into the question determined the amount for which the receiver is liable. I receive support in my so understanding this judgment by what happened later on in the very case that was the subject of discussion in *Palaniappa Chetty* v. *Palaniappa Chetty* (1). That matter at a later stage came again before this Court in *Palaniappa Chetty* v. *Palaniappa Chetty* (6), and the learned Judges Krishnan and Venkatasubba Rao specifically state that they are not able to understand how the amount of Rupees 36,100, which the Court directed the receiver to pay into Court was arrived at, counsel in that case were also unable to state how the amount was arrived at evidently because the accounts of the receiver had not been duly investigated and the amount due by him had not been determined by the Court, in accordance with O. 40, R. 4. As I read the judgment in *Palaniappa Chetty* v. *Palaniappa Chetty* (1) it is not a decision on this point. As regards *Ganesha Lall* v *Kumar Satya Narayan Singh* (2) and *Arunachellam Chettiar* v. *U Po Lu* (3), in both these cases, the learned

(6) A. I. R. 1923 Mad. 85=69 I. C. 203

Judges seem to suggest that a right of suit would be available in such cases and that the matter is not one for appeal, and that appeal is limited only to cases where consequential orders attaching property of the receiver are passed under O. 40, R. 4. I may state that, as remarked by the learned Judges who decided *Palaniappa Chetty* v. *Palaniappa Chetty* (6), the proper procedure to be followed in such cases is this : If after asking parties interested to state the points in dispute and after giving them liberty to surcharge and falsify the accounts filed by the receiver, the Court comes to the conclusion that the matter involved is not intricate and that justice to the parties and the receiver could be meted out by having the questions decided in those very proceedings, then the Court should appoint a commissioner to go into the matter after taking evidence and itself dispose of the disputes raised. Of course evidence is taken, and the questions are ultimately decided by the Court. To say that after all this is done, a right of suit is still available to any aggrieved party or receiver seems to be really not in accordance with what the learned Judges have observed in *Palaniappa Chetty* v. *Palaniappa Chetty* (6). Further, a suit against a receiver requires the sanction of the Court. If the Court, after examination and investigation into the matter after all the evidence available has been let in should come to definite conclusions on points in dispute, then ordinarily I cannot understand the Court giving leave to file a fresh suit relating to the same matter. The learned Judges in these cases, *Ganesh Lall* v. *Kumar Satya Narayan Singh* (2), and *Arunachallam Chettiar* v. *U Po Lu* (3), were evidently dealing with cases where only directions were given to the receiver in the matter of the management of the estate and not with cases where the Court had to decide the amount due from the receiver in respect of wilful default or gross negligence ; and in that view no objection could be taken to the remarks of the learned Judges in those cases.

Heaton, J., the case in *Shrinivas* v. *M. C. Waz* (7), observed at p. 103 (of 45 *Bom.*) that O. 40, is " somewhat imperfectly framed". With respect, I agree with that remark, and as the matter is one which is likely to be of frequent occurrence, it is right that there should be no doubt on such matters. It is a question for consideration whether O. 40, R. 4, may not be amended by the addition of a clause providing that the Court may, after inquiry, pass orders determining the amount due from the receiver on examination of his accounts, and also similarly determine the amount of loss caused to the estate by the wilful default or gross negligence of the receiver.

I therefore hold that an appeal lies in this case, and accordingly overrule the preliminary objection.

I agree with my learned brother on the merits of the case, and also in the order as to costs which he proposes to pass in this case.

P.R.S./B.V. *Appeal allowed.*

(7) A. I. R. 1921 Bom. 427 = 59 I. C. 421=45 Bom. 99.

A. I. R. 1931 Madras 768

JACKSON, J.

Kuppuswami Rao—Petitioner.

v.

Sathiapria Rao—Respondent.

Criminal Revn. No. 937 of 1930 and Criminal Revn. Petn. No. 865 of 1930, Decided on 19th February 1931, against order of Sess. Judge, Madura Division, in Criminal Misc. Petn. No. 97 of 1930.

Criminal P. C. (1898), S. 476 (B)—Sessions Court cannot direct Additional District Magistrate to prefer complaint under S. 476-B, but may itself prefer it.

There is no provision in law by which the Sessions Judge can direct the Additional District Magistrate to prefer a complaint under S. 476-B. The Superior Court may itself make the complaint. [P 768 C 2]

R. Kesava Ayyangar—for Petitioner.

The Public Prosecutor—for the Crown.

F. S. Vaz—for Respondent.

Order.—There is no provision in law by which the Sessions Judge can direct the Additional District Magistrate to prefer a complaint under S. 476-B, Criminal P. C. The Superior Court may itself make the complaint.

The order of the Sessions Judge is accordingly cancelled.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 769

JACKSON, J.

(*Muddi*) *Sudarsanam*—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 786 of 1930 and Crim. Revn. Petn. No. 729 of 1930. Decided on 10th February 1931, against order of Stationary Sub-Magistrate, Guntur, D/- 16th October 1930, in Crim. Case No. 468 of 1930.

Madras Salt Act (1889), S. 69—Powers of police under Act are not restricted.

There is nothing in the sections of the Act restricting the normal duty of the police to report to the Magistracy, nor is there any indication that the sections taken as a whole compose a self-contained Code of Procedure. [P 769 C 2]

If S. 69 imposes upon the police the duty of taking all measures in their power, one would expect some clause making that power clear, if it is a restricted power, and not the normal power of the police.

The Act does not intend a scheme of procedure nor does it intend anything more than a few special additions to the normal procedure of the Criminal Procedure Code: *A. I. R.* 1925 *Mad.* 856 and *A.I.R.* 1923 *Mad.* 339, *Ref.* [P 769 C 2]

K. S. Jayarama Ayyar and *G. Krishna Arya*—for Petitioner.

Advocate-General and *Public Prosecutor*—for the Crown.

Order.—This is a petition by an undertrial prisoner in the Court of the Sub-Magistrate of Guntur seeking to set aside his order that under S. 190 (b), he had lawfully taken cognizance of the offence.

This Court has already had occasion to remark upon the mischievous habit of trial Courts passing interlocutory orders for which there is no provision in the Criminal Procedure Code. If the accused wishes to raise a point of law by way of defence, he should raise it when called on for his defence, and the Court should deal with it in its judgment.

This petition therefore is misconceived and might be dismissed upon that short ground. However, since the point of law has been raised, it may be answered.

The petitioner was charge-sheeted by the police under S. 74 (d), Madras Salt Act and his plea is that for offence under that Act the police have no power to put in a charge sheet. This plea depends upon the contention that the Salt Act entirely regulates the manner of investigating offences under that Act, and its regulation does not admit of a police report to a Magistrate under S. 190 (b), Civil P. C. Ch. 6, Salt Act, deals with the powers of public officers for the detention and punishment of offences against the Salt law. It will be convenient to survey its sections as bearing upon police powers in concise form.

Section 46.—Magistrate to issue search warrant on information. Informant not specified; presumably any one

Section 47.—Police Officer duly empowered may search and arrest. Person arrested must be bailed for appearance before Salt Inspector.

Section 48. Headman to report to nearest salt factory or police station.

Sections 49 and 50.—Police may arrest without warrant.

Section 52.—To report such arrest to immediate official superior.

Section 53. Person arrested to be forwarded to Salt Inspector or to nearest police station.

Section 54.—Bail by police to appear before Salt Inspector.

Section 64.—Salt Inspector must send report to the Magistrate who acts as though it were a police report under S. 190 (b).

Section 67.—Police to take charge of property in crime.

Section 68.—Police must assist other departments in carrying out provisions of the Act.

Section 69. — Police must report breaches of the Act to Salt Inspectors, and shall be bound to take all reasonable measures in their power to prevent the commission of such breaches.

Section 70. — Landowners to report offences to the police. I cannot find anything in these sections restricting the normal duty of the police to report to the Magistracy, nor any indication that the sections taken as a whole compose a self-contained Code of Procedure. S. 64 seems to contemplate that the Magistrate will be familiar with police reports, and does not say

"in like manner as if report had been made to him in respect of other offences under S. 190(b)."

And if S. 69 imposes upon the police the duty of taking all measures in their power, one would expect some clause making that power clear, if it is a restricted power, and not the normal power of the police. In the Salt Act this clause finds place. S. 11. A charge of an offence under S. 9 shall not be enter-

tained except on the complaint of a Salt Revenue Officer. That the Madras Act contains no similar provisions seems conclusive upon the point. Ch. 6 is mainly concerned with providing special provisions in regard to arrest and bail; but as regards a mere report it is silent. *In re. Venkanna* (1) is very much to the same effect as the above observations, although that ruling is concerned with the Madras Abkari Act. With all respect I would transfer the argument to this case; only I should not use the phrase "serious lacuna" when reaching the point that, for cases where there is no arrest the Acts make no special provision. Because a lacuna suggests some gap or oversight in a regular scheme, and I do not think that the Acts intend a scheme of procedure, or intend anything more than a few special additions to the normal procedure of the Criminal Procedure Code.

In *Re Kuppusami* (2) which is also upon the Abkari Act it is found that the submission of a charge by the police instead of by the Abkari Officers placed a considerable disability on the accused. But as observed in *In re Venkanna* (1) it is not clear that this does not refer to an arrest in which special provisions in the Abkari Act were not observed.

In *Lazar Fernando* v. *Amirthan Fernando* (3) the learned Judge in the chapter entitled "powers and duties of officers" finds no mention of private persons, which is not surprising. It seems at least questionable whether, if the Abkari Act was intended to restrict the normal function of private persons, it would not have done so in terms.

I do not find therefore that the Magistrate wrongfully took cognizance of this offence, and dismiss the petition.

P.R.S./K.N. *Petition dismissed.*

(1) A. I. R. 1925 Mad. 856=90 I. C. 436.
(2) A. I. R. 1923 Mad. 339=72 I. C. 175=24 Cr. L. J. 335.
(3) A. I. R. 1929 Mad. 604=1929 Cr. C. 78=119 I. C. 174=30 Cr. L. J. 1011=52 Mad. 613.

A. I. R. 1931 Madras 770

JACKSON, J.

Gopal Naick and *others* — Accused — Petitioners.

v.

Alagirisami Naick — Complainant — Respondent.

Criminal Revn. Case No. 367 of 1930 and Criminal Revn. Petn. No. 343 of 1930, Decided on 19th December 1930, against judgment of Sub-Divisional Magistrate, Koilpatti, D/- 6th March 1930.

Criminal P. C. (1898), Ss. 202 and 156— Complaint forwarded under S. 202— Police investigation under S. 156 is not illegal but mere report is sufficient.

On receiving information in a complaint forwarded under S. 202 the police can investigate under S. 156 if they choose to do so. The investigation is not illegal but mere report by them is sufficient : *A. I. R.* 1929 *Bom.* 72, *Diss. from.* 11 *I. C.* 999 and *A. I. R.* 1923 *Pat.* 547, *Ref.* [P 770 C 2]

K. S. Jayarama Ayyar and *G. Gopalaswami*—for Petitioners.

P. Govinda Menon for *Public Prosecutor*—for the Crown.

T. Krishnamachariar— for Complainant.

Order.—The first point is that the Public Prosecutor having withdrawn from the case, the accused must be acquitted. It does not appear that there was formal withdrawal from the prosecution under S. 494. The Prosecution Inspector simply dropped out and let a vakil carry on the prosecution in what was practically a private complaint.

The second point is whether the police on receiving information in a complaint forwarded under S. 202 can investigate under S. 156. The police need do no more than report ; but if they choose to investigate, it is not illegal.

If *Emperor* v. *Haji Nur Mahomed* (1), is to the contrary, I respectfully disagree. In *In re Arula Kotiah* (2), it was held that a Magistrate having taken cognizance of a complaint is bound, if he decides to delay process under S. 202, to call for a report and cannot act under S. 156 (3) ; but this ruling does not affect the powers of the police. It would be a strange state of the law if a dangerous murderer was at large and the police could not arrest him because some misguided person had already lodged a com-

(1) A.I.R. 1929 Bom. 72=117 I.C. 329=30 Cr. L.J. 781=53 Bom. 339.
(2) [1911] 12 Cr. L.J. 463=11 I.C. 999.

plaint so suspiciously false that the Magistrate had called for a report. *King-Emperor* v. *Bhola Bhagat* (3) is to the same effect.

The petition is dismissed.

P.R.S./V.B. *Petition dismissed.*

(3) A.I.R. 1923 Pat. 547=72 I.C. 375=24 Cr. L.J. 375=2 Pat. 379.

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* A. I. R. 1931 Madras 771

BEASLEY, C. J. AND SUNDARAM CHETTY, J.

Sellappa Goundan—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 842 of 1930, Decided on 5th March 1931.

*** Madras Borstal Schools Act (5 of 1926) —Applicability—Requisites stated.**

Before the provisions of the Act can be applied, the requisite conditions are that the adolescent offender should be addicted to criminal habits or tendencies or be associated with persons of bad character; and if he satisfies these requirements and if he is a person who is likely to benefit by detention in a Borstal institution then he may be sent to any one of the institutions; but where these conditions are not fulfilled the order of detention in Borstal school is clearly wrong and should be set aside.

[P 771 C 2]

K. N. Ganapathi—for the Crown.

Order. — The respondent here was charged in the lower Court with having murdered one Palani Goundan on 28th June last by hitting him on the head with the handle of an axe. The facts of the case need not be stated and it is sufficient to say that the respondent appears to have lost his temper at the interference of the deceased in his quarrel with P. W. 3 and to have acted in the manner described. The learned Sessions Judge convicted him of an offence under S. 304 latter part, holding that there was no intention on the part of the respondent to cause the death of the deceased man and ordered him to be detained in the Borstal School at Palamcottah for five years. He did so because he found that the respondent was an adolescent offender within the meaning of S. 2, Borstal Schools Act 5 of 1926. It is quite clear that in the opinion of the doctor who was examined as a Court witness the respondent who gave his age as 15 was about 20 years old and certainly more than eighteen.

The learned Sessions Judge agreed with the view of the Public Prosecutor of Coimbatore that this was a fit case for action under the Borstal Schools Act. He has however overlooked the fact that before the provisions of that Act can be applied the conditions of S. 8 of that Act must be satisfied, that is to say, that it must appear to the Court that the adolescent offender should by reason of his criminal habits or tendencies or association with persons of bad character be subject to detention in a Borstal institution instead of having a sentence of imprisonment passed upon him, provided that before passing such sentence the Court shall consider any report or representation which may be made to it as to the suitability of the case for treatment in a Borstal School and be satisfied that the character, state of health and mental condition of the offender are such that the offender is likely to profit by such instruction and discipline. It is clear that the requisites are that the adolescent offender should be addicted to criminal habits or tendencies or be associated with persons of bad character; and if he satisfies these requirements and if he is a person who is likely to benefit by detention in a Borstal institution then he may be sent to any one of the institutions.

The view taken in the lower Court seems to be that the only qualification necessary is for the offender to be adolescent within the provisions of the Madras Borstal Schools Act. That is not sufficient. He must come within the other qualifications and there is no finding here by the learned Sessions Judge nor is there any evidence to show that the respondent was a person addicted to criminal habits, or was associated with persons of bad character. That being so the order passed upon him was not the correct order. We have looked at the Prevention of Crimes Act, 1908, the English Act which authorizes a sentence of detention in Borstal institutions and also the Criminal Justice Administration Act, 1914, S. 10 which enables Courts of Summary Jurisdiction to send youthful delinquents to Borstal institutions. It seems quite clear to us that the scheme of those Acts is to deal only with young offenders who have been previously convicted or who are shown to have criminal tendencies or to be associated with criminal persons. The wording of the former is the same as the Madras Borstal Schools Act and we think that exactly

the same considerations apply here. Under these circumstances the order of the learned Sesssions Judge was clearly wrong and we have therefore to substitute for his order our own sentence. The act committed was one as the learned Sessions Judge finds without premeditation. The offender is a young man and we think that the justice of the case will be met by sentencing him to rigorous imprisonment for three years. We accordingly set aside the order in the lower Court with regard to sentence and substitute therefor a sentence of three years' rigorous imprisonment.

P.R.S./K.N. *Order accordingly.*

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* A. I. R. 1931 Madras 772 (1)

JACKSON, J.

Narayana Naick and *others* — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 59 of 1931, and Crim. Revn. Petn. No. 57 of 1931, Decided on 12th March 1931, from order of Magistrate, Avanashi, D/- 26th December 1930.

*** Criminal Trial—Complainant's death—No abatement.**

There is no abatement of a criminal case on the death of the complainant : 16 *Cr. L J.* 713; *A. I. R.* 1929 *Rang.* 14, *Rel. on.*; *A. I. R.* 1923 *Mad.* 206, *Diss. from.* [P 772 C 2]

A. C. Sampath Ayyangar – for Petitioners.

Public Prosecutor—for the Crown.

Order.—Petitioners were complained against by a private person and charged under S. 166, I. P. C., a noncognizable noncompundable offence.

The complainant then died.

The Magistrate was moved to acquit the accused under S. 259 because the complainant was absent; and he ordered the case to proceed. This petition is to revise that order.

The Magistrate's action is within the four corners of S. 259 because after the charge is framed the Magistrate has no discretion in the matter.

But *Gulam Mohideen Quarishi Sahib* v. *Ahamadulla Begam Sahiba* (1), the ruling apparently which the Magistrate says does not apply, (he should give the reference to any ruling which he mentions) lays down as a general principle on p. 89 that criminal proceedings instituted by a private complainant abate on such person's death. I have been able to find no such principle in the Code.

It is argued on behalf of petitioners that death is unlike other absence, because a party, frivolously complained against, will have no redress. But a complete disappearance may be as effective as death, and anyhow after a charge has been framed there is not much question of frivolity and vexatiousness.

In *In re. Ramasamier* (2), Sir William Ayling has held that there is no abatement of a criminal case on the death of the complainant.

In *U Mo Gaung* v. *U Po Sin* (3), a case is ordered to proceed despite the complainant's death.

In the circumstances it cannot be said that there is a principle of general application that private complaints abate upon death; and the point was rightly decided by the lower Court.

The petition is dismissed.

P.R S./K N. *Petition dismissed.*

(1) A. I. R. 1923 Mad. 206=71 I. C. 49=24 Cr. L. J. 2=46 Mad. 88.

(2) [1915] 16 Cr. L. J. 713=30 I. C. 1001.

(3) A. I. R. 1929 Rang. 14=114 I. C. 681=30 Cr. L. J. 345=6 Rang. 664.

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* A, I. R. 1931 Madras 772 (2)

BEASLEY, C. J. AND SUNDARAM CHETTY, J.

Appachi Goundan—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 120 of 1931 and Case Referred No. 10 of 1931, Decided on 17th February 1931, for orders of High Court by Sess. Judge, Coimbatore, D/- 13th February 1931.

*** Criminal P. C. (1898), S. 435 (4)—"Made" — Meaning of, explained — Application not entertained by District Magistrate does not bar application to Sessions Judge.**

The word "made" means not only "made" but "entertained and decided." Making an application does not merely mean presenting a petition to the Magistrate or the Sessions Judge but it must mean something more. i. e., that the application must be heard and determined.

An application was made to the District Magistrate to revise an order of the Sub-Magistrate discharging one of the several accused on the same evidence which had led to the commitment of the other accused persons to the Court of Sessions. The District Magistrate remarked as follows :

"As I am informed that the records are in the Sessions Court and the time is too short to get them to enable me to consider this case, I think it would be convenient if this application were presented to the Sessions Judge."

On application being made to the Sessions Judge, he declined to entertain it as it was made to the District Magistrate.

Held : that it was open to the petitioners to present an application to the Sessions Judge and that it was open to the petitioners to represent the same application to the District Magistrate. [P 773 C 2]

The Sessions Judge—Referring Officer.

The Public Prosecutor—for the Crown.

Order.—Before the Stationary Sub-Magistrate of Palladam there were six accused persons charged with the murder of one Narayana Goundan on 27th September last. Of these, five accused were committed to the Sessions but the accused 5 was discharged by him. As in the opinion of the prosecution the same evidence which established a prima facie case against the five accused also did so against accused 5, an application was made to the District Magistrate to revise the order of the Stationary Sub-Magistrate. When the petition was put in on the 24th January last the District Magistrate dealt with it in the following manner as will appear from his endorsement on the petition :

"As I am informed that the records are in the Sessions Court and the time is too short to get them to enable me to consider this case, I think it would be convenient if this application were presented to the Sessions Judge."

After that the petitioners thought that the better course would be to withdraw the petition and accordingly the petition was withdrawn and another petition presented to the Sessions Judge of Coimbatore. When the matter was gone into by him objection was taken by the advocate for accused 5 that the Sessions Judge was not entitled to hear the petition by reason of S. 435 (4), Criminal P. C. which states :

"If an application under this section has been made either to the Sessions Judge or District Magistrate no further application shall be entertained by the other of them"

and it was argued that as an application had been made to the District Magistrate under S. 435, Criminal P. C the Sessions Judge has no power to entertain a similar application. The learned Sessions Judge has in considering that objection taken the literal meaning of the word "made." In his view when the application was presented it was made notwithstanding the fact that the District Magistrate declined to go into the merits of the application and said that the more convenient course would be to re-present the application to the Sessions Judge. We are unable to take the same view as the learned Sessions Judge has taken. We think that particularly when the facts of the case are applied to the consideration of the sub-section, the word "made" means not only "made" but "entertained and decided." We are of the opinion that making an application does not merely mean presenting a petition to the Magistrate or the Sessions Judge but it must mean something more, i. e., that the application must be heard and determined. In this case the facts are very strong. It was much more convenient in the opinion of the District Magistrate for the Sessions Judge to entertain the application; otherwise he would have entertained it himself. We certainly think that it would be a very odd state of affairs if after the Magistrate acted in the way he did no further steps could be taken by the petitioners to revise the order of the Stationary Sub-Magistrate. That in our opinion is clearly wrong. We are of the opinion that it was open to the petitioners to present an application to the Sessions Judge and that it is open to the petitioners to re-present the same application to the District Magistrate. We accordingly make an order that the District Magistrate is to take this application again on his file and dispose of it according to law.

P.R.S./K.N. *Order accordingly.*

A. I. R. 1931 Madras 773

BEASLEY, C. J. AND SUNDARAM CHETTY, J.

Subbarathnammal—Petitioner.

v.

Seshachalam Naidu—Respondent.

Criminal Misc. Petn. No. 175 of 1931, Decided on 26th March 1931.

Criminal P. C. (1898), S. 491—Procedure by way of habeas corpus cannot be utilized for going behind order of competent Court.

When a Court of competent jurisdiction has declared a person to be a fit and proper person to exercise guardianship over the infant it cannot be argued that the retention by such person legally appointed is either illegal or improper. The procedure by way of habeas corpus is not intended to be utilized for the purpose of going behind such an order and it is only in cases where it can be shown that a minor child is illegally or improperly retained that Courts will interfere by way of habeas corpus : *King* v. *Greenhill*, 4 *Ad. & E.* 624, *Dist.*

[P 774 C 2, P 775 C 1]

K. Rajah Ayyar, *V. Ramaswami* and *S. Narasinga Rao*—for Petitioner.

S. Varadachariar and *S. V. Venugopalachariar*—for Respondent.

Beasley, C. J.—The petitioner here is the mother of an illegitimate minor son and she has presented this petition praying for the issue of a writ of habeas corpus directing the respondent to hand over the custody of that child to her. The child was born on 11th April last year. It would appear that the petitioner had been living as the respondent's mistress for some two or three years in the respondent's house in which also the respondent's wife lived. The latter was incapable of bearing any children. There had been previously born to the petitioner two other children both of which died in very early infancy. After the birth of this child the petitioner went to Mysore, it is said, in order to visit her sister who was very ill; and she alleges that she was prevented by the respondent from taking her child with her, and upon her return to Madras early in July that he has refused to hand over to her this child. Accordingly she has presented this petition for a writ of habeas corpus.

Some important matters must be referred to. The petitioner presented a petition under the Guardians and Wards Act to the District Court of Chittoor, namely, O. P. 18 of 1930. In that petition she prayed to be appointed the guardian of the person of the minor child. The respondent here was the respondent in that petition. He put in a counter-petition alleging that the petitioner was not by reason of her immoral character and other matters a fit and proper person to be appointed the guardian of the person of the minor child. He added also that he was a fit and proper person and that he was willing to be appointed the guardian of the person of the minor child and prayed to be so appointed. The District Judge of Chittoor went into the merits of the case and decided that the petitioner was not the right person to be appointed guardian of the person of the infant and decided at the same time that the respondent was; and he was accordingly appointed the guardian of the person of the child. The petitioner then brought the matter up to the High Court in *A. I. R.* 1931 *Mad.* 478 and it was decided by the Division Bench in that case that as it appeared that the appellant was a resident of Mysore and therefore residing outside the jurisdiction of British India, she could not be appointed the guardian of the minor as over such a guardian the Court could not exercise a proper control and in support of that view reference was made to *Muthuveerappa Chetty* v. *Ponnuswamy Chetty* (1).

The order of the appellate Bench then goes on as follows:

"The appellant therefore cannot herself be appointed guardian of the minor under the Act. For this reason without going into any of the other questions raised, we find it unnecessary to interfere in the appellant's favour with the order of the learned District Judge. This will not preclude the appellant from seeking any other remedy open to her."

It is clear that the appellate Bench did not go into the merits of the case. On the question of jurisdiction they dismissed the appeal at the same time making the order of the District Court a final one. With regard to the concluding words of that order, we have had addressed to us an argument by Mr. Rajah Ayyar that he has come here really with the benediction of the Division Bench. But it appears to us that those words mean nothing more than that if the petitioner has got some other remedy, the decision of the appellate Bench is not to be taken to be a bar to her adoption of such a remedy. The question is whether she has got any such remedy as she seeks here. We have an order of the Court of competent jurisdiction declaring on the petitioner's own petition the respondent to be the fit and proper person to be appointed guardian of the person of the minor child. That order is still subsisting. The respondent therefore is declared to be the fit person entitled to the custody of the minor child. The question is whether under such circumstances in the face of that subsisting order, it is open to the petitioner to come here by way of habeas corpus and obtain custody of the child. It is quite clear to us that there is no remedy by way of habeas corpus unless it is shown that the retention of the minor child is illegal or improper. When a Court of competent jurisdiction has declared a person to be a fit and proper person to exercise guardianship over the infant, how can it be argued here that the retention by

(1) [1912] 13 I. C. 16.

that person legally appointed is either illegal or improper? We are quite satisfied that it was never intended that the procedure by way of habeas corpus should be utilized for the purpose of going behind such an order as we have here; and it is only in cases where it can be shown that a minor child is illegally or improperly retained that Courts will interfere by way of habeas corpus. We have been referred to the authority of *King* v. *Greenhill* (2). But that case really is an examination of other cases into the question as to which party, the husband or the wife as the case may be, was the best person or the better person to have the guardianship or custody of the child and it is quite clear from a reading of that case that where a child is in the legal or proper custody of another person, others be those persons mother, father or relatives, have no right to come by way of habeas corpus for a writ directing the return of the child from the person in whose proper or legal custody the infant is. The only remedy, if any—indeed there may be none in this case—open to the petitioner is to apply under S. 39, Guardians and Wards Act. If the petitioner is able to satisfy the Court that the conditions mentioned therein are present in the case, that will be a good reason for asking the Court to take the guardianship of this infant away from the respondent and to put it with the petitioner. S. 25 of the same Act does not assist the petitioner in the least degree. S. 25 merely deals with the case of a child which has been in the custody of or should be in the custody of a person appointed guardian and which leaves or is removed from such custody. Under such circumstances as those when the legal guardian or the natural guardian makes an application for the return of the child under S. 25, the question may be enquired into as to whether it is right that the child should be returned to that person on the ground that the person who has been appointed guardian or is the natural guardian of the infant is not a fit and proper person to have the child. That section has no application to this case.

This petition must be dismissed.

P.R.S./K.N. *Petition dismissed.*

(2) 4 Ad. & E. 624.

* A. I. R. 1931 Madras 775

WALLER AND PANDALAI, JJ.

Sundaram Aiyar – Accused 1—Appellant.

v.

Emperor

Criminal Appeal No. 136 of 1931, Decided on 21st July 1931, against order of Sess. Judge, Tinnevelly, in Case No. 97 of 1930.

*** Criminal P. C. (1898), S. 304—Mistake lying in misunderstanding of law—S. 304 does not apply.**

Section 304 contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury. It has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the case by the jury. Where the jury returns the unanimous verdict of not guilty clearly enough, but the Judge finding that reason which the jury added as a ground for their opinion was based on a misunderstanding of the law, addresses another charge on the law to the jury and requests the jury to reconsider the matter, the procedure adopted is bad and the amended verdict of guilty is illegal: 28 *Bom.* 412 and 14 *I. C.* 669, *Rel. on*; *A. I. R.* 1927 *Rang.* 68 (*F. B.*), *Dist.* [P 777 C 1]

K. S. Jayarama Ayyar and *G. Gopalaswami*—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—This is an appeal by accused 1 in a case tried by the learned Sessions Judge of Tinnevelly with a jury for an offence under S. 395, I. P. C., in which the appellant and seven others were convicted and sentenced to various terms of imprisonment. The sentence on the appellant is six months and a fine of Rs. 200 and six months more in default. The facts alleged were as follows: The appellant is the accountant of the Isanam Mutt to which the Marappanad village belongs. The other accused in the lower Court were mostly Pallars residing in the paracheri in that village. The mutt had engaged the Pallars to repair a breach in a channel. On 11th August 1930 the Pallars quarrelled about the distribution of wages between accused 2 in the lower Court and the father of P. W. 1. The dispute was referred to the appellant who asked that Rs. 10 should be deposited by both parties as caution money to abide by his decision by 3 p. m. on the 12th. The father of P. W. 1 did not turn up at the time nor did he pay. The son (P. W. 1) said that his father had gone to fetch the money. The appellant thought that it was a falsehood and that the father of the pro-

secution witness was trying to back out of the proposed settlement. It is alleged that at 5 p. m. that day (12th August 1930) the appellant and his co-accused Pallars went to the hut where P. W. 1 was cooking. The appellant stood on the bund of the channel and asked for P. W. 1's father and was told that he had not come back. Thereupon the appellant is said to have lost his temper and told his Pallar followers, the other accused, to pull off the roof of P. W. 1's house and to loot the contents of the house. They are alleged to have done so after binding P. W. 1's hands with his own cloth. After the looting, P. W. 1 is alleged to have been kept bound at the same place by two of the Pallars and not allowed to go away until mid-day on the 13th.

The conviction of the appellant is said to be based on a unanimous verdict of the jury. If so, it cannot be disturbed unless there was material misdirection or other material irregularity at the trial which would vitiate the verdict and judgment.

Counsel for the appellant has urged that the charge to the jury is vitiated by misdirections: (1) as to the explanation of the offence of dacoity, (2) by reason of mis-statements of the prosecution evidence in material particulars and (3) on account of general unfairness which did not leave the jury any real choice to exercise an independent judgment on the facts. He also complains that the sentence is vitiated by the fact that the verdict of the jury first given was one of acquittal of the appellant and that the subsequent verdict of guilty was given in circumstances in which the jury had no power to vary their first verdict and the Judge was not entitled to accept any variation.

In the view we take on this last point it is not necessary to consider the objections as to misdirection. The objection as to the verdict seems to us to be well founded. From the judgment it appears that what happened was that after the learned Judge had charged the jury on the law and on the facts the jury returned the following unanimous verdict:

"Accused 7 and 9 are not guilty; accused 11 and 12 are not guilty. Accused 1 did this only to intimidate, and the others are guilty of dacoity. Accused 1 should be let off because he did not intend to cause wrongful gain to himself, only to show that he was all powerful."

The judgment proceeds to show that upon this verdict being given the Judge again explained the definition of "dishonestly" in the Code and sent back the jury to reconsider their verdict in the light of the legal definition. On their return after a long deliberation the foreman stated: "We are unanimous. Accused 1 also is guilty of dacoity." In a note it is stated that this verdict was delivered by the foreman after a very long pause and with obvious emotion. The objection is that the jury, in the first instance, although for a reason which they were not bound to state and which may have been wrong, found the appellant not guilty as they state expressly that he should be let off, and this verdict not being vitiated by any mistake or accident, neither the jury nor the Judge had the power to bring about its reversal and convert it into one of guilty.

In a similar case, *Emperor* v. *Konbida* (1), it was held that S. 304, Criminal P. C., contemplates cases where the verdict delivered is not in accordance with what was really intended by the jury and that it has no application where there is no accident or mistake in the delivery of the verdict and the mistake lies in the misunderstanding of the law by the jury. If such a mistake results in an erroneous verdict, it can be corrected only by the Judge disagreeing with the jury and referring the case under S. 307 of the Code to the High Court. It has also been held by this Court that there is no provision in the Criminal Procedure Code which empowers the Judge to question the jury as to their reasons for a unanimous verdict when there is nothing ambiguous in the verdict itself and no lurking uncertainty in the minds of the jury themselves regarding it and that S. 303 of the Code limits the power of the Judge to question to cases in which it is necessary to ascertain what the verdict of the jury is: see *In re Rama Naicker* (2). In this case we can find nothing in the first verdict to show that it was delivered by accident or by mistake, in other, words, that that verdict did not express the jury's real meaning. The jury themselves did not say that they had made any mistake or intended anything else but what they said.

(1) [1904] 28 Bom. 412=6 Bom. L. R. 361.
(2) [1912] 13 Cr. L. J. 285=14 I. C. 669.

Their meaning was quite clear that the appellant should be let off, in other words, that he was not guilty. They no doubt added as a ground for that opinion that he was not actuated by any intention to cause wrongful gain to himself but only to intimidate P. W. 1. That may not be right as an application of the law as to dishonesty in the Penal Code. All that it showed was that the jury had, by committing an error of law, committed an error of judgment but not that they delivered a verdict which they did not intend to deliver. This was not a case under S. 303 because the learned Judge put no questions to the jury as obviously no questions were necessary to be put to them to ascertain what their verdict was. They had stated their verdict clearly enough as also their reason for it which they were not bound to do. The case was one in which the learned Judge might have thought that the jury's verdict of not guilty against the appellant was based upon an error of law, and on that ground he might have thought fit to disagree with the verdict, and if so, he ought to have submitted the case to this Court under S. 307. In fact however the course he adopted was to address another charge to the jury on the law as to dishonesty and to request them to reconsider their verdict in the light of the legal definition. On the reconsideration, the jury, apparently with great reluctance, returned a verdict of guilty and as the record shows they did so with obvious emotion. For this procedure there is no warrant in Criminal Procedure Code and the amended verdict of the jury was therefore illegally obtained and the conviction and sentence following thereupon cannot be sustained.

The decision in *Emperor* v. *Nga Tin Gyi* (3) which was referred to by both sides during the argument was not a case like the present but one in which the verdict of the jury did not make it plain under which part of S. 304 they found the prisoner guilty. Thereupon the learned Judge questioned the jury, as he was entitled to do, under S. 303 to ascertain what their verdict was. From the answers given it appeared that the jury wanted some further elucidation of a decision which had been referred to in the summing up. The learned Judge explained the decision further to the jury who retired again and afterwards returned a verdict of guilty under S. 303. It was held that this second verdict could be accepted. Whether in the particular circumstances of that case the opinion that the second verdict could be accepted or not and whether the decision was right it is not necessary for us to say. But the case itself is an illustration of the rule that only where the verdict is ambiguous or defective and it becomes necessary to ascertain what the verdict is, can the Judge question the jury under S. 303. That was not this case nor indeed did the learned Judge, as already stated, question the jury under that section. We therefore set aside the conviction and sentence and order that the appellant be set at liberty. In the circumstances of the case we do not think it necessary to order a retrial. The appellant will be discharged.

P.R.S./P.N. *Conviction set aside.*

(3) A. I. R. 1927 Rang. 63=99 I. C. 1013=28 Cr. L. J. 230=4 Rang. 488 (F.B.).

A. I. R. 1931 Madras 777

JACKSON, J.

Uppalapati Bulli Nagayya — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 152 of 1931, and Criminal Revn. Petn. No. 134 of 1931, Decided on 28th April 1931, against judgment of Sub-divisional Magistrate, Gudivada, in C. A. No. 23 of 1930.

(a) Madras Act (3 of 1930)—Act is not retrospective—Madras Towns Nuisance Act (1889).

Act 3 of 1930 is not retrospective and its similarity to a previous Act cannot make it so. [P 775 C 1]

(b) Madras Towns Nuisances Act (3 of 1889), S. 9—Confiscation of money used for gambling.

Where Court orders the confiscation of money with which gambling is alleged to have been carried on there must be proof that it was used for gambling. [P 778 C 2]

(c) Madras Towns Nuisance Act (3 of 1889), S. 6—Statutory crimes outside Penal Code—Imprisonment should be last resort—Confiscated money is practically fine.

For statutory crimes like gambling outside the Penal Code imprisonment should be the last resort in cases of contumacy rather than the general penalty. Gambling is a nuisance but it hardly ranks with ordinary crimes against person and property.

Confiscated money is practically fine and for a first offence to give a man the maximum term of imprisonment together with confiscation

which is three times the maximum fine is hardly what the law contemplates. [P 778 C 2]

T. G. Singaravelu—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner is accused 1 in C. C. No. 348 of 1929 on the file of the Sub-Magistrate, Gudivada. The appellate Court has sentenced him to three months rigrous imprisonment. It has also confirmed the order of the trial Court whereby sums of money amounting to Rs. 1,906-9-6 found in the house of accused 1 have been confiscated.

Apparently the accused was convicted in the alternative under S. 6, Madras Act 3 of 1889 or S. 8, Madras Act 3 of 1930. The offence was on 18th November 1929 and Madras Act 3 of 1930 received the assent of the Governor-General on 21st March 1930.

The appellate Court finds that there was nothing wrong in passing sentence under the 1930 Act because its Ss. 8 and 9 are identical with Ss. 6 and 7 of the 1889 Act. There is no reason for presuming that Act 3 of 1930 is retrospective and its similarity to a previous Act cannot make it so. The Act under which accused is liable is clearly Act 3 of 1889. Under S. 9 of that Act a police officer may seize all moneys reasonably suspected to have been intended to be used for the purpose of gaming. Under S. 517 (1), Criminal P. C. a Court can confiscate any property which has been used for the commission of an offence. The lower Courts should specifically have passed orders under S. 517 instead of leaving it vague under what law they were proceeding, but that omission does not affect the validity of the order. The more difficult question is to determine whether these moneys were intended to be used for gambling. The Sub-Magistrate finds that they were so intended because the accused refused to open the safe, because the safe contained cowries, and because each currency note was folded by itself "indicating its passing through business at the time." The appellate Court does not go into the question. Apparently the game played was pitch and toss. Whether the petitioner held the bank and gambled with his clients, or whether they gambled with each other, and he took a commission as his payment for providing facilities is not clear. The point is important in discovering what money was likely to be used in the business. There is no evidence about the appearance of the safe when it was opened; how much had been hurriedly bundled away, and how much was folded singly. It is not made clear why this folding proves that the notes were used for gambling. That the safe contains cowries does not necessarily mean that its whole contents must have been used for gambling. For instance, the empty purse M. O. 5, could hardly have been so used. M. O. 1 is Rs. 175-15-9 taken from persons present other than the petitioner apparently including a sum found under bed. M. Os. 2, 3 and 4 are money taken from each shelf of the safe Rs. 1730-9-9 in all. There is really no evidence that this large sum was all used for gambling. In any circumstances confiscated money is practically a fine, and for a first offence to give a man the maximum term of imprisonment together with confiscation which is three times the maximum fine is hardly what the law contemplates. Moreover for these statutory crimes outside the Penal Code imprisonment should be the last resort in cases of contumacy rather than the general penalty. Gambling is a public nuisance but it hardly ranks with the ordinary crimes against person and property. Instead of the remainder of the sentence of imprisonment accused 1 will be fined Rs. 500 and that being paid, the contents of the safe will be returned to him (except for the cowries), because it is impossible to say on the evidence how much was used or intended to be used for gambling, and the onus is upon the prosecution.

The accused's bail is released.

P.R.S./R.M. *Order accordingly.*

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* A. I. R. 1931 Madras 778

JACKSON, J.

Ganesh Mull Marwadi — Accused — Petitioner.

v.

Emperor

Criminal Revn. No. 61 of 1931 and Criminal Revn. Petn. No. 59 of 1931, Decided on 23rd April 1931, against order of Sess. Judge, Anantapur, in Criminal Appeal No. 45 of 1930.

*** Penal Code, S. 193—Person making one statement in committing Court and contradicting it in Sessions Court—Latter statement true—Sessions Court can complain of**

falsehood of former only if committed in relation to Sessions trial.

When a person makes one statement in the committing Court and contradicts it in the Sessions Court, the Sessions Judge can complain in the alternative that one or other of the statements must be false. If the statement in the Sessions Court is true, the Sessions Judge can complain of the statement in the committing Court only if the latter statement has been committed in relation to the Sessions trial : *A. I. R.* 1927 *Cal.* 478 and 25 *I. C.* 524, *Ref.*

[P 779 C 1]

V. V. Srinivasa Aiyangar and *S. Ramanujachari*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—This Court would not have called up this case except that it involves an interesting point of law, because the petitioner confined his appeal below to a plea ad miseri cordiam and a party must obviously work out all his remedies in the properly constituted Courts below before he comes up for revision.

The point is whether when a person makes one statement in the committing Court and contradicts it in the Sessions Court, the Sessions Judge can complain in the alternative that one or other of the statements must be false. If the statement in the Sesssions Court is true, can the Sessions Judge complain of the statement in the committing Court. He can only do so if the latter statement has been committed in relation to the Sessions trial. It has been held in Calcutta *Nazir Ahmed* v. *Emperor* (1) that if a person makes a false charge in a police station which eventuates in a trial, the false charge is in relation to the trial. In the same way the false statement at the committal stage which eventuates in a trial is in relation to the trial. The learned Judges in *Rami Reddi* v. *Public Prosecutor of Kurnool* (2) were considering subordinacy and not the phrase "in relation to."

In these circumstances it cannot be said that the lower Courts erred in law. But by way of superabundant caution in these alternative cases it is well to have complaints from both Courts. On the merits there is no reason to interfere. The petition is dismissed.

P.R.S./B.V. *Petition dismissed.*

(1) A. I. R. 1927 Cal. 478=100 I. C. 708=28 Cr. L. J. 324.

(2) [1914] 15 Cr. L. J. 612=25 I. C. 524.

⁂ A. I. R. 1931 Madras 779

JACKSON AND CORNISH, JJ.

Sheikh Kalesha—Prisoner—Accused.

v.

Emperor

Referred Trial No. 68 of 1931 and Criminal Appeal No. 284 of 1931, Decided on 16th June 1931, referred by Sessions Court, Nellore Division, for confirmation of sentence of death in Cases Nos. 9 and 19 of 1931.

⁂ **(a) Interpretation of Statutes — Court should interpret language which legislature has employed—Criminal P. C. (1898), S. 162.**

The Court's sole function is to interpret the language which the legislature has employed. Very probably the intention and the language do not coincide but the Courts are only concerned with the language. [P 780 C 2]

Where the language is perfectly plain as in S. 162, Criminal P. C., no good object is served by the judiciary attempting to re-adjust the artificial barriers which the legislature has erected in the way of evidence. If the legislature chooses to lay down that any statement recorded by a police officer in the course of his investigation is worthless, save as provided by S. 27, Evidence Act, the Court must treat it as statutorily worthless, though judicially it may amount to evidence of the greatest value: 4 *Rang.* 84, *Foll.* and 44 *C. L. J.* 257, *Ref.*

[P 781 C 2]

⁂ **(b) Criminal P. C. (1898), S. 162—"Any person" includes accused person.**

Section 162 is explicit and applies to accused persons as well. The words 'any person" are wide enough to comprehend a person who subsequently becomes the accused: 44 *C. L. J.* 253; 4 *Rang.* 72; 5 *Pat.* 63 and 7 *Lah.* 84, *Diss. from.*

[P 782 C 1]

(c) Criminal P. C. (1898), S. 162—"Any purpose"—Meaning explained.

The words "any purpose" must include purpose of prosecution or defence. [P 782 C 1]

(d) Criminal P. C. (1898), S. 162—Statement by accused to police during investigation cannot be brought into evidence although forming best of defence—Accused can repeat that statement in Court—Absurdity of S. 162 illustrated.

Where at the time of the investigation the accused made a long statement to certain neighbours when a Police Sub-Inspector was present and was one of the signatories, so that it was undoubtedly a statement made to a police officer in the course of his investigation.

Held: that such statement could not be brought into evidence by the accused though forming his best defence because of S. 162.

Held, further: that the language of S. 162 was expressed and compelling. "No statement by any person to a police officer shall be used" was surely as express and compelling language as could be found, and the difficulty lay not in its plain interpretation, so much as in the fact that its plain interpretation leads to absurdity.

[P 781 C 2]

The rule in S. 162 was one of procedure. It was aimed at preventing a statement by an ac-

cused to the police at an investigation being produced by the police at the trial except for the limited purpose permitted by the section. But it did not prevent the accused from proving his defence aliunde. His mouth was not sealed at the trial in respect of anything said by him at the police investigation. It was open to the accused when making his defence to repeat in Court what he had already said to the police at the investigation, and to call witnesses to support his statement. But he could not call for his statement made at the investigation for the purpose of corroborating or implementing his defence at the trial: 51 *Mad.* 967, *Rel. on.* and 51 *Mad.* 974 *Ref.* [P 782 C 2]

K. S. Jayarama Ayyar for *V. L. Ethiraj* and *N. Somasundaram*—for Accused.

N. S. Mani for *Public Prosecutor*—for the Crown.

Jackson, J.—The accused has been sentenced to death for murdering a boy G. Ramanathan, the offence punishable under S. 302, I. P. C.

The facts which are very few are summarized in para. 38 of the judgment. The boy disappears by 6 p. m. Next morning he is found murdered and stripped of his ornaments. He was last seen alive at 5 p. m. that evening. Then he was seen going into a shed with accused. Next day accused took the police to where the jewels were buried.

The fact that he went into the shed is not proved beyond suspicion. A little girl aged 9, P. W. 4, who was taking a morbid interest in the case for she not only went to see the corpse but identified it, says that she saw the boy enticed into the shed by the offer of a doll which latter she changes to the offer of a pomegranate. If she is speaking plain truth and not drawing upon her imagination she should know if it was a doll or a pomegranate: and it is quite possible that she is telling the Court not what she saw, but what she thinks she must have seen; a common and dangerous type of witness in criminal trials.

So the only fact proved beyond all doubt is that the accused took the police to where the jewels were hidden next day, and if he cannot explain his knowledge, a presumption of guilt lies against him. At the trial he denied that he had ever shown the jewels to the police. And here there arises a point of much interest and difficulty. At the time of the discovery of the jewels the accused made a long statement to certain neighbours Ex. K. The Sub-Inspector was present and is one of the signatories, so that it is undoubtedly a statement made to a police officer in the course of his investigation.

This is one of those items of evidence which the legislature has laid down shall not be used by Courts of law, except in the special manner provided in S 162, Criminal P. C. Mr. Jayarama Ayyar who appears for the accused says that it is a document which materially assists his client's defence, and wishes to bring it upon the record. Is this prevented by S. 162?

This question has been considered in Calcutta where it is held in 44 *C. L. J.* 253, that a statement made by an accused to a police officer may be proved against him (and presumably a fortiori for him) provided that it is not a confession. This decision is based on various lines of thoughts.

In 4 *Rang.* 72, Duckworth, J., expressed the opinion that Ss. 160, 161 and 162 only refer to witnesses and not to an accused persons. The Chief Justice apparently held the same view though he preferred to base his judgment on other grounds. He refers to the authority of 5 *Pat.* 63, where it is also held that S. 162 does not apply to accused persons partly because otherwise the special provision in S. 27, Evidence Act, would be repealed, and partly because the Court would be deprived of valuable material for testing the truth of the case.

This latter reason has little force because the whole object of S. 162, Criminal P. C., and the kindred S. 25, Evidence Act, is to deprive the Court of material. If anything in the statutes depriving the Courts of what otherwise might prove to be valuable material is to be treated as a dead letter, S. 25 and S. 162 might both be ignored. With all respect it seems useles for the Courts to try to reconstruct the statutes on such lines of logic and common sense which might have commended themselves to the legislature. The Court's sole function is to interpret the language which the legislature has employed. As pointed out by Heald, J. (4 *Rang.* 84) very probably the intention and the language do not coincide, but the Courts are only concerned with the language. Rankin, C.J., in 44 *C. L. J.* 257,. accepts this position and interpret, "any person" in S. 162 as meaning 'quivi ex populo.' But it is not very clear why "anyone you like out of the people" is a phrase which ex-

cludes an accused person. His Lordship proceeds (p. 258) that it would require express and compelling language to deprive an accused of what is so often the mainstay of a good defence, the right to show that immediately he was challenged he gave an explanation. But this is to restate the problem. Is the language of S. 162 express and compelling, or what is there about its language to justify the view that it is not express or compelling? "No statement by any person to a police officer shall be used," is surely as express and compelling language as could be found, and the difficulty lies not in its plain interpretation, so much as in the fact that its plain interpretation leads to absurdity. But then as I ventured to point out in 51 *Mad.* 967 the whole provision involves absurdity. It must be borne in mind that the Criminal Procedure Code is not devised on behalf of the prosecution, or on behalf of the accused, but on behalf of justice; and anything that derogates from the proper claims of justice is inherently absurd. It is just as absurd to prevent the prosecution from exhibiting a confession, as to prevent the accused from exhibiting an admission, and if the statute were to be overriden to admit admissions merely to prevent absurdity, it might equally well be overriden to admit confessions. So this line of thought that language must be compelling, is not perhaps very helpful.

Then there is another line in 44 *C. L. J.* 257 strongly relied upon by Mr. Jayarama Ayyar that inasmuch as it has now been held by all the High Courts and by a Full Bench of our Court in 51 *Mad.* 974, that the special provision in S. 27, Evidence Act, admitting a confession to the police which leads to a discovery is not repealed by the general provision in S. 162 forbidding the proof of all statements to the police, therefore the provision in the Evidence Act, Ss. 17 and 18 that a statement which suggests an inference made by a party to the proceeding can be proved, is not repealed by the provision in S. 162 that statements made to the police cannot be proved. *Generalia specialibus non derogant.* But unfortunately the application of this maxim, so useful when S. 27, Evidence Act, was considered leads in precisely the opposite direction when Ss. 17 and 18, Evidence Act, are considered along with S. 162, Criminal P. C. Because now the generalia are embodied in Ss. 17 and 18, which lay down generally that all admissions can be proved, while the specialia are embodied in S. 162 which provides that even though all admissions can be proved statements made by any person to a police officer cannot be used. To sum up: there is no binding authority upon us that an admission to the police is not governed by S. 162 and therefore is admissible. 51 *Mad.* 974 has only conformed obiter with the opinion that S. 27, Evidence Act, is unaffected by S. 162, Criminal P. C.

There is however authority that S. 162 does not apply to accused persons. 7 *Lah.* 84 approved by 44 *C. L. J.* 253. When that authority is analyzed it is found to be based not so much on the plain reading of S. 162, as upon a dislike of what that plain reading involves. Speaking for myself I find no difficulty in the reading because the language seems to be perfectly plain; and I cannot see that any good object is served by the judiciary attempting to re-adjust the artificial barriers which the legislature has erected in the way of evidence. If the legislature chooses to lay down that any statement recorded by a police officer in the course of his investigation is worthless, save as provided by S. 27, Evidence Act, the Court must treat it as statutorily worthless, though judicially it may amount to evidence of the greatest value.

Exhibit K is a statement made by a person to a police officer in the course of his investigation and therefore it cannot be used. I would add that this case adds an anomaly which I overlooked in my list in 51 *Mad.* 974. Here there is an accused who runs grave danger of being hanged because judicially good evidence has been arbitrarily ruled out by the legislature.

The Court is confronted then by the fact that accused discovered the jewels to the police and offers no better explanation than that the story of the discovery is a lie. Can we in the absence of all other evidence, for the evidence of the little girl is now rejected, convict him of murder on that circumstance alone? We think not. He may have known where the jewels were hid,

without necessarily having committed the murder; and we think it safer to convict him only of the minor offence of causing evidence to disappear under S. 201, I. P. C. Accused is sentenced to seven years' rigorous imprisonment he is acquitted of the charge under S. 302, I. P. C.

Cornish, J.—I agree that the evidence for the prosecution is not sufficiently free from doubt to support the conviction of murder, but that the appellant should be convicted of an offence under S. 201, I. P. C. With regard to the question whether the appellant is entitled to use in his defence his statement to the police recorded in Ex. K, it appears to me that the question being solely one of procedure, it must be governed by S. 162, Criminal P. C. If he wishes to rely on Ex. K, or some part of it, then I think that S. 162 is in his way.

The view in *Azimuddy* v. *Emperor* (44 *C. L. J.* 253) approving of decisions in the Patna, Lahore and Rangoon High Courts, was that S. 162 did not apply to accused persons. With all respect, I do not think that the language of the section sanctions this differentiation. S. 162 is explicit. Firstly, it provides that no statement made by "any person"—and these words are wide enough to comprehend a person who subsequently becomes the accused—to a police officer in the course of an investigation shall, if reduced into writing, be signed by the person making the statement. Next it provides that no such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, shall be used for "any purpose" at any inquiry or trial in respect of any offence under investigation where the statement was made. The words "any purpose" must include purpose of prosecution or defence. Then comes the exception permitting the accused to obtain a copy of the statement, if it has been reduced into writing, and, if it is duly proved, to use it to contradict the witness who made the statement and who has been called to give evidence for the prosecution.

In *Azimaddy* v. *Emperor* (supra) Rankin, J., expressed his unwillingness to hold, in the absence of express and compelling language, that the section was intended to deprive an accused of the right of showing that he put forward his explanation to the police at the earliest opportunity. But could the language of S. 162 be more compelling than it is? Personally, I do not see that the rule puts an accused at a disadvantage. As already observed, the rule is one of procedure. It is aimed at preventing a statement made by an accused to the police at an investigation—and some police officer must be the repository of the statement whether it has or has not been reduced to writing—being produced by the police at the trial except for the limited purpose permitted by the section. But it does not prevent the accused from proving his defence aliunde. His mouth is not sealed at the trial in respect of anything said by him at the police investigation. It is open to the accused, as was pointed out by my learned brother in the course of the arguments, when making his defence to repeat in Court what he has already said to the police at the investigation, and to call witnesses to support his statement. But he cannot call for his statement made at the investigation for the purpose of corroborating or implementing his defence at the trial. In my opinion neither Ex. K nor any extract from his recorded statement was available to the appellant.

P.R.S./B.V. *Order accordingly.*

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* A. I. R. 1931 Madras 782

JACKSON, J.

(*Chitturu*) *Jagannadham* — Plaintiff—Appellant.

v.

Bura Pydayya and *others* — Defendants—Respondents.

Second Appeal No. 2103 of 1927, Decided on 21st April 1931, against decree of Sub-Judge, Vizagapatam, in A. S. No. 187 of 1926.

*** (a) Precedents — Subordinate Courts should follow statutes and reported cases—Unreported cases are not to be relied on.**

When an assumption is found to be unsupported by any provision of the Code of Civil Procedure, it is unsafe to say that it is too obvious to be reported. An assumption so naked that it can claim authority neither from the Code nor from the authorized reports cannot be said to be beyond suspicion. Subordinate Courts gravely misdirect themselves when instead of applying their minds to the binding authority of the statutes and authorized re-

ports, they pursue the ignis fatuns of the unreported cases. [P 784 C 1]

(b) Civil P. C. (1908), O. 21, R. 58—Consideration of—Claim under R. 58 put in after sale is not infructuous.

Where a claim under O. 21, R. 58, is put in after the property has been knocked down in Court auction, the consideration or investigation of such claim is not infructuous. The execution Court is competent to hear the claim: *A. I. R.* 1923 *Mad.* 76, *Dist.*; 15 *I. C.* 53 and *A. I. R.* 1926 *Cal.* 468, *Diss. from.*; 15 *I. C.* 53, *followed in A. I. R.* 1924 *Pat.* 76, *Ref.* [P 783 C 2]

Y. Suryanarayana—for Appellant.

S. Subramania Sastriar—for Respondents.

Judgment.—This is a suit for recovery of possession of property described in two Schs. A and B. The appeal is only concerned with the Sch. B property, identified as plots B-2 and B-3 by the District Munsif, and identification which the Subordinate Judge may be taken to accept.

On the findings of fact the plaintiff must fail as regards these two plots, unless he can show that defendants 5 and 9 and their legal representatives 3, 6 to 12 are estopped from defending the suit, because in a previous proceeding they put in a claim under O. 21, R. 58 and upon its rejection did not bring a suit within the prescribed year. Both the lower Courts have held that there can be no estoppel because the order rejecting the claim was passed after the property had been knocked down in Court auction, and at that point for disposing of claims under O. 21, R. 58 the Court was functus officio.

The order runs :

"The properties attached are sold to-day. This petition is put in too late, and unnecessarily delayed. Hence rejected."

Abdul Kadir Sahib v. *Somasundaram Chettiar* (1), cited by the Subordinate Judge has no application because there the lower Court had refused jurisdiction and had not acted under O. 21, R. 58. But in *Gopal Chandra Mukerji* v. *Notobiar Kundu* (2), the Calcutta High Court has held it to be incompetent to an execution Court to proceed with an application under O. 21, R. 58 after the sale has actually taken place. The reasoning is not easy to follow. R. 60 provides for the Court releasing property from attachment after investigating a claim and

"it is thus plain that an order under R. 60 must be made before the sale has taken place"

which would seem to assume that after the sale has taken place the property is ipso facto released from attachment, and therefore any investigation after the sale and consequent release is on the face of it absurd. But there is no warrant for this assumption. The Code is quite clear on the point when an attachment is released and sets forth under O. 21, R. 55, the three occasions when the attachment shall be deemed to be withdrawn. In the circumstances of the present case the attachment would normally cease on satisfaction being made through the Court after the full payment of the purchase money. Until that point of time the attachment undoubtedly subsists and while it so subsists it would be a strange state of the law if a Court is to be precluded from hearing the complaint of the lawful claimant. At any rate there is nothing in the Code that precludes it. The judgment continues :

"This is also made clear by sub-R. 2, R. 589 which provides for the adjournment of a sale pending the investigation of the claim."

No doubt if sub-R. 2 enjoined that pending a claim the sale must be adjourned, it would look as though no investigation after sale was ever contemplated ; but sub-R. 2 leaves the adjournment to the Court's discretion-it is "may" not "must." It is quite conceivable that during a sale a claim may be made, so seemingly ridiculous that the Court declines to inconvenience the bidders by adjournment and disallows the claim subsequently under R. 61. Or as in the present case, a claim may be put in after the sale, and may be considered and rejected. If on the other hand the claim is accepted the claimant will have his remedy even though the hearing has been after the sale, under O. 21, Rr. 99 and 100 as the Calcutta case points out ; and it cannot be said that the investigation of the claim is infructuous.

In another Calcutta case *Kalicharan Ghose* v. *Sarojini Debi*, *A. I. R.* 1926 *Cal.* 468 a single Judge has held that if the Court admit the application under O. 21, R. 58 before the sale, and then complete the sale, it precludes itself from considering the application, a ruling which affords a good example of the danger of holding that a Court while

(1) A. I. R. 1923 Mad. 76=70 I. C. 648=45 Mad. 827.
(2) [1912] 15 I. C. 53.

still fully competent to maintain an attachment is incompetent to hear a protest against that attachment. Surely to put the point figuratively, if a Court has hands to seize, it should also have ears to hear.

Gopal Chandra Mukerji v. *Notobiar Kundu* (2) is followed in *Mt. Puhupede Kuar* v. *Ram Charitar Barhi*, *A. I. R.* 1924 *Pat.* 76 where again the claim was duly presented before the sale, but was only taken up after the sale was completed. Here it is held to be obvious that after the sale the attachment was ipso facto determined. But surely if that were so a sale would be one of the circumstances marshalled in R. 55 as justifying the assumption that the attachment is withdrawn.

Finally these cases are approved in *Maung Pope* v. *Maung Kwa*, *A. I. R.* 1928 *Rang.* 80, where it is observed that no case warranting the assumption is to be found in the official reports, possibly because it was too obvious to be reported. But with the greatest respect, when an assumption is found to be unsupported by any provision of the Code of Civil Procedure, I think it unsafe to say that it is too obvious to be reported. An assumption so naked that it can claim authority neither from the Code nor from the authorized reports cannot be said to be beyond suspicion.

I would here observe that subordinate Courts gravely misdirect themselves when instead of applying their minds to the binding authority of the statutes and authorized reports, they pursue the ignis fatuns of the unreported cases. Here the learned District Munsif seems to have apprehended the correct law at the end of his judgment (para 18), but states that he is bound to follow the decisions which he cites, not a single one of which is binding upon him.

There can be no doubt but that the rejection of the claim was by a Court in the proper exercise of its jurisdiction, and defendants 5 and 9 are estopped from raising their defence. But whether any other party in the suit is bound by their estoppel is a question which the lower appellate Court has not determined, though the trial Court has held (para. 13), that they were neither managers nor members of a joint family.

In any case defendant 13 is admittedly unaffected. As regards him the appeal fails and is dismissed with costs. As regards the rest I must call for a finding from the lower appellate Court upon existing evidence whether defendants (excepting defendant 13) other than defendants 5 and 9 are estopped by virtue of the claim petition of 1917 and subsequent failure to bring a suit.

Time for submission of finding six weeks and ten days for objections. In compliance with the order contained in the above judgment, the Subordinate Judge of Vizagapatam submitted the following:

Finding. -The finding called for is whether defendants (except defendant 13) other than defendants 5 and 9 are estopped by virtue of the claim petition of 1917 and subsequent failure to bring a suit.

* * * * * * *

In the result I find that defendants 3, 4 and 9 to 13 are not estopped by the order on the claim petition and that defendants 6 to 8 are estopped by that order. The finding is submitted accordingly.

(This appeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following.)

Judgment.—The finding of the lower Court is partly in favour of the appellant and partly in favour of respondents. It is not disputed.

The plaintiff is entitled to a decree for 3/8ths of items 2 and 3 in Sch. B with proportionate mesne profits. Proportionate costs will be paid and received by plaintiff appellant and respondents 3 to 11 in all Courts.

P.R.S./B.V. *Order accordingly.*

A. I. R 1931 Madras 784

CURGENVEN, J.

S. S. A. S. Muttayya Chettiar—Petitioner.

v.

Periatambi Tevan and *another*—Respondents.

Civil Revn. Petn. No. 1852 of 1927, Decided on 31st July 1931, against order of Sub-Judge, Tanjore, D/- 15th August 1927

Provincial Insolvency Act (1920), S. 78—Application.

Section 78, Provincial Insolvency Act, has no application to a case in which the decree-holder and not the judgment-debtor is the insolvent: *A. I. R.* 1929 *Mad.* 715, *Foll.* [P 785 C 1]

K. S. Desikan—for Petitioner.

R. Kuppuswami Iyer—for Respondents.

Judgment.—I think that the learned Subordinate Judge was right in holding that the execution petition was barred by limitation. It can only be saved by excluding the period during which the insolvency petition was pending against the decree-holder and it is conceded that that can only be done if S. 78, Provincial Insolvency Act will in terms apply to the circumstances. Ithas recently been held by Anantakrishna Ayyar, J., in *Rama Pillai* v. *Kasamuthu Nadar* (1) that that section has no application to a case in which the decree-holder and not the judgment-debtor is the insolvent and my agreement with that decision will be sufficient to dispose of this case. There is however the further circumstance that S. 78 excludes the period between the date of adjudication and the date of the order of annulment, and in the present case it has to be admitted that no order of adjudication was passed against the decree-holder at all, so that it follows that no order annulling that adjudication can have been passed either. All that happened was that a petition was filed by a creditor and the Official Receiver was appointed as interim receiver, but before the stage of adjudication was reached the insolvency petition was withdrawn. In these circumstances it is not possible to hold that what took place had any effect in extending the time within which the execution petition had to befiled. The civil revision petition is accordingly dismissed with costs.

P.R.S./R.M. *Petition dismissed.*

(1) A. I. R. 1929 Mad. 715=121 I. C. 485.

A. I. R. 1931 Madras 785

WALLACE AND STONE, JJ.

(*Marappuredigari*) *Sayamma* and *others*—Defendants—Appellants.

v.

R. Venkata Reddy and *others*—Plaintiffs—Respondents.

Appeal No. 142 of 1929, Decided on 4th March 1931, against decree of Sub-Judge, Chittoor, in O. S. No. 54 of 1926.

(a) Evidence Act (1872), S. 92, Prov. 1—Scope of, stated.

Proviso 1 to S. 92 only applies if there is such mistake as would enable the party alleging the mistake to a decree or order rectifying or cancelling the document. [P 786 C 1]

(b) Evidence Act (1872), S. 92—Unilateral mistake if proved does not entitle party alleging to decree or order rectifying or cancelling document.

Unilateral mistake (not amounting to fraud legal or equitable) is not a ground for rectification and does not therefore, if proved, entitle the party alleging it to a decree or order rectifying or cancelling the document. *United States* v. *Motor Trucks Ltd.* (1924) *A. C.* 196 at 200; *May* v. *Platt*, (1900) 1 *Ch.* 616 at 623, *Ref.* [P 786 C 2]

(c) Practice — Justice, equity and good conscience —Mutual mistake is equitable remedy or defence—If remedy sought is equitable it is open to equitable defences.

Mutual mistake is an equitable remedy or defence and is available to a plaintiff, where the equitable remedy of rectification or cancellation is sought and to defendant against whom an equitable remedy e. g., specific performance is sought. If remedy sought is equitable it is open to equitable defences. [P 786 C 2]

(d) Specific Relief Act (1877), S. 31—Remedy sought in essence rectification—Same tests and defences apply as when rectification and consequential relief is claimed—Practice, relief — Evidence Act, S. 92, Prov. 1.

If what in essence is sought is rectification the same tests and same defences should be applied as would be applied if the plaintiff did what strictly he should do, viz., claim rectification and consequential relief. [P 787 C 1]

Whether the pleadings or claim are viewed strictly or loosely, a plaintiff who claims more than the unreformed deed gives him is claiming on the footing of the rectified deed, and if the Court allows his claim, it allows it on that basis, that is in effect it rectifies the deed. It does not nor can it let in a parol variation. [P 786 C 2]

(e) Evidence Act (1872), S. 92, Prov. 1—Suit on unreformed deed registered and unambiguous—Plaintiff cannot adduce evidence to show that by mistake term has been omitted unless mistake is such as would found claim for rectification.

Proviso 1, S. 92, does not empower a plaintiff suing on unreformed and registered and unambiguous deed to lead evidence to show that by mistake a term has been omitted from the deed, unless the mistake is such a one as would found a claim for rectification or cancellation and in such a case the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification: 34 *Mad.* 51; 39 *Mad.* 792 31 *I. C.* 671 and *A. I. R.* 1921 *Mad.* 172, *Dist.* [P 787 C 1]

(f) Specific Relief Act (1877), Ss. 31 and 33—Suit for rectification—Test is whether proof of error is clear—Burden lies on person seeking rectification.

In suit for rectification of a document the test is as to whether the proof of error is clear and conclusive. The burden of proof lies heavily on person seeking rectification. The defence allowed in such a suit is laches. [P 787 C 2]

(g) **Evidence Act (1872), S. 92 — Adding terms to unambiguous deed—Mere fact that terms are unusual is no ground.**

The mere fact that the terms of a document as they stand are so unusual as to show that document cannot mean what it says is no ground for adding terms to an unambiguous deed. [P 788 C 1]

Advocate-General and *Rangaswami Ayyangar*—for Appellants.

V. Ramadoss—for Respondents.

Stone, J.—This appeal raises a short point, viz., whether the deed of mortgage dated 4th January 1917 in favour of one Chinnayya Chettigaru provides for interest on the capital sum of Rupees 6,500 at the rate of Rs. 2 per month on the Rs. 6,500 or at the rate of Rs. 2 per centum per month. The said mortgage was attached by the decree-holder in E. P. No. 2 of 1925 and the plaintiff in this present action is the receiver therein.

The plaint makes no claim for rectification of this instrument, and issue 2 expressly raises the question whether the plaintiff is entitled to recover under this deed interest at the rate of Rs. 2 per cent per month without rectification. Issue 1 appears to raise the question whether as a matter of construction this deed reserves to the mortgagee interest at the rate of Rs. 2 per cent per month or at the rate of Rs. 2 per month. Why the plaintiff declined to ask for rectification can only be a matter of speculation. In fact he did not and proceeded to claim on the footing of an unrectified deed the same sum as would have been due had he claimed rectification and had succeeded in that claim.

It is not suggested that Ss. 95, 96, 97 or 98, Evidence Act, apply. It is not therefore a case of construing a document contrary to its apparent meaning. If evidence can be given to vary this document it can only be because of the proviso to S. 92, Evidence Act. This proviso permits the proof of a mistake which would entitle the party to a decree or order relating to the document or which would invalidate the document.

Does S. 92, Prov. 1 apply ? We conceive that it only applies if there be such mistake as would entitle the party alleging the mistake to a decree or order rectifying or cancelling the document. Prov. 1, thus on this point, permits mistakes to be proved, but when proved it has the same effect as in English law. What is that effect ?

It is clear that unilateral mistake (not amounting to fraud, legal or equitable) is not a ground for rectification and would therefore if proved, not entitle the party alleging it to a decree or order rectifying or cancelling the document: see *United States* v. *Motor Trucks Ltd.* (1) at 200; *May* v. *Platt* (2) at p. 623.

The common law is impatient even of mutual mistake save when the contract has not attached and the mistake shows absence of consensus.

Equity however relieves against mutual mistake upon equitable principles. But this is an equitable remedy or defence and is available to a plaintiff where the equitable remedy of rectification or cancellation is sought and to defendant against whom an equitable remedy (e.g. specific performance) is sought. This is a distinction which exists in India as in England. It is born of the fact that equitable remedies raise equitable defences and have equitable characteristics. Thus it is a defence to a suit claiming an equitable remedy that the plaintiff has been guilty of laches. This defence is unknown to the common law. If therefore the remedy sought is equitable it is open to equitable defences; if not, it is not so open.

It is apparent therefore that it is not being merely technical to inquire. Is the remedy sought in fact rectification or not ? Let it be conceded that in the same action the plaintiff can ask for rectification and consequential relief. Is it a mere technicality that he should ask for rectification before he can get relief on the basis of a reformed deed ? What is the date from which his remedy commences ? Is it the date of the deed and of the mistake, or is it the date of the failure to meet some obligation under the deed and if the latter what obligation ? Is it the obligation to be found in the reformed or the unreformed deed? To these questions we think there can only be one answer. Whether the pleadings and claim are viewed strictly or loosely, a plaintiff who claims more than the unreformed deed gives him is claiming on the footing of a rectified deed and if the Court allows his claim, it allows it on that basis, that is in effect, it rec-

(1) [1924] A. C. 196=93 L. J. P. C. 46=130 L. T. 129=39 T. L. R. 723.

(2) [1900] 1 Ch. 616=69 L. J. Ch. 357=83 L. T. 123=48 W. R. 617.

tifies the deed. It does not, nor can it let in a parol variation.

If what is in essence sought is rectification, it is manifest that the same tests and the same defences should be applied as would be applied if the plaintiff did what strictly he should do, viz., claim rectification and consequential relief.

Reliance was placed upon *Mahaedva Ayyar* v. *Gopala Ayyar* (3), *Rangaswami* v. *Souri* (4) *Chinna Mallayya* v. *Veeriah* (5) and *Balusami Aiyar* v. *Lakshmana Aiyar* (6) as showing that evidence could be given to prove mistake although no rectification be sought. In *Rangaswami* v. *Souri* (4) and *Balusami Aiyar* v. *Lakshmana Aiyar* (6) the mistake was alleged by way of defence. *Mahadeva Ayyar* v. *Gopal Ayyar* (3), purports to follow *Karuppa Goundan* v. *Periathambi Goundan* (7). *Karuppa Goundan* v. *Periathambi Goundan* (7) was a case where the error was by way of misdescription. It is a case similar to *In re Alexander Settlement* (8) at p. 228, where Parker, J. (as he then was), treated the use of the word "male" in "tail male" as a misdescription. In *Karuppa Goundan* v. *Periathambi Goundan* (7) the evidence was let in under the provisions of Ss. 95 and 97, Evidence Act. It is thus an entirely different case from this. It is a case where the deed cannot be related precisely to existing facts. *Chinna Mallayya* v. *Veeriah* (5) purports to follow *Mahadeva Ayyar* v. *Gopala Ayyar* (3), though a reference is there made to Prov. 1, S. 92. We are of the opinion that that proviso does not empower a plaintiff suing on an unreformed and registered and unambiguous deed to lead evidence to show that by a mistake a term has been omitted from the deed, unless the mistake is such a one as would found a claim for rectification or cancellation, and in such case the evidence will be tested by the same standards and the claim will be open to the same defences as though the action claimed rectification.

(3) [1910] 34 Mad. 51=8 I. C. 390.
(4) [1916] 39 Mad. 792=29 I. C. 588.
(5) [1916] 31 I. C. 671.
(6) A. I. R. 1921 Mad. 172=63 I. C. 374=44 Mad. 605 (F. B.).
(7) [1907] 30 Mad. 397=2 M. L. T. 336.
(8) [1910] 2 Ch. 225=79 L. J. Ch. 656=102 L. T. 909=54 S. J. 602.

One test which equity applies in a suit for rectification is: "Is the proof of error clear and conclusive?" One defence equity allows is laches. Equity will not relieve him who tarries on the way. One bias equity always shows in such matters, viz., a bias in favour of the evidence given by the other party to the instrument; that is to say, the burden of proof lies heavily on the person seeking rectification.

Keeping the above principles in mind, how does the matter on the evidence stand? The deed is dated 4th January 1917. The plaint is dated 29th October 1926. During all those years this mistake lay dormant though it relates to interest. The parties who are supposed to have agreed to something other than that expressed in the writing are *C* on the one side and *M S* and *M M* on the other side. *C* does not give evidence. *M S* gives evidence to the effect that the interest agreed was Rs. 2 per annum (not per month) on Rs. 6,500. She does not appear to have been asked a single question as to whether the Rs. 2 per month on the Rs. 6,500 was an error. The only answer having any bearing on this point in cross-examination is:

"I did not offer to write for Rs. 2 per cent interest because the previous rate was Rs. 3-8-0 per cent."

That obviously does not touch the point which the plaintiff had to establish, viz., that what had been agreed was Rs. 2 per cent and what was written was a mistake. The question of mistake was never put to the defendant. The terms of the alleged agreement were never put to her. The explanation given for not calling *C* was that he was ill on and off for four months. "He recovers and then falls ill." No reason is offered why this witness could not have been examined on commission as was another witness to this matter. Two witnesses remain to be considered, P. W. 1 and P. W. 3. P. W. 1 is the person who wrote Ex. A. He says he left out the words "per cent" by oversight. He states there was a dispute as regards interest when Ex. A was executed. *C* suggested one rate, *M S* offered another, and this counter-offer was not accepted. That evidence, so far as it goes, is to the effect that the parties were never ad idem. This witness then elaborates how this deed came

into being. There was, it seems, a draft. P. W. 3 read out the draft, *C*, *M S* and *M M*, amongst others, being present. P. W. 1 wrote down the deed from this dictation, and having written it read it over, there being present inter alia *C* (a money-lender), *M S* and *M M*. It is not suggested that anything was read out other than appears now in the deed. It is not explained how a term that was not agreed, viz., the term as to interest, could be in the draft or could be read out of the draft without comment being made.

P. W. 3 prepared and read out the draft. Where is this draft? It is not produced. This witness says he asked *C's* son for this draft on 4th September 1928, i. e., on the day he first gave evidence, 11 years after the deed was prepared; nearly two years after the suit was instituted. This vital document had apparently never before been inquired about. When asked for, it was found to be missing. This witness, 11 years after the event, pretends to remember the exact words he had written in the draft. A better example of the importance of excluding oral evidence to vary a written document can hardly be given than this witness's evidence at p. 77. Never before this day on which he gave evidence, it appears, had this witness been asked what the correct rate was: but when he asked he says:

"I thought within myself that I had dictated according to the draft and the writer might have written wrongly."

This, of course, amounts to nothing at all. The writer might have written wrongly or he might have written correctly.

There remains the circumstance that during the whole period sums were received from the mortgagor and credited in each case to capital: that no clear cut demand for the interest alleged, viz., 2 per cent, was ever made in all the 11 years.

It is urged that the terms, as they stand, are so unusual as to show that the document cannot mean what it says. That is not in our opinion any ground for adding terms to an unambiguous deed. We do not even find the bargain to be either absurd or unlikely. These ladies were merely coming forward to offer a security for another's debt. These are however irrelevant considerations. It is obviously no ground for finding mutual mistake that the bargain evidenced is one sided. At most that would show either unilateral mistake or fraud. Fraud is not suggested and unilateral mistake leads to no relief. The decree of the lower Court is modified in accordance with the above findings. Plaintiff will have from and pay to defendants 1 and 2, proportionate costs in both Courts. Time for redemption extended up to the last day before vacation of the lower Court.

P.R.S./R.M. *Decree modified.*

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* A. I. R. 1931 Madras 788

PANDALAI, J.

(*Kalagara*) *Purnayya*—Petitioner.

v.

Cherukuri Basava Kottayya and *others*—Respondents.

Civil Revn. Petn. No. 76 of 1928, Decided on 27th April 1931, against order of Dist. Judge, Kistna, in Appeal Suit No. 55 of 1927.

*** Insolvency—Joint Hindu family—Debts of father—Hindu father dying after incurring debts on promissory notes—Son cannot be adjudged insolvent on account of his liability as member—Hindu Law—Debts.**

A son of a Hindu father who dies after incurring debts on promissory notes cannot be adjudged insolvent on account of his liability as a member of the family to pay those debts out of the family properties, as his liability to pay the debt of the family which involves only liability to satisfy it to the extent to which the family property will go cannot be held to be a personal liability involving liability of his separate or self-acquired property which is a necessary foundation for adjudication: *A.I.R.* 1927 *Mad.* 922, *Rel. on.*; *A.I R.* 1929 *Mad.* 573 *Dist.*; *A. I. R.* 1928 *Lah.* 354, *Diss. from.*; *A.I.R.* 1926 *Mad.* 133, *Expl.* [P 789 C 1]

N. Rama Rao—for Petitioner.

A. Lakshmayya—for Respondents.

Judgment.—The question in this petition is whether the son of a Hindu father who died after incurring debts on promissory notes can be adjudged insolvent on account of his liability as a member of the family to pay those debts out of the family properties. The Subordinate Judge held that he could be, but the learned District Judge held that he could not be so adjudged.

The learned advocate for the petitioner (creditor) argues that the District Judge's decision is not correct and relies upon the decision in *Muthu Veerappa Chettiar* v. *Sivagurunatha Pillai* (1),

(1) A. I. R. 1926 Mad. 133=92 I. C. 800=49 Mad. 217.

which followed an unreported decision in *C. M. A. No.* 47 *of* 1916. The unreported decision goes to the full length of holding that members of joint families liable as such for a family debt but not otherwise, are debtors within the meaning of the Insolvency Act and therefore can be adjudged insolvent on those debts.

The decision in *Muthu Veerappa Chettiar* v. *Sivagurunatha Pillai* (1), did not fully follow this, because the learned Judges say that each case must depend on its own circumstances and that if the pettioner makes necessary allegations and proves them then the Court would be justified in adjudging the members of the joint family as insolvents. All that the decision amounts to in my opinion, is that the fact of persons being members of an undivided family does not prevent their being adjudicated insolvents. That is obvious enough, if there must be other circumstances which make them personally liable for the debt, such as that they were members of a trading firm and that the debts were incurred for trading purposes in which case the inference is drawn that all those who are or hold themselves out as partners make themselves personally liable as such; or there may be a case in which a member by obtaining time for payment may be implied to have agreed to become personally liable. These of course are facts quite distinct from being a member of the undivided family. But apart from some such special circumstance which would make a member personally liable for the family debt I am not able to see how a member's liability to pay the debt of his family which involves only liability to satisfy it to the extent to which that family property will go can be held to be a personal liability involving liability of his separate or self-acquired property which is a necessary foundation for adjudication, and this has been so held in *Nagasubramania Mudaliar* v. *Narsimhachariar* (2). The learned advocate relied upon a decision in *Somasundaram Chettiar* v. *Kanno Chettiar* (3), but that is of no use to him because that was a case of a trade debt. He also relied upon a decision of the Lahore High Court, *Paras Ram* v. *Amir Chand* (4), with which I am not able to agree. The petition is dismissed with costs.

P.R.S./R.M. *Petition dismissed.*

(2) A. I. R. 1927 Mad. 922=104 I. C. 642=50 Mad. 981.

(3) A. I. R. 1929 Mad. 573=118 I.C. 494.

(4) A. I. R. 1928 Lah. 354=109 I. C. 464.

A. I. R. 1931 Madras 789

CURGENVEN, J.

Mariappa Vaikaran — Defendant — Petitioner.

v.

K. G. Srinivasa Mudaliar — Plaintiff — Respondent.

Civil Revn. Petn. No. 685 of 1928, Decided on 31st July 1931, against decree of Sub-Judge, Tiruvarur, D/- 31st March 1928.

Provincial Small Cause Courts Act (1887), Art. 31—Applicability.

A suit for an account under Art. 31, does not mean every case in which accounts have to be looked into to ascertain the amount due to the plaintiff. Art. 31 applies to cases where the relationship of the parties is such that one of them is bound to render accounts to the other. Though the plaintiff may have chosen to put a definite money value on his claim, the suit may be one for an account: 28 *Mad.* 394; 20 *I.C.* 518 and 33 *I.C*, 16, *Ref.*; 10 *I.C.* 883, *Dist.* [P 790 C 1]

Watrap S. Subramania Iyer and *T. P. Gopalakrishna Iyer* — for Petitioner.

N. Muthuswami Ayyar — for Respondent.

Judgment.—The main contention raised in this revision petition is that the suit was not cognizable by a Small Cause Court, being one for an account as contemplated by Art. 31, Provincial Small Cause Courts Act. The plaintiff alleged that there was a settlement between the parties in February 1924 under which the defendant 1, acknowledged a certain amount due in paddy, cash and hay. Subsequently the dealings continued between the parties and the actual amount claimed in the plaint was something different from that shown in the settlement, the paddy being less and the cash being slightly more. The defendant in his written statement entirely denied the truth of the transactions that he executed any settlement or that any balance whatever was due from him. I think in these circumstances that it cannot be contended that the suit was one for an account. The plaintiff claimed a fixed sum and did not call upon the defendant to render an account, nor did he allege that the defendant from his position was liable to do so. The

defendant does not dispute the correctness of the amount claimed, nor any of the items in the account which forms the evidence of what was due, but denies the whole. All that the Court could do accordingly was to pass a decree for the entire sum or to dismiss the suit altogether. I cannot therefore agree that the suit was for an account as contemplated in Art. 31 and I think there is sufficient case law originating in this Court to support that view. In *Konduru Runga Reddi* v. *Subbiah Setty* (1) a Bench expressed the view that suit for an account under Art. 31 does not mean every case in which accouuts have to be looked into to ascertain the amount due to the plaintiff and that a suit for an account is a special form of suit in which a special process is required to take an account.

Again in *Varadarajulu Chettiar* v. *Narayanaswami Chetty* (2), it was held that the article applied to cases where the relationship of the parties was such that one of them is bound to render accounts to the other, and indeed that seems to be implied by the suit being for an account from the defendant to the plaintiff. It does not of course follow, as that case points out, that, though the plaintiff may have chosen to put a definite money value on his claim, the suit may not be for an account. It must however depend upon the relationship between the parties. In *Mariappa Nadan* v. *Arunachalam Chetty* (3) Sadasiva Ayyar, J., agrees with the learned Judges who decided the previous cases that the case law is perhaps not altogether reconcilable, but he adopted certain dicta, one of which related to the relationship between the parties and the other to the necessity to take accounts between them. I am asked to regard *Kailas Chandra* v. *Kiranenda Ghosh* (4), as an authority to the contrary effect, but I observe that in the small cause cases which there came up for consideration the trial Judge went so far as actually to treat the suit as one for accounts by making a preliminary decree and appointing a commissioner to adjust the accounts from the books which might be produced by the parties. The commissioner thereupon submitted his report and a decree was made in favour of the plaintiff. It had to be acknowledged, I think in those circumstances, that the suit was not only one for account but was so treated by the Small Cause Court a course which was clearly outside its jurisdiction. In the present case, as I have said, the only question before the Court was whether the sum claimed by the plaintiff is due and no process in the nature of taking an account had to be undertaken. I am accordingly unable to agree with the petitioner that the lower Court had no jurisdiction to treat the suit as a small cause case.

It is then said that the judgment has proceeded entirely upon the settlement of account and has lost sight of the fact that there were subsequent dealings. I do not think that that can be substantiated. In the judgment the contents of the plaint are correctly summarized, mention being first made of the settlement of the account, and then that the defendants cultivated the lands for one year more and lastly that the amount claimed in the plaint is therefore due from them. It is true that the learned Subordinate Judge has devoted the greater part of his judgment to a discussion of the evidence supporting the settlement, Ex. A but that clearly seems to have been the chief matter in controversy between the parties and when he says that the suit has been based on the settlement of account I do not suppose that he meant more than that that was the substantial question in the issue. The third point for decision was what amount the plaintiff is entitled to recover and the answer to that in the judgment is that the plaintiff is entitled to the amount sued for. Inasmuch as the defendant merely made a denial of liability in respect of the sum I do not think that in the small cause judgment much more fell to be said upon the point. Turning to the evidence I observe that accounts in support of the amount said to be due have been filed and proved by P.W. 1, so that the Court certainly had evidence before it npon which to pronounce its decree.

Finally it is urged that the settlement deed, Ex. A, has not been properly proved. Defendant 1 himself admits his signature to it, although he says that he signed nothing more than a blank paper. That admission of course would not be

(1) [1905] 28 Mad. 394.
(2) [1913] 20 I.C. 518.
(3) [1916] 33 I.C. 16.
(4) [1911] 10 I.C, 888.

sufficient to relieve the plaintiff of his duty of proving the document. But that he did prove it by evidence which is legally sufficient appears from the statement of his witness and agent, P.W. 1, who deposes that defendant 1 settled the account and signed the settlement. Inasmuch as there was no cross-examination upon that point, I think it is legally sufficient to show that defendant 1 not only signed Ex. A but signed it in token of having accepted liability for the sums shown in it. In these circumstances I cannot find that the trial before the lower Court is vitiated either by lack of jurisdiction to try the case or by any irregularity in the exercise of its jurisdiction in trying it. I accordingly dismiss this petition with costs.

P.R.S./K.N. *Petition dismissed.*

A. I. R. 1931 Madras 791

JACKSON, J.

Mallappa Chettiar and *another* — Plaintiffs—Petitioners.

v.

Alagiri Naicker and *others*—Defendants—Respondents.

Civil Revn. Petn. No. 1464 of 1929, Decided on 28th November 1930, from order of Dist. Judge, Ramnad, in Appeal No. 282 of 1926.

Civil P. C. (1908), O. 41, Rr. 25, 27 and 28—Court should follow specific provisions of Code when so given and should not instead make use of its inherent powers—Civil P. C., S. 151.

It is not open to the Court to follow a procedure which is contrary to what the legislature has expressly pointed out to be the proper procedure, as when in O. 41, Rr. 27 and 28, the legislature has given a specific direction, the Court instead of these provisions should not invoke its inherent powers: Ananthakrishna Ayyar, J., in *A. I. R.* 1928 *Mad.* 991, *Foll.*; 36 *Mad.* 492, *Ref.*; 44 *Cal.* 929, *Rel. on.*; 53 *I. C.* 417 and *A. I. R.* 1921 *Mad.* 716, *Expl.* and *Diss. from.*

[P 791 C 2]

K.V. Sesha Ayyangar—for Petitioners.

C. S. Seshagiri Sastriar and *R. Ramasubba Iyar*—for Respondents.

Judgment.—This is a revision petition against an order of remand passed by Mr. K. S. Ramaswami Sastri, District Judge of Ramnad, on 18th March 1929 in *A. S. No.* 282 *of* 1926.

The learned Judge tabulated three points for decision and decided them all except that he required a finding from the lower Court as regards the yellow marked items on the suit map. This of course is provided for in O. 41, Rr. 25 and 27. But the learned Judge has remanded the case "in the exercise of his Court's inherent power." No reason has been suggested for this surprising procedure, and the only reason which can be inferred from the record, that the quarter was closing and the Judge wished to add a disposal to his returns, is one which this Court would be loath to believe.

The question now is whether when the Code contains specific provisions which would meet the necessities of the case in question, such provisions should not be followed, instead of the inherent jurisdiction being invoked.

This point is very fully considered by Anantakrishna Ayyar, J., in *Venkamma* v. *Goparaju Perraju* (1), and his statement of his opinion and of the authorities upon which it is based is one to which I can add nothing but my entire concurrence. In his Lordship's view it is not open to the Court to follow a procedure which is contrary to what the legislature has expressly pointed out to be the proper procedure, as when in O. 41, Rr. 27 and 28, the legislature has given a specific direction.

But after thus stating his view the learned Judge holds that he is overborne by authority. He particularly refers to *Mahomed Maracayar* v. *Rangaswami Naidu* (2). I find there that the Judges confessed to feeling the difficulty, but they referred to *Athappa Chetty* v. *Ramanathan Chetty* (3) and *Abdul Karim* v. *Allahabad Bank Ltd.* (4). In *Athappa Chetty* v. *Ramanathan Chetty* (3) it is held that Courts have an inherent power of remand, but "where a power is given expressly Courts should not exercise their inherent power." For this view *Abdul Karim* v. *Allahabad Bank Ltd.* (4) and *Jambulayya* v. *Rajamma* (5) are cited. *Jambulayya* v. *Rajamma* (5) is the only authority for what is now generally accepted, that when there has been no regular hearing of the matter the appellate Court by its inherent power may remand. *Abdul Karim* v. *Allahabad Bank Ltd.* (4) is direct authority for the rule that the inherent power must not be exercised when there is a specific provision in the Code: see p. 936. The ques-

(1) A. I. R. 1928 Mad. 991=112 I. C. 1.
(2) A. I. R. 1921 Mad. 716=69 I. C. 826.
(3) [1919] 53 I. C. 417.
(4) [1917] 44 Cal. 929=41 I. C. 598 (F.B.).
(5) [1913] 36 Mad. 492=15 I. C. 859.

tion propounded in this judgment follows the language of that passage.

Therefore it will be seen that *Athappa Chetty* v. *Ramanathan Chetty* (3) which the Judges in *Mahomed Maracayar* v. *Rangaswami Naidu* (2) thought was authority for permitting the Court to remand when there was the specific provision in O. 41, R 27, is authority for precisely the contrary view. The mistake has crept in by careless head-noting. The Judges in *Athappa Chetty* v. *Ramanathan Chetty* (3) said :

" Where a power is given expressly Courts should not exercise their inherent power, which ought to be very cautiously indented upon. "

The head-note changes this to,

" where express powers are given, the Court should be very cautious in resorting to their inherent powers. "

And so "should not" has become "should cautiously." And then when one goes behind *Athappa Chetty* v. *Ramanathan Chetty* (3) to what is undoubtedly the leading case in this matter, the Full Bench Calcutta decision, the head-note is both correct and clear. Inherent jurisdiction must be exercised with care subject to the condition that the matter is not one with which the legislature has so specifically dealt as to preclude the exercise of inherent power.

In this state of the law I feel neither bound by the case *Mahomed Maracayar* v. *Rangaswami Naidu* (2) nor constrained to refer the matter to a Full Bench. It would indeed be strange if a Full Bench were assembled to decide whether when there is a clear provision in the Code of Civil Procedure the Judge by virtue of his inherent power may take up his pen and write a new rule for his personal use. Nor have I any hesitation in finding that the District Judge acted with material irregularity.

The order of remand is cancelled, and the trial Court is directed to submit a finding to the appellate Court, within six weeks of receipt of this order on the issue : What is the value of the yellow marked portions. The appellate Court will then dispose of the appeal.

A further question arises whether fresh evidence should be adduced. It appears that the parties had ample opportunity of producing evidence on this point which they undoubtedly knew to be material to the suit, and to call for fresh evidence after this long lapse is only an encouragement to perjury. The District Munsif must confine himself to the present record.

Costs of this civil revision petition will be costs in the cause.

P.R.S./B.V. *Revision allowed.*

A. I. R. 1931 Madras 792

VENKATASUBBA RAO, J.

In the matter of *Indian Companies Act 7 of* 1913.

and

In the matter of *Madras Native Permanent Fund Ltd.*

B. G. Kolandavelu Mudaliar and *others*—Petitioners.

Original Petition No. 75 of 1927, and Applns. No. 436 of 1930, 3485 of 1929, and 820 of 1930, Decided on 7th October 1930.

Companies Act (1913), Ss. 21 and 159—Ultra vires transaction by company creates no debt and contributories are not liable to pay it during liquidation proceedings.

Where the carrying on of a business by a company is ultra vires, that ultra vires transaction creates no debt, either legal or equitable. The contributories during the liquidation proceedings, when the company is being wound up, are not liable to pay such debts : *In re Birbeck Permanent Benefit Building Society*, (1912) 2 *Ch.* 183, *Foll.*: *Sinclair* v. *Brougham*, (1914) *A. C.* 398, *Ref.* [P 794 C 1]

O. T. Govindan Nambiar, instructed by Messrs. King and Patridge, Attorneys for *Messrs. Fraser & Ross, the Official Liquidators* and *N. Rajagopalan* for *V. Sundaresa Iyer*—for Applicant in Application No. 820 of 1930.

S. Duraiswami Iyer, T. K. Rangaswami and *V. Balaram*—for T. S. Natesa Sastri, President of the above named Fund.

V. Radhakrishnayya, for *K. B. Ranganatha Aiyar*—for P. Lakshminarasu, one of the Directors of the said Fund.

K. Ramachandra Sastri for *A. V. Seshayya*—for P. Duraiswami Mudaliar and C. Masilamoni Mudaliar, Respondents 2 and 3 in Application No. 820 of 1930.

C. V. Athmanathan—for Respondent 11.

K. Kuppuswamy—for Yegnanarayana (Contributory No. 244).

V. Rajagopala Mudaliar, instructed by Short Bewes & Co., Attorneys—for P. M. Doraiswami Chetty, 7th Respondent in Application No. 820 of 1930.

C. Srinivasachariar — for Devarajan for Contributories Nos. 282 and 335.

S. Panchapagesa Sastri for *K. S. Viswanatha Sastri*—for Respondents 6 and 8 in Application No. 820 of 1930.

Judgment. — This is a misfeasance summons under S. 235, Companies Act. Certain breaches of duty are alleged against the directors and some other officers of the company and the summons asks that they may be ordered to bring into Court a sum of about Rs. 42,000. An objection in limine is taken that the applicants have no locus standi. If they are creditors as they allege themselves to be, they can apply under the section to which I have referred. The question is, are they creditors of the company and have they as such a locus standi ?

The company was started in 1878 under the name of the Madras Native Permanent Fund Ltd., with a capital of two lakhs divided into two thousand shares of Rs. 100 each. Each shareholder was to pay one rupee per month per share and at the end of seven years, he was to receive from the company Rs. 100 and his account was then to be closed ; in other words, on his paying a sum of Rs. 84 he receives Rs. 100. The objects of the company as stated in the Memorandum of Association were, to make advances to shareholders upon security of moveable or immovable property for enabling them to purchase, build and repair houses and to grant to them simple loans to a limited extent and to do such things as are incidental to the attainment of the above objects. In 1887 a new branch was started and was called the Deposit Branch, to distinguish it from the Loan Branch, the name adopted to designate the company's original activities. The capital of the company was raised by Rs. 10,000 divided into thousand shares of Rs. 10 each and the shares newly raised were allotted to the Deposit Branch. It is stated for the respondents, that the accounts of each branch were separately kept and that there was no mixing up of the moneys or the dealings of the two branches. This statement is not merely borne out by such of the balance sheets as have been handed to me but is not even disputed by the applicants. While the loan branch was confined to the original objects, the Deposit Branch developed into an ordinary bank and carried on banking business. In fact, the operations of the deposit branch assumed large proportions, whereas the Loan Branch did business on a very limited scale. In the Deposit Branch, there were deposits and advances, customers depositing money and loans being advanced on pledges of jewels. The customers of the bank included both members and strangers. This went for about forty years and it was then found that the company's affairs were not being conducted satisfactorily. Certain irregularities occurred, such as loans being advanced on jewels of insufficient value. The result was, the company having sustained a loss, the depositors were unable to get back their moneys. A liquidation petition was filed and a compulsory order was made in May 1927. To make clear the point that has now arisen, I may briefly refer to certain previous orders made in the course of the winding up. The liquidators, Messrs. Fraser & Ross, treated in the list filed by them, certain 357 persons of the Loan Branch, as contributories in the liquidation. Waller, J., observing :

"The Loan Branch of the fund is, I consider nothing but a mutual benefit society, with rules resembling those of the Mylapore Hindu Permanent Fund, vide : *Gurusami Pandian* v. *Chinna Thamliar* (1),"

held that the 357 persons in question could not be treated as contributories. The learned Judge in effect held that there was nothing illegal in the company closing the accounts of the shareholders of the Loan Branch by paying each Rs. 100 at the end of seven years. The appellate Court reversed the order of Waller, J., holding that the payment of the share capital to the members contravened the provisions of the Companies Act as such payment amounted to a reduction of capital forbidden by the Act. The 357 persons were accordingly declared to be contributories. Before the appellate Court the question was raised. Were the debts which it was sought to make these persons liable to liquidate debts incurred ultra vires of the company ? This question was left open and no decision was pronounced upon it. This is what the learned Judges observe :

"When these persons are called upon to contribute to the liquidation of definite debts, it will be open to them to argue that the debts which they are called upon to contribute to pay are ultra vires of the powers of the company, that is to say, are not in law debts at all."

The matter came back to the original side. For the contributories it was con-

(1) A. I. R. 1921 Mad. 340 = 61 I. C. 242 = 44 Mad. 1 (F.B.).

tended, that the amounts which the company made itself liable to return were those deposited by its customers, in the Deposit Branch and that the company, in receiving such deposits, practically converted itself into a bank. This, it was argued going beyond the Memorandum of Association, was ultra vires of the company. Pandalai, J., relying upon *Ashbury Carriage Co.* v. *Riche* (2), accepted this contention. From his judgment, I quote the two following passages:

"On the best consideration I can give to the matter, I see no escape from the conclusionthat the taking of deposits in the Deposit Branch from strangers to the company was ultra vires of the powers of the company."

"All that I do decide and declare is that the contributories are not as such liable to contribute to the debts due to stranger depositors in the Deposit Branch of the fund."

Some of these depositors are the applicants in this misfeasance summons. The short question I have to decide is, are the amounts due to them debts ? In other words, are they lenders, in the eye of the law, creditors and is the borrowing company, debtor ? This point is now well settled by authority. Where the carrying on of a business by the company was ultra vires it was held that the ultra vires transactions created no debt either legal or equitable. This was held in *In re Birkbeck Permanent Benefit Building Society* (3). The facts of that case resemble those of the present. A building society carried on a banking business altogether beyond what was authorized. Cozens Hardy, M. R., observes that the so called contracts of loan, though not illegal, are void and in truth have no existence. This is treated as the doctrine as to ultra vires borrowing. The case went up to the House of Lords and this view was affirmed, although on another point the decision of the Court of appeal was varied : *Sinclair* v. *Brougham* (4). The relation between the depositor and the company is not that of debtor and creditor and the only possible remedy for the person who has paid the money is one in rem and not in personam. This is a most unequivocal declaration, that ultra vires transactions do not create the relationship of debtor and creditor. The preliminary objection therefore must be upheld and on this short ground the application is dismissed.

From this it does not follow that the lenders can in no circumstances recover their deposits. The very case I have cited, *Sinclair* v. *Brougham* (4), decides what their rights are and how and to what extent they can be enforced. There are no persons other than the depositors who have any claims to the money in the Deposit Branch ; the question of priority decided in *Sinclair* v. *Brougham* (4) does not therefore arise in this case. The Loan Branch, as I have said, was always treated as being separate from the Deposit Branch. Some trifling amounts are due to some unadvanced shareholders of that branch. I see no reason why they should not be paid the sums due to them from the money to the credit of that branch. Now, as regards the depositors to whom moneys are due from the Deposit Branch, they have already, under orders of Court, been paid sums amountig to over a lakh. These payments cannot be questioned. I may mention that some of the directors of the company are also among such depositors. They have offered, at my suggestion as a matter of fair dealing, to bring back the amounts they withdrew during the period of one year before the commencement of the winding up. As the other depositors have already been paid 11 annas in the rupee, these directors are, on this basis, bound to bring back only a sum which represents five annas of their drawings. The following table shows the amounts that they are thus liable to bring back and I understand that they have this day paid these sums to the liquidators.

(*For Table see page* 795)

Of the sum of Rs. 436 mentioned in the affidavit of the liquidators Rs. 375 represents the sum paid to them by the first two of the three directors named in the above table, when calls were made after the decision of the appellate Court to which I have referred. This sum as well as the abovementioned sum of Rupees 1347-13-0, together with Rs. 1500 (vide application No. 3485 of 1929), shall, subject to the payment of all proper costs, be treated by the liquidators as available for distribution among the depositors of the Deposit Branch. Rs. 1,955-13-9 in the Loan Branch shall be distributed

(2) [1875] 7 H. L. 653 = 44 L. J. Ex. 185= 33 L. T. 451=24 W. R. 754.
(3) [1912] 2 Ch. 183=81 L. J. Ch. 769.
(4) [1914] A. C. 398=83 L. J. Ch. 465 = 111 L. T. 1=58 S. J. 302=30 T. L. R. 315.

Name	Amount of deposit withdrawn within one year before liquidation.	Amount to be refunded at 5 As. in the rupee.
P. Lakshminarasu Naidu	Rs. 2000	Rs. 625 0 0
T. S, Natesa Sastri	Rs. 1500	Rs. 468 12 0
V. Sadagopan Naidu	Rs. 813	Rs. 254 1 0
		Total Rs. 1347 13 0

among the unadvanced shareholders of that branch ; if any balance is left over, it shall be carried forward to the Deposit Branch.

This order disposes of (1) application No. 820 of 1930 (misfeasance summons), (2) Application No. 346 of 1930 the liquidators' application as to the disposal of Rs. 2330-13-9 said to be the assets of the Loan Branch) and (3) Application No. 3485 of 1929 regarding the disposal of Rs. 1,500. In the misfeasance summons, the liquidators snall take their costs which I fix at Rs. 150 and pay the applicants' costs which are also fixed at Rs. 150. In Application No. 346 of 1930 the liquidators may take Rs. 35 as their costs. I desire before closing to tell the liquidators that they must, to save further costs, take steps to have the affairs of the company wound up as early as possible.

P.R.S./B.V. *Order accordingly.*

A. I. R. 1931 Madras 795

CURGENVEN, J.

A. E. Venkatarama Chettiar and *another*—Defendants—Petitioners.

v.

Marudachala Goundan and *others*—Plaintiffs—Respondents.

Civil Revn. Petn. No. 1910 of 1929, Decided on 6th August 1931, against Order of Dist. Munsif, Udumalpet, D/- 2nd July 1929.

Civil P. C. (1908), O. 34, R. 5 (2)—Mere fact that Court can dispense with notice and can direct that final decree be passed does not invalidate order to issue notice and to dismiss application for final decree on default of decree-holders—Court should conform with O. 9, R. 5 if it issues notice—By force of S. 141 provisions of O. 17 and O. 9 apply to application for final decree under O. 34, R. 5—Civil P. C. (1908), S. 141 and O. 9, R. 5.

On application by the decree-holder for a final decree the Court ordered notice to the judgment-debtor. On several occasions notices were issued and a number of the defendants served but eventually when an order was passed on 18th August 1926 for substituted service to be applied for against defendant 2 and a guardian to be proposed for defendant 1's legal representative the decree-holder defaulted and the application as a whole was dismissed on 15th September 1926, without allowing sufficient time under O. 9, R. 5.

Held : that the mere circumstance that the Court could dispense with notice and could direct that a final decree be passed under O. 34, R. 5 (2) did not invalidate the orders passed by the Court.

Held further : that by force of S. 141, the provisions of O. 9 and O. 17 apply to such a proceeding and the Court before dismissing the application should satisfy itself that the terms of O. 9, R. 5, are complied with and that the Court was not at liberty to dismiss the application in respect of any of those defendants who had been in fact served and that even in the case of defendant 2 who was not served it did not allow sufficient time for a further application to be made before passing the order of dismissal and the order was not justified by law and was ultra vires : 17 *All.* 106 (*P.C.*) ; *A.I.R.* 1928 *Mad.* 522 and *A. I. R.* 1929 *Mad.* 31, *Ref.*

[P 796 C 2, P 797 C 1]

T. M. Krishnaswami Iyer and *K. V. Ramachandra Ayyar*—for Petitioners.

B. Sitarama Rao and *T.G. Ramaswami Ayyar*—for Respondents.

Judgment.—The facts of this case have been sufficiently set out by the learned District Munsif of Udamalpet. There was a preliminary decree passed in a mortgage suit and an application I. A. No. 777 of 1925, was put in by the decree-holder for a final decree. Upon this the Court ordered notice to the judgment-debtor. On several occasions notices were issued and a number of them served, but eventually when an order was passed for substituted service to be applied for against defendant 2 and for a guardian to be proposed for defendant 1's legal representative the decree-holder defaulted and the application was dismissed. The date of the dismissal was 15th September 1926 and on 3rd August 1928 the application out of which this petition arose, I. A. No. 686 of 1928, was filed praying the Court to revoke the previous order on the ground that it was invalid. The learned District Munsif after considering certain rulings has come to the conclusion that there is no necessity to issue notice to the defendants on an application to pass a final decree in a

mortgage suit and further that even if on such an application the Court thinks fit to order notice and a decree-holder neglects to take steps the Court has not the power to dismiss the application as it has done in the present case.

As authority for the former proposition the learned District Munsif has referred to the case short notes in *Nemichand Sowcar* v. *Kesari Mull* (1). This case has since been reported as *Rasan Chettiar* v. *Rangayyan Chettiar* (2) and a perusal of it makes it clear I think that, while it is not obligatory upon a Court to issue notice, it is nevertheless a practice advisable, and the case is certainly not an authority for the position that the Court would be acting ultra vires in adopting such a course. There is in fact a considerable body of case-law in favour of the view that notice should issue, as in the generality of interlocutory applications. The mere circumstance that the Court can dispense with notice and can direct that a final decree be passed under O. 34, R. 5 (2), Civil P.C., does not therefore invalidate the orders passed by the Court in the present case. Whether or not in directing the issue of notice the learned District Munsif who passed the order did so with his eyes open as to the discretion vested in him to abstain from such a course is no doubt another matter. But I must take it that the action which he took was taken in the exercise of his judicial discretion since he undoubtedly had power to take it.

The question then arises whether he was equally justified in dismissing the application as a whole upon the failure of the decree-holder to persist in taking out notice until each and every one of the defendants had been served. Reference has been made to *Timmaraju* v. *Narasimha Raju* (3), where it has been held by Jackson, J., in somewhat similar circumstances that, if a Court is going to act under S. 151, Civil P. C., it must satisfy itself and, I presume, record something to satisfy an appellate or revising Court, how the ends of justice or its own process needed to be safeguarded by such a course. In other words, S. 151 will not allow a Court as a matter of course to dismiss an application for default either in taking out notice or in any other manner. I do not think it necessary for me to express either concurrence or disagreement with that decision, because I am not satisfied that recourse must be had to S. 151 in the circumstances which arise here. I am unable to see why by force of S. 141 of the Code the provisions of O. 9 and of O. 17 should not become applicable to a proceeding of the class now under consideration. It has no doubt been held by the Privy Council in *Thakur Prasad* v. *Fakirullah* (4) that this portion of the Code will not apply to proceedings in execution. But whatever else an application of this kind may be, it is certainly not an application in execution and I think it can hardly be contested that it is an integral part of the mortgage suit. No authority has been shown me why the provisions I have mentioned should not be extended to cover a proceeding of this nature, and it seems to me somewhat improper that the Court should possess more unqualified power by resort to S. 151 of the Code in dealing with an application of this kind than it possesses in the case of a suit. If this view be correct, it appears to me that before dismissing the application the Court should have satisfied itself that the terms of O. 9, R. 5 were complied with.

We have been at some trouble to elucidate the course taken for securing service in this case and it appears that by 18th August 1926 all the defendants had been served except the first, who was dead, and the second. As already remarked the Court passed an order for an application for the guardianship of the legal representative of the first and for substituted service on the second. It may be remarked incidentally that this order for substituted service was passed after this defendant had received service by affixure no less than six times. It would appear from that circumstance that had the Court applied its mind to the matter, it would especially in a proceeding of this nature have found service to be sufficient. Nevertheless on 18th August it did in fact pass these orders and when the case came up again on 15th September, no steps having been taken the petition as a whole was dismissed. It is unnecessary to trouble ourselves with the case of defendant 1's legal representa-

(1) A.I.R. 1929 Mad. 31=114 I.C. 818.
(2) A.I.R. 1930 Mad. 105=120 I.C. 72.
(3) A.I.R. 1928 Mad. 522=109 I.C. 528.
(4) [1895] 17 All. 106=22 I.A. 44=6 Sar. 526 (P.C.).

tive because the original order has not been revoked in the case of this party. As regards defendant 2, if we are to apply R. 5, O. 9 the decree-holder had a period of three months from the date of return made on the prior summons within which to apply for the issue of a fresh snmmons. It is quite clear that no such period as three months was allowed before the dismissal order was passed. The conclusion I draw accordingly is that the Court was not at liberty to dismiss the application in respect of any of those defendants who had been in fact served and that even in the case of defendant 2 who was not served it did not allow sufficient time for a further application to be made before passing the order of dismissal.

It appears to me accordingly that the order was in fact ultra vires and it only remains to say that the revision petition in the present case is preferred by defendants 11 and 12 who were themselves served at an earlier stage of the proceedings. In these circumstances it is very difficult to see how they can themselves support the earlier order, since it seems clear that so far at least as they were concerned the order of dismissal cannot be maintained. An argument has been addressed to me in order to meet the position that the Court may dismiss an application of this sort piecemeal that it would not be fair to pass a decree against some of the defendants; and that the only proper course would be to pass it against all or none. I can only say as regards this argument that I have not been sufficiently put into possession of the facts in order to see whether in the present case it has any substance. It scarcely needs remark that, if an injustice would ensue in circumstances such as the present, it would be likely to ensue in similar circumstances under O. 9, R. 5 where a suit is partly decreed and partly dismissed by virtue of partial default in service. My conclusion accordingly is, although it is arrived at on somewhat different grounds from those which influenced the learned District Munsif, that the order dismissing the application for a final decree was not justified by law and in fact was ultra vires. Mr. T. M. Krishnaswami Iyer has conceded what I think is .unquestionable that if so it was a nullity and the Court could have proceeded to pass further orders as if the original application was still pending. That in substance is what it has done and I cannot find there are sufficient grounds to interfere now in revision with that order. The civil revision petition is dismissed with the costs.

P.R.S./P.N. *Revision dismissed.*

* A. I. R. 1931 Madras 797

RAMESAM AND CORNISH, JJ.

M. Ranganayaki Ammal—Appellant.

v.

Official Assignee of Madras and *another*—Respondents.

Original Suit Appeal No. 98 of 1928, Decided on 23rd January 1930, from judgment and order of Waller, J., D/- 26th March 1928, in Applications Nos. 765 of 1927 and 117 of 1928.

*** Provident Fund Act (1925), S. 3—Insolvent handing over his provident fund deposit to his wife—Official Assignee can claim that amount back from wife—Presidency Towns Insolvency Act (1907), S. 58.**

A compulsory deposit, e. g., a Provident Fund deposit is only a deposit so long as it remains in the Fund and not after it has been paid over to the person to whose credit it has hitherto stood.

Where an insolvent has handed over his Provident Fund deposit to his wife, such payment being a voluntary transfer cannot prevail against the Official Assignee and the Official Assignee is entitled to an order against the wife that she should pay down that amount to him : 44 *Bom.* 673, *Diss. from*; *A. I. R.* 1927 *Oudh* 22, *Rel. on*; 26 *Mad.* 440 ; 46 *Cal.* 962; *A. I. R.* 1924 *All.* 68; *A. I. R.* 1923 *Cal.* 585 and *A. I. R.* 1929 *All.* 417, *Ref.* [P 793 C 2]

M. S. Krishnaswamy Ayyangar—for Appellant.

M. S. Venkatarama Ayyar—for Respondents.

Ramesam, J.—This is an appeal against the order of our brother Waller, J., in connexion with the insolvency of one Venkataratnam Naidu. The insolvent was employed in the M. & S. M. Ry. and was subscribing for a Provident Fund. By May 1927 he got deeply into debt, his lands and house were mortgaged to the extent of Rs. 8,000 odd and he had unsecured debts to the extent of Rs. 3,900. In May 1927, a creditor obtained a decree and attached his salary, a notice being sent to the railway company. On this the railway company put an end to his services and paid the amount lying to his credit in the Provident Fund into his hands. This amounted to Rs. 3,000 and he paid it to his wife in June or July. On 10th August he was adjudi-

cated insolvent on his own petition. After the wife got the Rs. 3,000, Rs. 600 out of this was utilized by her for redeeming jewels of hers which were pledged by the husband with a creditor. The Official Assignee now prays for an order against the wife directing her to pay down the Rs. 3,000 and also surrendering the jewels for Rs. 600. Our learned brother made the order. The wife appeals.

The learned advocate for the appellant contended that even after the amount, the Provident Fund was paid into the insolvent's hands, it is still exempt from attachment or claims of the Official Assignee under S. 3, Provident Fund Act of 1925. It is true that it has been held in some cases (for instance *Hindley* v. *Joynarain Marwari* (1), *Devi Prasad* v. *Secy. of State* (2), *Secy. of State* v. *Raj Kumar Mukerjee* (3) and *Secy. of State* v. *Har Charn* (4) that so long as the money has not been paid to the subscriber but remained with the authority that constituted the Fund, the sum is not liable to the attachment of a creditor cr to the claims of an Official Assignee.

This question does not arise before us and we have nothing to say at present to those cases. But in one of these cases, *Devi Prasad* v. *Secy. of State* (2), Daniels, J., observed, referring to a decision in *Nagindas Bhukhandas* v. *Ghelabhai Gulabdas* (5) that it is not necessary for him to go to the extent that the Bombay Judges had gone. In the case in *Nagindas Bhukandas* v. *Ghelabhai Gulabdas* (5) the question was whether the insolvent was rightly convicted under S. 43 (2), Insolvency Act 3 of 1907 which corresponds to S. 69 (2), Provincial Insolvency Act of 1920. One of the grounds they gave was that he was not guilty of any fraudulent act in handing over the sum to his wife because he might well have thought that the sum was not subject to any claims of the Official Assignee. To that extent we have nothing to say against that decision. But another reason was also given in that judgment, namely, that even after the fund was paid to the insolvent, it continues to retain its character of a compulsory deposit and for this view the learned Judges relied on the decision in *Official Assignee of Madras* v. *Mary Dalgairns* (6). We are unable to see how the decision in *Official Assignee of Madras* v. *Mary Dalgairns* (6), supports the reasoning of the learned Judges. In the decision in *Official Assignee of Madras* v. *Mary Dalgairns* (6) the subscriber died and there was no nominee mentioned when the Fund was opened and it was held under the new Act that the claim of the nominee prevails and the Official Assignee has no right to any portion of the Fund. In that case the money was never paid into the hands of the subscriber for he died before it matured, and the only person who was entitled to draw was the widow and under the Act her claims prevailed over those of the creditors of the Official Assignee.

We see that the decision in *Nagindas Bhukandas* v. *Ghelabhai Gulabdas* (5), has been dissented from in *Gauri Shankar* v. *De Cruze*, *A. I. R.* 1927 *Oudh* 22. In this decision it was observed that a compulsory deposit is only a deposit so long as it remains in the Fund and not after it has been paid over to the person to whose credit it has hitherto stood. We agree with these observations and dissent from the decision in *Nagindas Bhukandas* v. *Ghelabhai Gulabdas* (5). That being so, we must agree with our learned brother that the payment of Rs. 3,000 which under the circumstances of the case amounted to a voluntary transfer cannot prevail against the Official Assignee and the Official Assignee is entitled to the order against the wife that she should pay down the amount of Rs. 3,000; but the Official Assignee is not entitled to payment of Rs. 3,000 plus another sum of Rs. 600, for it does not appear that any part of the gratuity drawn by the insolvent was paid into the wife's hands. The Official Assignee is only entitled to the sum of Rs. 3,000. It is true that in respect of the amount of Rs. 600 out of this he is entitled to a charge over the jewels. It will be open to the appellant to pay down Rs. 600 to the Official Assignee so as to avoid surrendering the jewels. If

(1) [1919] 46 Cal. 962=54 I. C. 439.
(2) A. I. R. 1924 All. 68=74 I. C. 746=45 All. 554.
(3) A. I. R. 1923 Cal. 585=77 I. C. 1025=50 Cal. 347.
(4) A. I. R. 1929 All. 417=117 I. C. 622=51 All. 845.
(5) [1920] 44 Bom. 673=56 I. C. 449.
(6) [1903] 26 Mad. 440.

she so pays she need not surrender the jewels and she will thus rank as a creditor to the extent of Rs. 600 against the insolvent's estate along with other creditors. As to the other Rs. 2,400 there will be merely an order against her to pay to the Official Assignee, but if she does not pay the Rs. 600, the Official Assignee will be entitled to have the possession of the jewels until he realizes his charge for Rs. 600 over it. Subject to this modification the appeal is dismissed with costs. (Fee payable on Rs. 3,000 only).

P.R.S./B.V. *Decree modified.*

A. I. R. 1931 Madras 799

RAMESAM, J.

V. Alagarsami Naidu — Defendant — Appellant.

v.

Kathia Goundan and *others*—Plaintiffs —Respondents.

Second Appeal No. 2347 of 1927, Decided on 10th April 1931, against decree of Sub-Judge, Madura, in Appeal Suit No. 6 of 1927.

Deed—Construction—Deed held to be not void or against Transfer of Property Act (1882), S. 10.

A document executed by *A* in favour of *B* recited that : "As I have taken a sale deed from you of the site and the house mentioned below, I will be residing in the said site and house. While I so reside neither I nor my heir shall mortgage or hypothecate or otherwise alienate the property. If myself or my heirs should not like to reside in the said site and house, we shall reconvey the property to you for a price not exceeding the sale price of Rs. 60." *A* subsequently mortgaged the property.

Held: that the undertaking was not void as it could not amount to a transaction which had the effect of restraining alienations by way of mortgage or sale.

Held further: that there was no offer though if no offer is made *B* might be able to sue *A* for damages for breach of his undertaking but could not sue for specific performance and that the mortgage was not void by reason of the undertaking : 41 *Mad.* 582 (*F. B.*) ; 13 *All.* 224 ; *A. I. R.* 1926 *Mad.* 120 ; *A. I. R.* 1922 *Mad.* 16 and *A. I. R.* 1927 *P. C.* 113, *Ref.*

[P 800 C 2]

A. V. Narayanaswami Ayyar—for Appellant.

A. Nagaswami Ayyar — for Respondent.

Judgment.—This second appeal arises out of a suit by a mortgagee to recover an amount of Rs. 60 due on the mortgage Ex. A dated 19th December 1921 executed by defendants 1 to 5 in favour of the plaintiff. Defendant 6 was impleaded as a subsequent purchaser of the suit hypotheca under Ex. 2 dated 27th November 1924. In his written statement defendant 6 does not merely rely on the subsequent sale deed but upon an earlier transaction. He says in his written statement that the whole site on which the suit house and other houses are situate was part of the Survey No. 13 belonging to him. Then he says :

"In the said Re-Survey No. 13 this defendant has built a big bandy stand (Vandipettai) and provided it with all conveniences for stay of bandies going to and fro on the highway. The said pettai, and all the shops, houses, vacant space etc., round it absolutely belong to this defendant. For the sake of safety and protection to the said pettai, this defendant gave permission to people to build houses there and reside and in the houses built by defendant 6 all conveniences for tenants have been provided. The people so residing have no permanent right or interest in the said houses or the vacant space. The people residing there have no right either to sell, mortgage etc., either the buildings or the vacant space."

He also says that he has been paying a tax of Rs. 25 per year to the Government. In support of this right which he has pleaded in the written statement whatever right it may be called he relies upon Exs. C and I. Ex. C is the sale deed he gave to defendant 1 for Rs. 60. He says he gave similar deeds to others. And Ex. C is accompanied simultaneously by Ex. 1 which is a registered agreement executed by defendant 1 to defendant 6. Undoubtedly the two ought to be taken together to see the nature of the transaction. Ex. 1 says :

"As I have taken a sale deed from you of the site and house mentioned below, I will be residing in the said site and house. While I so reside, neither I nor my heir shall mortgage or hypothecate or otherwise alienate the property. If myself or my heirs should not like to reside in the said site and house, we shall reconvey the property to you for a price not exceeding the sale price of Rs. 60."

The first question that arises is what is the effect of agreement like Ex. 1 ? The Courts below have thought that the agreement is one probibiting alienation and is therefore void. But I am not satisfied with that mode of disposing of the case. Mr. Narayanaswami Ayyar, the learned advocate for the appellant, contends that it is an agreement to resell the property to defendant 6 at a favourable price of Rs. 60, the consideration for this agreement being that the house was sold to defendant 1 at the favourable price of Rs. 60. I am willing

to accept these suggestions. Probably the house is worth much more than Rs. 60 and because it was given to defendant 1 for Rs. 60 he gives a counter-agreement to resell it, for Rs. 60. But there are difficulties in enforcing this agreement. It is not an agreement absolutely binding on defendant 1 to sell it in a particular time or within any time at all. He is bound to sell it to defendant 6 whenever he thinks of parting with the property.

If he does not think of parting with the property, he is not bound to sell it. That is the first difficulty in the case. The second difficulty is that he is bound to resell it for Rs. 60. At one stage Mr. Narayanaswami Ayyar said that the right was analogous to the right of pre-emption. But on that footing he was met by the decision in *Vasudevan Moosad* v. *Ittirarichan Nair* (1). Sir John Wallis says there citing the judgment of Mahmood, J., in *Baij Nath* v. *Sital Singh* (2), that a compulsory sale, such as a sale in execution of a decree or a sale under an authoritative order of the revenue authorities for arrears of Government revenue, does not render pre-emption enforcible whether it is a customary right or a right arising out of private contract. In this case it is necessary for defendant 6 to show that his right of sale is such that the mortgage in favour of the plaintiff is invalid as against his own right. A mortgage by the owner of a house will often end in a suit by the mortgagee and in Court sale. And if the Court sale can be made free of defendant 6's right to repurchase under Ex. 1, the right is useless. So he has to contend that not only absolute alienation but also mortgages by defendant 1 are void if they are to affect his right of repurchasing it for Rs. 60.

Now, the decision in *Vasudevan Moosad* v. *Ittirarichan Nair* (1), is against this view if it is to be described as a right of pre-emption. So Mr. Narayanaswami Ayyar contended that it is somewhat similar to pre-emption but is not actual pre-emption. I am willing to accept this suggestion. What shall we describe this right as? In my opinion if it is not a right of pre-emption, the undertaking which defendant 1 made in Ex. 1 is merely an undertaking to give defendant 6 the first offer for Rs. 60 whenever he chose to sell it. This undertaking is not without consideration and therefore cannot be disposed of as nudum pactum. It had consideration and it is a complete contract, the contract being the undertaking to make the offer. In the language of the Judges who decided *Helby* v. *Mathews*, it is a pre-contract to a contract to sell and purchase. It seems to me that such a contract does not amount to an offer, it is only an undertaking to make an offer whenever he thinks of selling the property; he has yet made no offer and therefore it is incapable of acceptance. Mr. Narayanaswami Ayyar has cited before me a decision in *Govindaswami Pillai* v. *Doraiswami Mudali*, *A. I. R.* 1926 *Mad.* 120. In that case Krishnan, J. following the decision in *Papa Naidu* v. *Muniswamy Ayyar* (3), held that there was only an offer, that the other side to the contract was not bound and that until the offer was accepted there could be no complete contract to sell and purchase. There also the contract begins with the words:

"If it so happens that I have to sell it (property) out of necessity, I will sell it to you."

In my opinion the undertaking in that case did not amount to a continued offer kept open but only an undertaking to make an offer when he thinks of selling the property as in the present case, and I think there is neither an offer nor can there be an acceptance in that case. However the learned Judge thought that there was an offer and he gave an opportunity for the respondents by calling for a fresh finding whether there was an acceptance of the offer. But the finding was that there was no completed contract with the result that the appeal was allowed. But it seems to me that in such a case there is no offer, nor can there be an acceptance of the offer. If no offer is made by the person who makes the undertaking no doubt he is guilty of breach of his undertaking. It is possible that he is liable to be sued for damages. But I do not see how a person to whom option is given I say option because it is no more than an option to repurchase the property can sue for specific performance. He can only sue for damages. This is also the view in *Papa Naidu* v. *Muniswamy Ayyar* (3) the only difference being that

(1) [1918] 41 Mad. 582=45 I.C. 46 (F.B.).
(2) [1891] 13 All. 224=(1891) A.W.N. 68.
(3) A.I.R. 1922 Mad. 16=65 I.C. 720=46 Mad. 30.

in that case there is a continuing offer left open. In the present case there is no offer at all. Defendant 6 may be able to sue defendant 1 for damages for breach of his undertaking in Ex. 1. I do not want to say that Ex. 1 is void as the lower Courts have said. It cannot amount to a transaction which has the effect of restraining alienations by way of mortgage or sale.

Mr. Narayanaswami Ayyar relied on *Sheobaran Singh* v. *Kulsum-un-nissa* (4), in which it was held that the Official Assignee takes the property of a bankrupt exactly as it stood in his person with all its advantages and all its burdens That may be so, so far as the Official Assignee is concerned. But it is conceded in that case that a sale in execution of a decree transferred the property free from a claim of pre-emption : see p. 375 (of 49 *All.*) It is clear that whatever may be the nature of the Official Assignee's powers, involuntary sales cannot be made invalidated by a right of pre-emption. It seems to me that the mortgage in this case cannot be invalid by reason of Ex. 1. The second appeal fails and is dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

(4) A.I.R. 1927 P.C. 113=101 I.C. 368=54 I. A. 204=49 All. 367 (P.C.).

A. I. R. 1931 Madras 801

CURGENVEN AND CORNISH, JJ.

(*His Holiness Srila Sri*) *Vythilinga Pandara Sannadhi Avergal, Athinakarthar, of Tiruvadathurai Athinam*—Plaintiff—Appellant.

v.

Temple Committee, Tinnevelly Circle, and *another*—Defendants—Respondents.

Appeal No. 210 of 1930, Decided on 4th March 1931, against decree of Sub-Judge, Tinnevelly, in O. S. No. 15 of 1929.

(a) Civil P. C. (1908), S. 92—Suit brought in individual capacity to establish individual claim as trustee does not come within S. 92.

So far as a suit is brought by a plaintiff in his individual capacity as a trustee to enforce his individual claim to be such trustee, it does not lie within the scope of the section : 42 *Mad.* 668 ; *A. I. R.* 1922 *Mad.* 17 ; 33 *Cal.* 789, *Rel. on.* and *A. I. R.* 1928 *P. C.* 16, *Expl.* [P 801 C 2]

(b) Madras Religious Endowments Act (1927), S. 73—Suit by trustee to establish hereditary right—It is doubtful whether it is in respect of administration or management —Quaere.

It appears to be very doubtful whether a suit by a trustee to establish his hereditary right to his office is a suit in respect of the administration or management of the religious endowment to which the trusteeship appertains : 33 *Cal.* 789 and *A. I. R.* 1923 *Bom.* 67, *Ref.* [P 802 C 2]

(c) Interpretation of Statutes—Where civil Court's jurisdiction is sought to be ousted, statute should be strictly construed.

It is a well-accepted principle of construction that a provision of law should receive a strict interpretation when it is sought by it to oust the ordinary jurisdiction of the civil Court : *A. I. R.* 1928 *Lah.* 121 (*F.B.*) and *Leach* v. *Rex*, (1912) *A. C.* 305, *Foll.* [P 803 C 1]

(d) Madras Religious Endowments Act, (1927), S. 73 (2)—Trustee of temple suing—Temple Committee to establish hereditary right—Suit is entertainable by civil Court.

The words "except as provided for by this Act" are intended to bear the sense of "contrary to the provisions of this Act." Hence a suit by the trustee of a temple to establish his hereditary right to the office of trusteeship of a temple against the Temple Committee removing him from office is not barred by S. 73 (2) and is therefore entertainable by a civil Court : *A. I. R.* 1927 *Mad.* 338, *Rel. on.* [P 803 C 2]

C. S. Venkatachari, V. N. Venkatavaradachari and *R. Gopalachari* — for Appellant.

E. S. Chidambaram Pillai, C. Rangaswami Ayyangar, T. M. Krishnaswami Iyer and *K. V. Ramachandra Iyer*—for Respondents.

Curgenven, J.—The plaintiff sued to establish his right as hereditary trustee of the Sri Papavinasaswami Temple at Vikramasingapuram village in Ambasamudrum Taluk of the Tinnevelly District, and for certain consequential reliefs. The plaint alleges that the Temple Committee, defendant 1, in disregard of the plaintiff's hereditary right as trustee, had held that he had vacated office under S. 51, Madras Hindu Religious Endowments Act and had appointed defendant 2 as sole trustee of the temple. The learned Subordinate Judge of Tinnevelly has found that a suit of this character is barred by the provisions of the Act above referred to, and this is the sole question which we have to decide in appeal.

There is ample authority for the view that a suit to establish a personal right of this character does not fall within the terms of S. 92, Civil P. C. It is true that in *Subramania Pillai* v. *Krishnaswamy Somayajiar* (1) a suit by two out of three trustees of a temple for a declaration that the appointment by the Devasthanam Committee to fill a vacancy in the third trusteeship was invalid was held to fall under that section ; but this

(1) [1919] 42 Mad. 668=53 I. C. 605.

decision was not approved in the Full Bench case *Appanna Poricha* v. *Narasinga Poricha* (2), in which it was held that the class of suit contemplated in S. 92 was one representative in character, one or more persons being enabled by it to sue on behalf of the public and sanction being required as a precaution against wasteful litigation. The learned Judges who decided that case referred with approval to the elaborate judgment of Woodroffe, J., in *Budree Das Mukim* v. *Chooni Lal Johurry* (3), where the principle underlying the section has been explained and illustrated. So far as a suit is brought by a plaintiff in his individual capacity as a trustee to enforce his individual claim to be such trustee, it does not lie within the scope of the section. Mr. T. M. Krishnaswamy Ayyar, who recognizes that the authority of the Full Bench case is fatal to his position upon this point, contends that it has been superseded by the judgment of the Privy Council in *Abdur Rahim* v. *Mahomed Barkat Ali* (4), but I cannot find that that decision does more than set at rest the question of the mandatory nature of the section, it being decided further that sub-S. (2) does not extend the scope of sub-S. (1). A reference to the arguments on behalf of the respondents in that case will show that it was conceded that a suit in respect of a private right, where no breach of trust is alleged, may be maintained without the sanction of the Advocate-General.

Turning now to the Madras Religious Endowments Act, we have to see whether such a suit is barred by any of its provisions. The Act provides for the institution of suits, or for reference to a Court, in a number of circumstances—see for instance, Ss. 55 (4), 57, 63, 65 and 67—and then ensues the more general S. 73. It is admitted that if the suit is barred it must be by the terms of this last section. It runs as follows :

"(1) The Board or Committee having jurisdiction over any mutt or temple or any person having interest and having obtained the consent of the Board may institute a suit in the Court to obtain a decree :

(a) Appointing or removing the trustee of a mutt or excepted temple ;

(b) vesting any property in a trustee ;

(c) declaring what proportion of the endowed property or of the interest therein shall be allocated to any particular object of the endowment ; or

(d) granting such further or other relief as the nature of the case may require.

(2) Sections 92 and 93 and R. 8, O. 1, Sch. 1, Civil P. C., 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by this Act."

It will be seen that the first part of this section is modelled very closely upon S. 92, Civil P. C., some of the reliefs which may be sued for under the terms of S. 92 being reproduced verbatim while others are provided for elsewhere in the Act. It is not possible, I think, to contend successfully that a class of suit to which S. 92 would not relate can be brought within the scope of this first part of S. 73 ; nor indeed does the plaintiff here ask for any of the reliefs which it contemplates. The argument addressed to us depends upon the construction of the closing words of sub-S. (2):

"No suit in respect of such administration or management shall be instituted except as provided by this Act."

Now in the first place it appears to me very doubtful whether a suit by a trustee to establish his hereditary right to his office is a suit in respect of the administration or management of the religious endowment to which the trusteeship appertains. It is a suit relating to a personal right, and though upon its decision may depend the question whether or not the plaintiff continues in office as trustee, that question is not one arising out of the administration of the trust, as for instance, where a trustee is removed for breach of trust or mismanagement. The suit raises no issue as to the manner in which the trust property has been administered or should in future be administered. From that point of view, too, it will not fall within the terms of S. 92, Civil P. C., a provision which was designed to deal with every aspect of the management of endowments. As in *Budree Das Mukim* v. *Chooni Lal Johurry* (3), so here, no directions are necessary for the administration of the trust. In dealing with the question whether a suit by hereditary muktessars for a declaration that certain persons were not properly appointed trustees fell within the provisions of S. 92, it was held by the Bom-

(2) A. I. R. 1922 Mad. 17=69 I. C. 304=45 Mad. 113 (F. B.).
(3) [1906] 33 Cal. 789=10 C. W. N. 581.
(4) A. I. R. 1928 P. C. 16=108 I. C. 361=55 I. A. 96=55 Cal. 519 (P. C.).

bay High Court in *Nilkanth Devrao* v. *Ramakrishna Vithal* (5) that the section did not apply because it provided only for two cases : (1) either there must be an alleged breach of any express or constructive trust; or (2) the direction of the Court must be deemed necessary for the administration of any such trust. This, I think, affords some authority for the view that a suit of this character is not one in respect of the administration or management of the endowment. For this reason alone I do not think that sub-S. (2), S. 73 of the Act opposes any bar to the institution of a suit like the present. Even assuming however that the qualification attached to such suits as the subsection deals with is satisfied in the present case, a further question arises as to the meaning of the phrase "no suit * * * shall be instituted except as provided by this Act." Mr. T. M. Krishnaswamy Ayyar wishes us to read the phrase as meaning "no suit shall be instituted unless it is provided for by this Act," so that, since there is no express provision authorizing such a suit no such suit can lie. The alternative view offered is that the words mean no more than that "no suit shall be instituted contrary to the provisions of this Act." At first sight the former construction may perhaps be thought the more natural meaning of the words, a meaning which, except that "provided for" stands in the place of "provided" is to be attached to similar language in S. 404, Criminal P. C. I am not prepared to say that "provided for" and "provided" convey exactly the same meaning. But the real difference to notice, I think, is that S. 404, Criminal P. C., deals with the right of appeal and that that right is created by the Code itself, whereas the right of a trustee to sue existed to the Religious Endowments Act and can only be restricted, not created cr extended, by its terms. It is a well-accepted principle of construction that a provision of law should receive a strict interpretation when it is sought by it to oust the ordinary jurisdiction of the civil Court : *Ali Muhammad* v. *Hakim* (6) and *Leach* v. *Rex* (7). In spite therefore of the similarity of language I do not think that the meaning of S. 404 affords a safe guide in the present instance. It is then argued that on the view that the words mean no more than that the Act must be examined to see if such a suit is barred. The words are mere surplusage, which is no doubt true ; and that to construe them as the appellant desires would allow certain suits to be brought as, for instance, for a scheme, which had previously been restricted by S. 92, Civil P. C. The example given is a doubtful one, as it is arguable that by affording an alternative remedy the Act impliedly bars such a suit. Per contra, if the section is read as the respondent proposes, the example of the present case is sufficient to show that it would create an absolute bar to any suit for the establishment of personal rights of the greatest importance to the person affected, and which have been perhaps in the enjoyment of his family for centuries. I am unable to believe that the drafters of the Act intended, not indeed to qualify by conditions the ordinary right of resort to the Courts in such a case but to exclude it altogether. Therefore I think that, if the language of the section is open to two alternative constructions, it is permissible to select that one which avoids such a result. This may be done by applying to the words "except as provided by this Act," the sense of "contrary to the provisions of this Act," which, I think, they may well have been intended to bear. This is the construction which has been placed upon them by Wallace, J. in *Alagappa Chettiar* v. *Arunachalam Chettiar* (8) The learned Subordinate Judge has referred to a decision of my own as adopting the opposite view. The observations in that case must be read in the light of the circumstance that neither party contended for the position now assumed by the appellant ; so that, it being granted that the suit fell either under S. 73, Religious Endowments Act, or under S. 92, Civil P. C., the only question which I had to decide was under which provision it would fall.

My conclusion accordingly is that the Court had jurisdiction to entertain the suit. As my learned brother agrees with me, we allow the appeal, set aside the decree and remand the case for trial

(5) A. I. R. 1923 Bom. 67=64 I. C. 353=46 Bom. 101.
(6) A. I. R. 1928 Lah. 121=108 I. C. 748=9 Lah. 504 (F. B.).
(7) [1912] A. C. 305.
(8) A. I. R. 1927 Mad. 338=97 I. C. 480.

upon the further issues and disposal in due course. Costs would abide the result. The appellant will be entitled to a refund of the court-fee paid on the memorandum of appeal.

Cornish, J.—I concur.

P.R.S./S.N. *Decree set aside.*

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* A. I. R. 1931 Madras 804

WALLER AND PANDALAI, JJ.

Subramania Chettiar and *another* — Plaintiffs—Appellants.

v.

Sankara Velayudam Chettiar—Defendant—Respondent.

Letters Patent Appeal No. 33 of 1930, Decided on 3rd August 1931, against decision of Anantakrishna Ayyar, J., in Second Appeal No. 1732 of 1925.

* (a) **Hindu Law—Adoption — Adoptive father and natural father agreeing to dispose of portions of adoptive father's ancestral property including gift by will to adoptive father's brother's daughter—All other dispositions in agreement ratified by adoptive son — Gift by will to brother's daughter not questioned for 20 years after his majority — Such gift must also be deemed to be ratified.**

A disposition by way of bequest by a Hindu of portions of the family property in favour of his deceased brother's widow for life with remainder absolutely to her daughter should be held to be ratified by his adopted son when it is found that this and other dispositions of family property were made in pursuance of an arrangement made by the adoptive father with the natural father of the boy whom he wished to adopt in consideration of the adoption and it is also found that the adopted son has ratified all the other dispositions forming part of the same arrangement and has not questioned the disposition in dispute for a period of more than 20 years after attaining majority : *A. I. R.* 1927 *P. C.* 139, *Expl.*; *A. I. R.* 1927 *Mad.* 139, *Expl.*

(b) Hindu Law — Adoption— Invalid disposition by adoptive father at time of adoption binds adopted son, if he ratifies it subsequently.

Invalid dispositions by an adoptive father at the time of the adoption and in consideration of it may become binding on the adopted son if he subsequently ratifies them. Though the adopted son cannot be defeated by an invalid disposition on the ground that he is approbating and reprobating, yet where a disposition by the adoptive father is such that the adopted son may disregard it, he may, by his subsequent conduct of affirming those invalid dispositions, put it beyond his power to disallow them, and it is not that such ratification must necessarily be accompanied by all the ingredients of a valid contract and must be made between the adopted son and the party benefited by the invalid disposition : *A. I. R.* 1927 *P. C.* 139 and 2 *Mad.* 91 (*P. C.*), *Rel. on.*; *A. I. R.* 1918 *P. C.* 196 and *A. I. R.* 1929 *Mad.* 502, *Ref.*

(c) Civil P. C. (1908), S. 100—Invalid disposition by adoptive father — Ratification by adopted son—Whether ratification is of whole or part of transaction is question of fact.

Where a ratification by the adopted son of the dispositions as per agreement between the natural and the adoptive father is of a whole transaction or arrangement, or only of a particular portion of it is essentially a question of fact.

[P 806 C 1]

K. V. Venkatasubramania Ayyar — for Appellant.

B. Sitarama Row and *K. Venkateswaran*—for Respondent.

Pandalai, J. — The question in this appeal is whether a disposition by way of bequest by a Hindu of portions of the family property in favour of his deceased brother's widow for life with remainder absolutely to her daughter can be held to be ratified by his adopted son when it is found that this and other dispositions of family property were made in pursuance of an arrangement made by the adoptive father with the natural father of the boy whom he wished to adopt in consideration of the adoption and it is also found that the adopted son has ratified all the other dispositions forming part of the same arrangement and has not questioned the disposition in dispute for a period of more than 20 years after attaining majority.

The facts are fully stated in the judgments of the District Munsif and the learned Subordinate Judge. One Veerabahu died in 1889, having a short time before his death adopted the present respondent and at the time of the adoption having made, in pursuance of an arrangement with the respondent's natural father, certain dispositions by way of two wills, Exs. A and B, in respect of his family property. The substance of the arrangement was that he set apart certain properties for the maintenance of his two wives and his brother's widow for their lives, gave certain other property absolutely to his brother's daughter, and provided that the brother's daughter should take the property given for maintenance to the brother's widow after the latter's death. He also set apart certain property for charity and left the rest of the estate to the son who was to be adopted. The brother's daughter (appellant's mother) died in 1918. The suit was brought in 1921 by the appellant because the respondent, who had attained majority in 1889 and till then

raised no dispute about the dispositions in the father's wills and had ratified and affirmed them so far as other dispositions are concerned, began to interfere with the appellant's possession of the property in dispute soon after the death of Virabahu's brother's widow who had been in possession till her death in 1921.

So far as is now material, the appellant-plaintiff urged that the respondent-defendant, had accepted and affirmed the wills and attested a sale deed for property conveyed under the wills to the plaintiff's mother and grandmother and that the respondent is therefore estopped from questioning the dispositions in the wills. The respondent after contending that the wills were invalid as against him as they related to ancestral property, contended that he had not accepted or affirmed those dispositions -because he had attested the sale deed mentioned in the plaint without knowing its contents. Issues 1 and 4 raised two questions, the former as to the validity and binding character of the wills and the latter as to estoppel by the defendant's conduct.

In dealing with these issues both the District Munsif and the Subordinate Judge dealt with the long period of 32 years which had elapsed since Virabahu's death before the suit and the acts of the defendant-respondent which showed that at the time of the adoption of the respondent, Virabahu and the respondent's natural father had agreed to the dispositions of the wills as a just provision for the two branches of the family and also that the wills were acted upon during this whole period and that the respondent himself had accepted and affirmed their validity by attesting a sale deed by the plaintiff and his mother and grandmother of the properties left to their branch to a stranger and by entering into an arrangement for managing the charities established by the wills with the other branch of the family. They therefore held that both by virtue of the agreement between the father and Virabahu at the time of the adoption and also by virtue of the defendant's conduct in ratifying the dispositions of the wills after Virabahu's death the defendant-respondent is estopped from contesting plaintiff-appellant 1's rights. These judgments were pronounced in December 1923 and January 1925. The respondent filed a second appeal to this Court in September 1925. Before the appeal came on for hearing before Anantakrishna Ayyar, J. in August 1929 the decision of the Privy Council in *Krishnamurti Ayyar* v. *Krishnamurti Ayyar* (1) was pronounced in March 1927 and was reported in the same year.

In view of this decision which reversed the decision of this Court in *Krishnamurti Ayyar* v. *Krishnamurti Ayyar* (2), the learned Judge thought that the lower Courts had failed to appreciate clearly the points for consideration and he therefore called for findings on three matters, (1) the exact nature of the arrangement entered into at the time of the adoption, (2) whether the defendant is in any way equitably estopped from claiming the properties and (3) whether the defendant has in any way ratified the arrangement, if any, come to at the time of the adoption. Another learned Subordinate Judge returned findings on these issues. As to the arrangement he found that Veerabahu and the respondent's natural father at the time of the adoption of the respondent entered into an arrangement whereby the natural father consented to the bequests under the two wills and agreed to the respondent taking the properties undisposed of by them. On the question of ratification he found that the above-described arrangement as well as the bequests made by the wills were accepted by the respondent as valid. He went on to say that it was not a case of ratification in the strict sense as the bequests evidenced by the wills were not made on behalf of the respondent but he added that nevertheless the defendant can (must) be held to have ratified his natural father's consent to abide by the bequests made in the two wills.

On the question of estoppel he held that there was no estoppel in the proper sense because the respondent had made no representation on which the appellant or his predecessors-in-title had acted to their prejudice. After recording these findings which was all that he was required to do, the Subordinate Judge went on to consider the validity of the wills in view of the recent decision of the Privy Council, and in the end opined that the two wills are valid only to the extent of the bequests made in favour of Virabahu's

(1) A.I.R. 1927 P.C. 139=101 I.C. 779=54 I.A. 248=50 Mad. 503 (P.C.).
(2) A.I.R. 1925 Mad. 932=85 I.C. 882.

wife and the brother's widow. This was an opinion on a question of law and was as such not binding on the learned Judge in second appeal.

The learned Judge in second appeal held that according to the decision in *Krishnamurti Ayyar* v. *Krishnamurti Ayyar* (1), the dispositions of the two wills, although they were assented to by the respondent's natural father, were not binding on the respondent so far as they went beyond the provisions for his own wife and his brother's widow who was entitled to maintenance. In short the wills were invalid to the extent of the dispositions therein contained in favour of Virabahu's brother's daughter, the appellant's mother. To this extent we agree with the learned Judge.

But this does not dispose of the case because the respondent would be bound by the dispositions if he had, as found by the Subordinate Judge, ratified them by subsequent conduct. We are unable to agree with the learned Judge's view as to the nature of this finding and its effect upon the case. He says that the finding on the question of ratification is against the appellant and in favour of the respondent so far as the suit properties are concerned. In other words he limited the effect of the ratification to the dispositions other than that in respect of the suit properties. There is no doubt, according to the decision of the Privy Council in *Ramaswami Ayyar* v. *Venkataramaiyan* (3), that invalid dispositions by an adoptive father at the time of the adoption and in consideration of it may become binding on the adopted son if he subsequently ratifies them and this was recognized by the learned Judge. Unless therefore his view that the respondent's ratification though it affected the other dispositions of the will did not affect the disposition of the property now in dispute can be supported, that disposition would be binding on the respondent, its original invalidity notwithstanding. Whether a ratification is of a whole transaction or arrangement or only of a particular portion of it is essentially a question of fact. If there is evidence upon which the Subordinate Judge could have found that there had been ratification of the entire arrangement in pursuance of which the wills were executed, his finding that they were ratified as a whole could not be disturbed in second appeal. We have carefully examined the findings of the Subordinate Judge and we are unable to see in it any justification for any distinction so far as ratification is concerned between the dispositions of the other properties and the disposition of the property now in dispute.

The Subordinate Judge expresses himself as above stated quite generally in that portion of his judgment where he records his finding as to ratification. We have already stated that the Subordinate Judge's view as to the invalidity of the wills in respect of this property was based upon his view of the decision in *Krishanmurti Ayyar's* case (1). As to this he bases his opinion upon what he considers to be the view of the Judicial Committee namely that the doctrine of "approbate and reprobate" is not applicable. Their Lordships were not in this passage referring to ratification at all. They were simply enforcing the view that the adopted son cannot be defeated by an invalid disposition on the ground that he is approbating and reprobating. They point out that the only thing which he approbates is his adoption which has the result of making him entitled to all the property of the family which had not been validly alienated away. Nor can he therefore be said to be reprobating a disposition which he need not reprobate at all but which is simply invalid against him by reason of his having become a member of the family. This explanation of the true ground of the adopted son's right to disregard invalid dispositions made by the adoptive father at the time of the adoption is entirely independent of and does not affect the question of ratification. In other words it is not affected by the doctrine enunciated in *Ramaswami Ayyar* v. *Venkataramaiyyan* (3) that even though a disposition by the adoptive father be such that the adopted son may disregard it, he may, by his subsequent conduct of affirming those invalid dispositions, put it beyond his power to disallow them. The latter is the question in this case. The finding, so far as it is one of fact, of the Subordinate Judge being that the respondent had ratified and affirmed the bequests under Exs. A and B, that finding in our opinion was binding on the second appellate Court if there were evidence to sup-

(3) [1878] 2 Mad. 91=6 I. A. 196 (P.C.).

port it. In our opinion there was ample evidence to support the finding that the respondent had affirmed the whole of the arrangement and dispositions covered by the two wills, Exs. A and B. It is not merely that for more than twenty years after he attained majority he did not question them. So long ago as 1892 the appellant's mother on her attaining majority had got possession in pursuance of the wills from the respondent's natural father of the properties given to her absolutely under the will. The respondent has not questioned this and has said in the box, he has no intention of questioning it. It is impossible for him to do so at this distance of time. In 1918 he attested a sale deed by the appellant, his mother and grandmother of some property left to them on exactly the same terms as the property now in dispute, that is, to the grandmother for life and afterwards to the mother absolutely. In 1920 the respondent and the appellant entered into mutual agreements for the management of the charities established by the wills. From all this and from the oral evidence of the respondent himself there was sufficient evidence on which the Subordinate Judge might have come to the conclusion that the respondent in affirming and accepting the arrangements made by his natural father affirmed them in the entirety without leaving any exception in respect of the property now in dispute. In this view of the case the learned Judge should have upheld the finding and dismissed the appeal.

But the learned advocate for the respondent has urged that the ratification by an adopted son which might validate an invalid disposition according to the decision in *Ramaswami Ayyar* v. *Venkataramayyan* (3), is not what is proved in this case. He argued: (1) that the ratification in such a case must have all the ingredients of a valid contract, that is consideration and the rest and that it is not enough that a mere unilateral affirmation not addressed to the party benefited by the disposition is made; (2) that an arrangement entered into by a natural father at the time of his son's adoption is not a voidable transaction like widow's or guardian's alienation which requires to be set aside by the reversioner or ward but is void and remains void until it is validated by an independent and valid act of the adopted son. The argument was that the ratification in this case does not satisfy the above requirements but amounts at the most to the exercise by the respondent of an option not to question certain matters which must be limited to those particular matters, (3) that such ratification as there was in this case was made at a time when such agreements between the adoptive father and natural father were considered valid so long as they were reasonable and was therefore made in ignorance of the respondent's right and therefore cannot avail after the decision in *Krishnamurti Ayyar's* case (1). We may at once concede that an arrangement between an adoptive and a natural father disposing of the father's family property in violation of the rule laid down in *Krishnamurty Ayyar's* case (1) is not voidable in the ordinary sense of the term but that it is void against the adopted son. At the same time there can be no doubt that such arrangements are capable of validation by the party affected, the adopted son. In the words of their Lordships in *Ramaswami Ayyar* v. *Venkataramayyan* (3) at p. 101:

> "the agreement of the natural father which has been set out was not void but was at the least capable of ratification when his son came of age."

The word "void" in this context has been explained in *Krishnamurti Ayyar's* case (1) as meaning not an agreement that was funditu null, one incapable of producing any legal result. It is not that, but so far capable of legal results as to be capable of ratification by the son when he comes of age. But this conclusion does not materially advance the respondent's case. The question still remains whether the respondent in this case validated his adoptive father's disposition by his own ratification after he came of age. That was the precise question which was remitted by the learned Judge and found as we have observed in favour of the appellant. We have not been referred to any authority to show that such ratification must necessarily be accompanied by all the ingredients of a valid contract and must be made between the adopted son and the party benefited by the invalid disposition. On the contrary, the agreement of 19th August 1871 in *Ramaswami Ayyar* v. *Venkataramayyan* (3) which, according to their Lordships was a sufficient ratification was one bet-

ween the adopted son and the widow, the alienor and not between him and the alienees. Still it was held that the alienations were sufficiently ratified. Nor are we able to see why, if it is open to the adopted son by his own act to ratify and validate arrangements made by his adoptive father, an act amounting to an election to hold it good, sufficient according to the doctrine enunciated by the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan* (4) followed and applied in *Rama Kotayya* v. *Veeraraghavayya* (5), should not be sufficient for that purpose.

In this case the acts by which the respondent affirmed some of the dispositions of Virabahu's wills were acts to which the appellant and his mother were parties (Ex. C and C 1). The ratification in this case therefore cannot be objected to on the ground that it was made to a third party. Lastly it cannot be said that the respondent was ignorant of his rights at the time of ratification because the decision in *Krishnamurti Ayyar's* case (1) was not then given. The question to what extent arrangements made by the natural father at the time of the adoption are binding on the adopted son had engaged the Courts long prior to the decision in *Ramaswami Ayyar* v. *Venkataramayyan* (3). In that case their Lordships left the general question open, saying that it was not altogether unattended with difficulty and that the decision of the Bombay High Court in *Chitko Raghunatha* v. *Janaki* (6), decides that an agreement on the part of the father that his son's interests shall be postponed to the life interest of the widow is valid and binding. The numerous decisions considered in *Krishnamurti Ayyar's* case (1) reflect the ebb and flow of judicial opinion on this topic and they leave no room for the view that the respondent could have been ignorant of his right to question the dispositions of the wills in this case assented to by his natural father. The respondent was certainly ignorant of the particular decision which their Lordships of the Privy Council delivered in *Krishnamurti Ayyar's* case (1). He could not have anticipated it, but that could not absolve him from the consequence of his previous and deliberate acts done at a time when the adopted son's rights were well known, and if he, knowing of such rights as the Courts would then have upheld, elected to ratify the arrangement and the dispositions under the wills, he cannot now be allowed to go back upon it. The result is in our opinion that the learned Judge should have dismissed the second appeal. We set aside the decision appealed from and restore the decree of the District Munsif with costs throughout.

P.R.S./B.V. *Order accordingly.*

(4) A. I. R. 1918 P. C. 196=50 I. C. 498=46 I. A. 72=42 Mad. 523 (P.C.).
(5) A. I. R. 1929 Mad. 502=119 I. C. 156=52 Mad. 556 (F.B.).
(6) [1874] 11 Bom. H. C. R. 199.

A. I. R. 1931 Madras 808

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Municipal Council, Anantapur—Appellant.

v.

Sangali Vasudeva Rao—Respondent.

Letters Patent Appeals Nos. 93 and 108 of 1930, Decided on 20th July 1931, against decision of Madhavan Nair, J., in Second Appeal No. 266 of 1929 : Reported in *A. I. R.* 1930 *Mad.* 844.

(a) Madras District Municipalities Act (1884), Sch. 4, R. 9—After completing revision of assessment books, Municipal Chairman has to give due notice to tax-payers to put in objections—Tax imposed without such notification is illegal.

It is clearly the duty of the Chairman under the rules to issue a notification when he has completed his revision of the assessment books which will give the tax-payers due notice that they have an opportunity of disputing his revised assessment. To give a vague notice that the council " proposes to increase the taxes " is certainly not to give a notice that he has revised the assessment of their property and that they may come in and dispute it. Where such a notification is not such as should have been issued and where the tax-payers are not as required by the rules, informed that a revision of the assessment of their property has been completed and that they have an opportunity of coming forward and disputing it as it affects them, a tax imposed without such a compliance with the Act in that respect is clearly illegal. [P 810 C 2]

(b) Civil P. C. (1908), S. 80—Municipal Council is not " public officer " within S. 80—Madras District Municipalities Act (1884), S. 350.

A Municipal Council is not a " Public Officer " within the meaning of S. 80, Civil P. C., because if a Municipal Council was a " Public Officer " to whom notice under S. 80 of the Code was necessary, then the provisions in S. 350 (1), District Municipalities Act, would be superfluous. [P 811 C 1]

(c) Madras District Municipalities Act (1884), Sch. 4, R. 8—Revision of assessment not made before end of five years—Tax should be collected on old assessment.

Although the Act requires that the assessment of property for the purpose of house tax should be revised every five years, there is nothing in the Act, to show that, if for any reason a revision of assessment is not made before the end of five years, no house tax can be collected or that the old assessment lapses. In such a case the tax should be collected on the old assessment. [P 811 C 2]

(d) Madras District Municipalities Act (1884), S. 80—Notification published some time later than date from which tax is to come in force—Merely this fact does not make tax illegal.

No doubt it is desirable that the notification that a tax is to be levied or enhanced should be published before the date from which the levy or enhancement comes into force but S. 80 of the Act, as it stood then, cannot be read as making the publication in the District Gazette a vital and pre-requisite necessity so that, if publication does not precede the date on which the tax is to come into force, the levy of tax from that date is illegal. There is nothing in the section to show that the tax is to become legally enforceable only after the notification is published. The section lays the duty on the Chairman to publish the notification "forthwith." The fact that a notification happened to be published in the District Gazette five days after the commencement of the financial year does not make the levy of the tax at the enhanced rate from the beginning of that year illegal. [P 812 C 1]

B. Somayya—for Appellant.

B. Sitarama Rao—for Respondent.

Reilly, J.—In this case the plaintiff, who is the owner of three houses within the Municipality of Anantapur, sued the Chairman of the Anantapur Municipal Council, defendant 1, and the Municipal Council, defendant 2, for a declaration that the house-tax levied by the Municipal Council on his three houses for the year 1928-29 was illegal and that he was not liable to pay it, and for a permanent injunction restraining the defendants from collecting the tax from him. It happened that in respect of the tax to which he objected not only had the rate of the tax been increased by the Municipal Council, but the assessment of his property on which the rate was calculated had also been increased in the course of a pericdical revision of assessment under the District Municipalities Act. The District Munsif, dismissed the suit as against the Chairman, defendant 1, but made the declaration and injunction prayed for against defendant 2. The Municipal Council then appealed to the District Court, and the District Judge, dismissed the suit so far as the house-tax was concerned. Then the plaintiff came to this Court on second appeal. Madhavan Nair, J., found that the increased rate of house-tax was valid but that the enhancement of the assessment of the property was illegal; and he made a declaration that the Municipal Council was not entitled to collect the house-tax at the new enhanced rate but only on the old assessment as it stood before the revision and also made an injunction in accordance with that declaration. I may mention that the suit originally covered questions about water-tax and education-tax as well as house-tax, but that by the time it reached this Court it was concerned only with house-tax. Against the decision of Madhavan Nair, J., the Municipal Council has preferred L. P. A. No. 93 of 1930.

Under the District Municipalities Act, provision is made for a revision of the assessment of land and buildings for the purpose of house tax once in five years. R. 7, Sch. 4 of the Act, provides that the Chairman shall enter the annual value of all lands and buildings determined by him and the tax payable thereon in assessment books to be kept for the purpose at the Municipal Office, and those books are to contain certain particulars in respect of each item of property entered. R. 8 provides that the assessment books shall be completely revised by the Chairman once in five years. R. 9 provides that when the assessment books have been prepared for the first time and whenever a general revision of such books has been completed, the Chairman shall give public notice stating that revision petitions will be considered if they reach the Municipality within a period of 30 days in the case of ordinary assessees, that notice shall be affixed to the notice board of the Municipal Office and on the same day shall be published in the Municipality by beat of drum.

The process of revising the assessment in the Anantapur Municipality was going on towards the close of 1927 and the beginning of 1928. Madhavan Nair, J., has found that there were certain serious irregularities in the proceedings of the Chairman, which made the levy of house-tax of which the plaintiff has complained on an enhanced assessment illegal. . He has arrived at that conclu-

sion partly because the provisions of para. 70 of the Municipal Account Code were not followed properly. With great respect I may point out that that paragraph of the Municipal Account Code appears to have no statutory force. It is not, as the learned Judge appears to have thought, a statutory rule made under the Act. So far as I can gather, he was led into that misapprehension by the learned advocate who argued the case for the Municipal Council before him appealing to the provisions of that paragraph. But without going into that matter any further or into any of the other points in the learned Judge's judgment in my opinion it is sufficient to deal with this case on the ground of the defects in the notification published by the Chairman in regard to the revision of the assessment or rather on the ground that no proper notification was issued by him as required by R. 9, Sch. 4 of the Act.

Exhibit D is a copy of an English Notification, dated 22nd December 1927, and published in the Anantapur District Gazette of 5th January 1928, on this subject. It notifies not, as required by the rule, that the Chairman has completed the general revision of the books, but that the Municipal Council proposes "to revise the taxes on the properties situated within the Municipality with effect from 1st April 1928."

It calls for objections to be submitted by 6th February 1928 and states that

"the revision lists of the four wards will be available for verification of the public from 11 a. m. to 5 p. m. daily in the Municipal Office."

Now I have mentioned that at that time there was not only a revision of assessment of property going on, but there was an enhancement of the rate of tax under consideration, the enhancement to which the plaintiff objects in this case. This notification to which I have referred is not a notification that a revision of assessment has been carried out and that tax-payers have an opportunity of objecting to the revision of the assessment. It is a notification that the council proposes "to revise the taxes," which people might well understand to refer to the proposal to increase the rate of tax. It is urged for the Municipal Council that the notification ought not to be read in that way because it is stated that the revision lists of the four wards will be available for verification by the public in the Municipal Office. That reference to revision lists is certainly not enough to make it clear to the public that the revision of taxes mentioned at the beginning of the notification is not an enhancement of the rate but a revision of assessment. And the reference to revision lists does not state that the lists have already been completed. It merely states that they will be available at some indefinite date. It is clearly the duty of the Chairman under the rules to issue a notification when he has completed his revision of the assessment books, which will give the tax-payers due notice that they have an opportunity of disputing his revised assessment. To give a vague notice that the Council "proposes to increase the taxes" is certainly not to give a notice that he has revised the assessment of their property and that they may come in and dispute it. So much for Ex. D. But it is urged that at the same time another notification in Telugu was published. That notification was I think clearly better from the Chairman's point of view than the English notification. It was generally in the same terms as the English notification. But it ended with a paragraph that every day between 11 a. m. and 5 p. m. the lists for the four wards, in respect of which changes had been made, would be publicly exhibited. That at least shows that something had already been done; that it was not merely in the stage of a proposal. But para. 1 of the notification is almost as bad as the English one. Literally translated it runs :

"Making changes in the property gutha the Municipal Council proposes to bring the changes into effect from 1st April 1928."

Now it is admitted that "gutha" may mean either assessment or tax. So by that notification also the tax-payers were left in doubt as to what it was that was being done, whether it was the assessment of their property that was being revised or a higher rate of tax which was being calculated on the assessment fixed. To my mind there is no doubt that neither the English notification, Ex. D, nor the Telugu notification, Ex. E, has complied properly with the requirements of R. 9, Sch. 4 of the Act.

It has been suggested before us for the Municipal Council that, even if these

notifications were not such as would have been issued, S. 354 (1) of the Act makes the defects in them not such as to take away the validity of the taxes imposed. The effect of S. 354 (1) appears to me to be far too narrow to have that result. It provides that the clerical errors or mistakes in respect of the name, residence, place of business or occupation of any person or in the description of any property or thing or in respect of the amount assessed, demanded or charged shall, not be enough for impeaching any assessment or demand for taxes. But here we have something very much more serious than a mere clerical error or mistake such as is referred to in that section. The tax-payers were not, as required by the rules, informed that a revision of the assessment of their property had been completed and that they had an opportunity of coming forward and disputing it as it affected them. The tax imposed without a compliance with the Act in that respect appears to me clearly illegal; and without going into the other questions discussed by Madhavan Nair, J., in my opinion his decision, that the tax based upon the new assessment, which is subject to this important defect, is illegal, must be supported.

It has also been urged for the appellant, as it was urged from the beginning, that the plaintiff's suit must fail because he did not give notice to the Municipal Council such as is required by S. 80, Civil P. C. It is contended for the Municipal Council that the Council is not only a "person"—which is not denied—but is a "public officer" within the meaning of S. 80 of the Code. I entirely agree with Madhavan Nair, J.'s rejection of that contention. I may add to what he has said on that subject that, if a Municipal Council was a "public officer," to whom notice under S. 80 of the Code was necessary, then the provisions in S. 350 (1), District Municipalities Act, would be superfluous.

In my opinion therefore Letters Patent Appeal No. 93 of 1930 should be dismissed with costs.

Letters Patent Appeal No. 108 of 1930 is an appeal in respect of the same suit by the plaintiff against Madhavan Nair, J.'s decision. It is contended for the plaintiff that, if the revised assessment, on which he was required to pay the tax for 1928-29, had not been made legally, then he was not liable to pay any house-tax at all. But, although the Act requires that the assessment of property for the purpose of house-tax should be revised every five years, there is nothing in the Act to show that, if for any reason a revision of assessment is not made before the end of five years, no house-tax can be collected, but that the old assessment lapses. I see no reason to suppose that Madhavan Nair, J.'s view that the tax should be collected on the old assessment, is wrong. It is also contended for the plaintiff in this appeal that the enhanced rate of tax at 7 1/2 per cent instead of 6 1/4 per cent could not legally be enforced against him because all the formalities for enhancing the tax had not been carried out. It is admitted that the Municipal Council passed a resolution in January 1928 that the rate of tax should be raised to 7 1/2 per cent from 1st April 1928 and that a notification to that effect was published in the District Gazette on 5th February inviting objections, that no objections were received and that the Municipal Council confirmed its resolution to levy the enhanced tax on 17th March 1928. All that was in accordance with the prescribed procedure. But there was one further step to be taken by the Municipal Council in such cases. S. 80 of the Act, as it stood at the time, provided that

> "when a Municipal Council shall have determined subject to the provisions of Ss. 78 and 79 to levy any tax or toll for the first time or at a new rate, the Chairman shall forthwith publish a notification in the District Gazette and by beat of drum specifying the rate at which the tax or toll will be levied from a date to be specified in the notification."

Mr. Sitarama Rao for the plaintiff urges that the intention of that section is that the notification should be published before the tax comes into force. It happens that the Chairman sent a notification in accordance with those provisions to the District Gazette on 19th March 1928, but that it was not published in the District Gazette until 5th April 1928. Mr. Sitarama Rao therefore contends that the notification published in the Gazette on 5th April 1928, stating that the tax at the enhanced rate would be levied from 1st April 1928 was not a proper compliance with the requirements of the section and was equivalent to retrospective taxation. No

doubt it is desirable that the notification that such a tax is to be levied or enhanced should be published before the date from which the levy or enhancement comes into force; but I do not think that we can read S. 80 of the Act, as it stood then, as making the publication in the District Gazette a vital and pre-requisite necessity so that, if publication does not precede the date on which the tax is to come into force, the levy of tax from that date is illegal. There is nothing in the section to show that the tax is to become legally enforceable only after the notification is published. The section lays the duty on the Chairman to publish the notication "forthwith," and that duty was fulfilled by the Chairman in this case. It is true, as Mr. Sitarama Rao has contended, that the whole scheme under the Act is that house-tax should be assessed and collected for the financial year; but I cannot agree with him that the fact that this notification happened to be published in the District Gazette five days after the commencement of the financial year makes the levy of the tax at the enhanced rate from the beginning of that year illegal.

In my opinion this appeal also should be dismissed with costs.

Anantakrishna Ayyar, J.—I agree.

P.R.S./B.V. *Appeals dismissed.*

A. I. R. 1931 Madras 812

WALLER AND PANDALAI, JJ.

P. V. M. Muhaidin Kader Meera Sahib Maraikkayar—Defendant—Appellant.

v.

P. L. S. Lakshmanan Chettiar and *others*—Plaintiffs—Respondents.

Appeal No. 144 of 1926, Decided on 31st July 1931, against order of Sub-Judge, Tuticorin, in I. A. No. 423 of 1925, and O. S. No. 14 of 1924.

Civil P. C. (1908), O. 5, R. 20 and O. 9, R. 13—Substituted service may be good service under certain circumstances.

There may be circumstances under which there is no difficulty in treating substituted service as due service.

Where defendants deliberately evade service of summons and substituted service is properly asked for, granted and effected, there is due service. If the defendants remain absent, and an ex parte decree is passed, they must apply for setting it aside within 30 days of the decree : *A. I. R.* 1928 *Mad.* 815 and *C. M. A. No.* 382 *of* 1927, *Expl.* [P 813 C 1]

K. V. Krishnaswami Ayyar—for Appellant.

T. R. Ramachandra Iyer and *S. R. Dikshit*—for Respondent.

Judgment.—The appellant, in this case, applied to have an ex parte decree against him set aside. His application was put in more than a year after the date of the decree. Several ineffective attempts had been made to serve him with summons and ultimately substituted service was ordered and effected. He did not appear and a decree was passed against him ex parte. The Subordinate Judge dismissed his application as time-barred under Art. 164, Limitation Act. We have been asked in appeal to refer the question at issue, that is to say, whether substituted service is due service, to a Full Bench, on the ground of a supposed difference of opinion between two Benches of this Court. The decision of one is to be found in *Shariba Beeby* v. *Abdul Salam* (1), the other in *C. M. A. No.* 382 *of* 1927. In the first case an ex parte decree passed after substituted service on the defendant was set aside. In revision the High Court reversed the order of the lower Court and remanded the matter for a decision on the allegation by the respondent that substituted service had not been properly effected. In the second case, the appellant had been served by substitution as the respondent in an appeal and the appeal was allowed ex parte. She applied to have the decree set aside, but her application was dismissed. The High Court reversed the order of the lower Court and gave the appellant an opportunity of proving that substituted service had not been properly effected. The circumstances of the two cases are different, no doubt, but the result in both was the same—the aggrieved party was given an opportunity of proving that substituted service had not been properly effected, that, in other words, there had been no due service.

The truth appears to be that what the Judges were dissenting from in *C. M. A. No.* 382 was a very extreme argument put forward by Mr. K. P. Ramakrishnier, which, he contended, was justified by the decision in the 51 *Madras* case (1). It was that substituted service necessarily is due service which can never be

(1) A. I. R. 1928 Mad. 815=110 I. C. 490=15 Mad. 860.

contested by the judgment-debtor at a later date. The 51 *Madras* case (1) is, of course, no authority for such a contention, for in it the judgment-debtor was given an opportunity of proving that he had not been duly served. In the case we are now dealing with, the opposite extreme is being put forward and the decision in *C. M. A. No.* 382 is cited in support of it. It is that substituted service is necessarily not due service. *C.M. A. No.* 382 lends no support to such an argument. Ananthakrishna Iyer, J., pointed out that there are circumstances under which "there is no difficulty in treating substituted service as due service."

This being so, we see no reason to make a reference to a Full Bench. The first case does not decide that substituted service is necessarily due service, nor does the second decide that it is necessarily not due service. Each was remanded in order to give the party an opportunity of proving that there had not been due service. On the merits of this particular appeal, we think it clear that all of the defendants, including the appellant, deliberately evaded service of summons and that substituted service was properly asked for, granted and effected; in other words that there was due service. The appellant should therefore have applied within 30 days of the decree and his appeal is dismissed with costs.

P.R.S./P.N. *Appeal dismissed.*

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* A. I. R. 1931 Madras 813

REILLY AND ANANTAKRISHNA AYYAR, JJ.

Gyanammal—Plaintiff—Appellant.

v.

Abdul Hussain Sahib — Defendant—Respondent.

Appeal No. 382 of 1927, Decided on 28th April 1931, against order of Dist. Judge, Chingleput, D/- 8th April 1927, in C. M. P. No. 697 of 1926 and A. S. No. 144 of 1925.

(a) Civil P. C. (1908), O. 9, R. 13 and O. 41, R. 21 — No decree shall be made against party behind his back—This is cardinal principle underlying rules for service of summons.

All the rules in the Code relating to service of defendants and respondents are intended to carry out the cardinal principle of administration of civil justice that no decree shall be made against a party behind his back.

[P 814 C 2]

*** (b) Civil P. C. (1908), O. 9, R. 13—Though return is that summons has been served personally yet defendant can get ex parte decree against him set aside on various allegations—He cannot be precluded from doing so.**

It cannot be said in all cases of personal service on a defendant that because the return is that the summons has been served personally, it has been duly served and so the defendant cannot get an ex parte decree against him set aside. It is open to a defendant in such circumstance to show that the summons in the suit was not really served upon him but upon somebody else, or that what was served upon him was not the summons in the suit, or that it did not give the correct date or some other essential information about the suit, or that it was not accompanied by a copy of the plaint in the suit concerned so that although in a sense he was personally served, he was not provided with the knowledge of the claim against him, which is the object of the service. All these and similar allegations are open to him even if there is a record that he has been personally served. [P 815 C 1]

(c) Civil P. C (1908), O. 5, Rr. 17 and 19—Though service by affixture is endorsed as "due service" by the Court, yet defendant can afterwards come in and say that it was not good service and he had no knowledge of claim against him.

Although the Court uses in its finding in the cases of service of summons by affixture the words "duly served" according to the rule, that does not prevent the defendant from coming in afterwards and showing that the summons was not duly served by affixture because that affixture really did not bring home to him the knowledge of the claim against him. The order made by the Judge that the service by affixture has been due service, which enables the suit to go on is an ex parte order, and it cannot be suggested that the defendant in those circumstances cannot come in and show that he never had knowledge of the claim against him, that the inference that it was brought to his knowledge by the affixture is for some reason not a sound inference. [P 815 C 2]

(d) Civil P. C. (1908), O. 5, R. 20—Substituted service—Inference as to defendant's knowledge—When it is strong and when it is weak explained.

If substituted service is ordered because the Court is satisfied that the defendant is keeping out of the way for the purpose of evading service, then the inference that he knows of the case is easily drawn. In other cases the basis of the inference is that the summons is affixed to the house where he last lived or carried on business and to the notice board in the Courthouse, a public place, and therefore it may have come to his notice. The inference is often not at all a strong one. [P 816 C 1]

*** (e) Civil P. C. (1908), O. 5, R. 20 (2)—R. 20 (2), explained—"Substituted service" is not necessarily due service.**

Rule 20 (2), O. 5, of the Code provides that substituted service by order of the Court shall be as effectual as if it had been made on the defendant personally. That means that the proceedings can go on after the date fixed in the summons so served. But it cannot be said that it is necessarily due service, which can never be contested by the defendant at any later date.

There is nothing in the rule about it being due service. The word "due" does not appear in R. 20 at all. Such service is said to be as effectual as if it had been made on the defendant personally, not more effectual. Even if the defendant is served personally it is open to him to come to the Court and show that that was not really due service because it did not really give him knowledge of the claim against him. If a defendant who is served personally can do that a defendant who is served only by inference through substituted service cannot be said to be shut out for ever from showing that he had no knowledge of the claim against him. The statement in sub-Cl. (2), R. 20, that "substituted service shall be as effectual as if it had been made on the defendant personally" does not make such service "due service in all cases and necessarily : *A. I. R.* 1927 *Mad.* 507, *Ref.*; *A. I. R.* 1927 *Mad.* 487 and *A. I. R.* 1925 *Lah.* 639, *Dist.*; *A. I. R.* 1928 *Mad.* 655, *Expl.* *A. I. R.* 1928 *Mad.* 815, *Diss. from.* [P 816 C 1]

K. Krishnaswami Ayyangar A. Dorai Raj—for Appellant.

K. P. Ramakrishna Ayyar—for Respondents.

Reilly, J.—The appellant in this case obtained a preliminary decree for sale on a mortgage. Defendant 1 in the suit being the mortgagor and defendant 2 a purchaser of the equity of redemption. Defendant 2 appealed to the District Judge of Chingleput. That appeal was heard ex parte without any appearance having been put in for the plaintiff, and the decree obtained by the plaintiff in the original Court was set aside. Subsequently the plaintiff made an application to the District Judge under R. 21, O. 41 of the Code praying that the ex parte decree against her made in the appeal might be set aside. Before the appeal was heard several attempts were made to serve the plaintiff, and as they were unsuccessful, eventually an order was made for substituted service on her. That substituted service appears to have been held sufficient, as the learned District Judge disposed of the appeal against the mortgage decree. But when the plaintiff came forward with her application under R. 21, O. 41, she alleged that she had never heard anything about the appeal and wished to give evidence to establish that. The learned District Judge however, finding that the formalities for substituted service had been properly carried out and, as his order shows, that there was no allegation before him that they had not been properly carried out in due form, refused to give the plaintiff an opportunity of showing that the appeal had never come to her knowledge. He therefore dismissed her application, and the present appeal before us is against that order of dismissal.

We are not now concerned with the evidence which the plaintiff may be able to produce to show that she did not hear of the appeal against her mortgage decree. But it may be noted in passing that prima facie her allegation that she did not know of the appeal does not appear to be a frivolous one. Having obtained a preliminary decree on her mortgage it is not prima facie probable that she would not have contested the appeal if she had known of it, and it may be also mentioned that while the appeal against her decree was pending and after Judge holds is that a good election had it, she was prosecuting the proceedings in the original Court with the object of obtaining a final decree in her suit. However I do not wish to go any further into that side of the matter than to say that prima facie her allegations that she did not know of the appeal does not appear to be frivolous. Nevertheless the learned District Judge was of opinion that, because substituted service had been ordered and had been effected, he could not allow the plaintiff an opportunity of proving that she did not know of the appeal. And for the respondent here, defendant 2 in the suit, it is urged that that view of the learned District Judge is correct and that as substituted service had been effected the plaintiff cannot now say that she was not duly served; if she was duly served within the letter of the law, then she cannot come under R. 21, O. 41, and ask for the decree made in the appeal against her be set aside.

The question what is the exact effect of substituted service in such a case is an important one. Substituted service is a legal method of serving a defendant or respondent, the rules for service on defendants applying also to respondents. The question is whether, when it has been effected with due formality, it is necessarily due service within the meaning of R. 21, O. 41, which corresponds to R. 13, O. 9, in respect of suits. I think the task of answering the question before us will be simplified if we remember that all the rules in the Code relating to service of defendants and respondents are intended to carry out the cardinal principle of our administration of civil

justice that no decree shall be made against a party behind his back. There are several methods of service provided. The first and best method of service is personal service on the defendant himself; and in the class of personal service we may include service on the defendant's agent, or the manager of his business or a male member of his family residing with him. All that comes within the class of personal service because it may reasonably be inferred, and it is inferrable under the rules, that if a summons is served upon a defendant's agent or the manager of his business or a male member or his family living with him, it comes to the defendant's knowledge. Obviously the best method of service is upon the defendant himself. But even if the summons is returned to the Court as having been served on the defendant himself, and he does not appear at the trial of the suit, he is not necessarily concluded.

We cannot in all cases say that, because the return is that the summons has been served personally it has been duly served and so he cannot get an ex parte decree against him set aside. It is open to a defendant in such circumstances to show that the summons in the suit was not really served upon him but upon somebdy else, or that what was served upon him was not the summons in the suit, or that it did not give the correct date or some other essential information about the suit, or that it was not accompanied by a copy of the plaint in the suit concerned, so that, although in a sense he was personally served, he was not provided with the knowledge of the claim against him, which is the object of the service. All these and similar allegations are open to him, even if there is a record that he has been personally served.

If after due diligence the process-server is not able to serve a defendant personally, either on himself or his agent or his manager or a member of his family, the rules provide that he may affix the summons to the door of the house in which the defendant ordinarily resides or carries on business; and when that is done and a return to that effect is made, the Court after taking an affidavit from the process-server may hold that that is due service and proceed with the case. There it will be seen there is a reasonable inference which the Court may draw that the defendant really had knowledge of the suit derived from the notice which was fixed on his door. But in that case the rule is that the Court before proceeding with the case must specifically hold that such service is due service. Obviously, the reason of that is that, if the Court is not satisfied that such affixture has been made effectively, a fresh attempt at service must be made. But, although the Court uses in its finding in such cases the words "duly served" according to the rule, that does not prevent the defendant from coming in afterwards and showing that the summons was not duly served by affixture because that affixture really did not bring home to him the knowledge of the claim against him. The order made by the Judge that the service by affixture has been due service, which enables the suit to go on, is an ex parte order, and it cannot be suggested that the defendant in those circumstances cannot come in and show that he never had knowledge of the claim against him, that the inference that it was brought to his knowledge by the affixture is for some reason not a sound inference.

But it is not always possible to serve a defendant by affixture to the house where he ordinarily resides or works. Therefore a third method of service is provided namely substituted service. That may be adopted when the Court is satisfied that the defendant is keeping out of the way for the purpose of evading service, or for any other reason summons cannot be served in the ordinary ways. That method of service is by affixing a copy of the summons to the notice board of the Court and to some conspicuous part of the house in which the defendant is known to have last resided or carried on business. That is obviously the least satisfactory of all methods of service, only to be used by the Court as a last resort when other means are unavailable. And it is the practice of the Courts to give a long period before the hearing of a case after substituted service has been effected in that way. Inferior as that method of service is to the other methods of service, it will be seen it too provides some slight basis for an inference that the summons really comes to the knowledge of the defendant before the case is heard. If substituted service is ordered

because the Court is satisfied that the defendant is keeping out of the way for the purpose of evading service, then the inference that he knows of the case is easily drawn. In other cases the basis of the inference is that the summons is affixed to the house where he last lived or carried on business and to the notice board in the Court house, a public place, and therefore it may have come to his notice. The inference is often not at all a strong one. But plaintiffs cannot be kept waiting for their relief indefinitely because the defendants cannot be found, and therefore some such method as substituted service must be provided as a last resort to be used by the Court when other means of service are unavailable. R. 20 (2), O. 5 of the Code provides that substituted service by order of the Court shall be as effectual as if it had been made on the defendant personally.

That means, as I understand it, that the proceedings can go on after the date fixed in the summons so served. But does it mean as Mr. Ramakrisha Ayyar for defendant 2 would have us say, that it is necessarily due service, which can never be contested by the defendant at any later date? There is nothing in the rule about it being due service. The word "due" does not appear in R. 20 at all. Such service is said to be as effectual as if it had been made on the defendant personally, not more effectual. As I have mentioned, even if the defendant is served personally, it is open to him to come to the Court and show that that was not really due service because it did not really give him knowledge of the claim against him. If a defendant who is served personally can do that, how can we say that a defendant who is served only by inference through substituted service is shut out for ever from showing that he had no knowledge of the claim against him? I can find nothing in O. 5, which deals with summonses on defendants and respondents, to indicate that that is the intention of the rules.

But it has been urged by Mr. Ramakrishna Ayyar that there are certain decisions which support the position which he has taken up. He referred to a decision of Wallace, J., in *Doraisamy Ayyar* v. *Balasundaram Ayyar* (1). The only part of that decision which is of interest to us in this matter is, I think, the learned Judge's statement that "duly served" is not equivalent to "personally served"; and that is a statement with which none of us I think would care to quarrel. A more important decision in Mr. Ramakrishna Ayyar's favour is that of Madhavan Nair, J. in *Narasimha Chettiar* v. *Balakrishna Chetti* (2), where he made the statement that substituted service is due service for the purpose of the Limitation Act, even though it does not in fact come to the defendant's knowledge. With great respect I may point out that that statement of opinion was made obiter, or was at least unnecessary as in that case the defendant, before substituted service was ordered, had refused to receive a summons sent to him by registered post under order of the Court and was found to have been evading summons in the suit, of which he must have had knowledge. The learned Judge quoted as an authority for his opinion a statement made by Shadi Lal, C. J., in *Dittu Ram* v. *Nawab* (3).

It is true that the learned Chief Justice made a similar statement; but in that case too it was made obiter. On the other hand in *V. Venkatachalam* v. *S. Subbayya* (4), Srinivasa Iyengar, J., said that substituted service was not due service for the purpose of the Limitation Act, that is for the purpose of Art. 164, which provides the period of limitation for applications to set aside ex parte decrees in original suits. That as a general statement may go too far. But Srinivasa Iyengar, J., drew attention to an important point, namely, that under Art. 164 the 30 days period runs from the date of the decree or, where summons was not duly served, from the date when the applicant has knowledge of the decree; and he suggested with great force, I think, that the provision that, when the summons is not duly served, the period runs from the date when the applicant had knowledge of the decree implies that due service within the meaning of that article is service which brings the claim to the knowledge of the defendant. However there is a decision of a Bench, to which Mr. Ramakrishna Ayyar, drew our attention : *Shariba Beebi* v. *Abdul Sa-*

(1) A. I. R. 1927 Mad. 507=102 I. C. 243.

(2) A. I. R. 1927 Mad. 487=101 I. C. 651.
(3) A. I. R. 1925 Lah. 689=92 I. C. 272.
(4) A. I. R. 1928 Mad. 655=108 I. C. 889.

lam (5). In that case Phillips and Madhavan Nair, JJ., held that substituted service effected under O. 5 of the Code is as effectual as if it had been made personally and must be deemed to be due service within the meaning of Art. 164, Limitation Act. Now that substituted service is as effectual as if it had been made on the defendant personally cannot be disputed as it is so provided by the rule itself. But there is nothing in the rule, if I may say so with respect, which declares that it must be deemed to be due service within the meaning of the Limitation Act, or in any other sense. The learned Judges in that case stated that they differed from Srinivasa Iyengar, J's., view in the case which I have quoted; but they did not deal with his argument drawn from the reference to "knowledge" in Art. 164, Limitation Act. And if I may say so with very great respect, the matter was not fully discussed by them.

With great respect I venture to differ frow their view that substituted service must always be deemed to be due service within the meaning of Arts. 164 and 169, Limitation Act, or R. 13, O. 9 or R. 21, O. 41 of the Code. I see nothing in the rules to prevent a defendant against whom an ex parte decree has been made from showing, if he can, that he has not been duly served in the sense that knowledge of his opponent's claim has not been brought home to him, even though the formalities of substituted service have been carried through. As I understand the matter, due service within the meaning of Arts. 164 and 169, Limitation Act and O. 9 and O. 41 of the Code is not service which is technically and formally correct as a basis for proceeding ex parte, but service which has really been effective, which had achieved the object of service by bringing the claim against him to the knowledge of the defendant or respondent. Substituted service may be such service; but we know that often it is not so. Nevertheless we are asked to say that, when substituted service is carried out in the prescribed form, it must invariably be held to be due service. It would be a very extraordinary thing if the most unsatisfactory of all methods of service, substituted service, where the inference that the defendant has knowledge of the claim against him is never strong and often almost entirely absent, should somehow be turned into the most effective of all services, a service which the defendant can never dispute, which must bind him for all time, although in fact and in truth he has never had any knowledge whatever of the proceedings against him. I venture to think that the decision in *Shariba Beebi* v. *Abdul Salam* (5) goes too far and would lead to very great difficulties and injustice. The rules about service should I think be interpreted as a whole and must be read in the light of the fundamental principle that we should never make a decree against a man behind his back, a principle which, so far as I can see, they are intended to carry into effect, not in any way to supersede or abrogate.

In my opinion therefore the plaintiff in this case was entitled when she came before the District Judge under R. 21, O. 41, alleging that defendant 2's appeal had never come to her knowledge, to prove her statement, if she could, in spite of the fact that substituted service on her had been ordered and as the learned District Judge found had been effected with all due formality. In my opinion this appeal should be allowed and the plaintiff's application should be remanded to the District Judge for fresh disposal after allowing her an opportunity to produce such evidence as she may have. Defendant 2 of course should also be allowed to offer such evidence as he may wish and to raise any lagal objection regarding limitation or otherwise. Costs of this appeal will abide and follow the result and be provided for in the revised order of the District Court.

Anantakrishna Ayyar, J.—The appellant in this appeal was respondent in Appeal No. 114 of 1925 on the file of the District Court, Chingleput. Substituted service of notice of that appeal was effected so far as the present appellant was concerned. That appeal was heard ex parte in her absence and was allowed, with the result that the preliminary mortgage decree, which she had obtained in her favour in the trial Court in O. S. No. 201 of 1922 on the file of the Tirvellore Munsif's Court, was reversed by the decree in Appeal No. 114 of 1925, and her suit was dismissed. On the allegation that she was not served with any notice

(5) A. I. R. 1928 Mad. 815=110 I. C. 490=51 Mad. 860.

in that appeal, and that she became aware of the decree passed in that appeal only within a few days prior to her application, she applied under O. 41, R. 21, Civil P. C., for the rehearing of the appeal. Her application was dismissed by the learned District Judge of Chingleput, and against that decision she has preferred the present Civil Miscellaneous Appeal.

On behalf of the appellant great stress was laid on the fact that she had obtained a preliminary decree in the suit for money due on a mortgage executed by defendant 1, that the purchaser of the equity of redemption, defendant 2, had appealed against that preliminary decree, and that there was no reason to suppose that she would have omitted to defend the appeal in case she had notice of the same in the circumstances. But, in my view, the question for our decision now is not whether she had a good case on the merits of the appeal then pending, but whether she has complied with the conditions imposed by law in respect of her present application to rehear the appeal. Under O. 41, R. 21, Civil P. C., she must satisfy the Court that the notice of appeal was not duly served on her, or that she was prevented by sufficient cause from appearing when the appeal was called on for hearing. Her allegation in effect is that the notice of appeal was not duly served on her. Under Art. 169, Limitation Act, the period of limitation for an application for the rehearing of an appeal heard ex parte is thirty days from the date of the decree, in appeal, or, where notice of the appeal was not duly served when the applicant has knowledge of the decree.

In considering the question whether notice of the appeal was "duly" served on her or not, we have to be guided by the provisions of O. 5, Civil P. C. Personal service (O. 5, R. 12), and, in cases where the defendant cannot be found and has no agent empowered to accept service of the summons, service on any adult male member of his family residing with him (O. 5, R. 15), and where the defendant or his agent or such other persons as aforesaid refuses to sign, or where the serving officer cannot after using all due and reasonable diligence find the defendant, and there is no agent or other person on whom service could be made, service by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides, ..., (O. 5, R. 17), these are principal, primary, and ordinary modes of service prescribed by the Code; and under O. 5, R. 19, the Court is empowered in case of returns under O. 5, R. 17, to declare that the summons has been duly served. When those methods fail, then under O. 5, R 20, where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any other reasons summons cannot be served in the ordinary way, the Court is empowered to order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided, or in such other manner as the Court thinks fit. This is what is called "substituted service of the summons," and under sub-Cl. 2, R. 20:

"service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally."

The learned District Judge did not dispose of the application for rehearing filed before him on the merits; but has, as I understand his judgment, dismissed it on the ground that the formalities prescribed for substituted service having been followed, her application has necessarily to be dismissed. To use the learned Judge's own words:

"the petitioner contends that she heard nothing about the appeal until the appellant began to execute his decree. I am unable to accept this as a sufficient reason for ordering a rehearing of the appeal. The petition contains no allegation of fraud and no allegation that the formalities prescribed for substituted service were not strictly followed, nor does it in fact appear that there was any irregularity. In the circumstances, I decline to grant the petitioner's request for an adjournment to produce evidence that she was in fact ignorant of the proceedings."

In para. 4 of the petitioner's affidavit, in support of her application for rehearing, she stated that she was not served with any notice in the appeal, that she was therefore not able to appear at the hearing of the appeal, and that she came to know of the decree in the appeal only within a few days of her application. It seems to me that the Court has first to consider whether notice of the appeal had been duly served on her within the mean-

ing of O. 41, R. 21, read with O. 5, Civil P. C., having regard to her allegations.

Exigencies of litigation in Court require that in order to bring proceedings pending in a Court to a termination, within a reasonable time, the rules regarding service of notice on the respondent or the defendant should include not only those forms of service, viz., personal service, service on agent or other adult male member living with him, or affixing notice on the house in which he resides at the time, from which knowledge could be reasonably imputed to the defendant of the proceedings in question, but also other forms of service which though less efficacious for the purpose of imputing such knowledge to the defendant, have owing to the necessities of the case, to be resorted to in order to bring the proceedings to a termination. These latter modes will fail in their object, unless they be declared to be as effectual as if the same had been made on the defendant personally for the purpose of going on with the proceedings in Court ; and that is what is enacted by O. 5, R. 20, sub-Cl. 2. It is significant that the legislature has not expressly declared that " substituted service" is " due service'. The words "duly served" occurring in O. 5, R. 19 are not used in R. 20, Cl. 2. Does the statement in sub-Cl. 2, R. 20, that " substituted service shall be as effectual as if it had been made on the defendant personally" make such service "due service" in all cases and necessarily? In my view, the same does not necessarily follow. In cases where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, and therefore the Court orders substituted service, then, there is no difficulty in treating substituted service in such circumstances as due service. Ex hypothesi the defendant is aware of the proceedings in such cases, and is keeping out of the way for the purpose of avoiding service ; and no injustice would be done to him in the circumstances, and he has only to thank himself for any inconvenient results that might follow. But substituted service could be ordered in various other cases also. The plaintiff might act bona fide. There might be no fault to be found with the defendant's conduct either, in the circumstances. Yet serious injustice would result if one were to accept the view that if the formalities are gone through, then substituted service should be held to be due service in all such cases and for all purposes. Even in the case of personal service, one can imagine various circumstances which might not make it due service. To give substituted service the effect contended for is in effect to give it greater efficacy than even personal service. Orders are passed in the absence (necessarily) of the defendant in such cases and the materials before the Court are often very scanty, and the plaintiff himself could not often personally vouch for the accuracy of the allegations. In these circumstances, I think it was open to the petitioner, the appellant before us, to prove, if she could, that the notice of the appeal was not duly served and that she had no knowledge of the appeal at the time.

We were pressed by the learned advocate for the respondent with three decisions of this Court, reported in *Doraiswamy Ayyar* v. *Balasundaram Ayyar* (1) and *Narasimha Chettiar* v. *Balakrishna Chetti* (2), and *Shariba Beebi* v. *Abdul Salam* (3). There is nothing really in the first of these cases necessarily against the view I am suggesting ; the observations in the second of the cases are only obiter ; the third case requires more respectful consideration. The judgment of the learned Judges does not contain any real discussion on the question. The arguments in *Vitta Venkatachalam* v. *Sivapuram Subbayya* (4), were met only by a reference to sub-Cl. 2 of O. 5, R. 20, and the implications that follow from the last clause of Art. 164 (also Art. 169), Lim. Act, have not been duly considered. The view taken by the learned Judges would lead to the conclusion that

> "whenever a defendant is served according to any of the rules of the Procedure Code, it could never be held that there was no due service."

This view would, in my opinion, lead to injustice to defendants in many cases where they could not be said to be in default in the ordinary acceptation of the term. It should further be noticed that the learned Judges finally remanded the case before them for the trial of the question whether substituted service was duly effected in that case or not. In the present case also, the appellant in the argument before us complained that the

substituted service was not duly effected and that she was residing at St. Thomas Mount, and not in George town as was represented by the defendant-appellant 2 in the main appeal in connexion with the substituted service of notice of that appeal in the appellate Court.

In the circumstances of this case, I think that the learned District Judge ought to have given an opportunity to the petitioner (appellant before us) to substantiate her contention that there was no due service of the notice, and that she had no knowledge of the appeal except a few days prior to the date of her present application to the District Court.

I therefore agree that this appeal must be allowed and C. M. P. 697 of 26 remanded to the District Court for fresh disposal. It would be open to both parties to let in evidence in support of any pleas available to them. Of course I express no opinion at all on the merits of the petition. Costs of this appeal will abide and follow the result and be provided for in the revised order of the District Court.

P.R.S./B.V. *Appeal allowed.*

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* A. I. R. 1931 Madras 820

BEASLEY, C. J. AND SUNDARAM CHETTY, J.

In re *Marudamuthu Padayachi*—Petitioner.

Criminal Revn. Case No. 524 of 1930, and Criminal Revn. Petn. No. 487 of 1930, Decided on 6th March 1931, from judgment of Joint Magistrate, Kumbakonam, in C. C. No. 70 of 1930.

*** Evidence Act (1872), S. 30 — S. 30 must be construed strictly in favour of accused — "Proved" means proved before prosecution case ends.**

Section 30 creates a very marked exception to the fundamental principles of the criminal law and as such must be strictly construed in favour of an accused person. The word 'proved' in S. 30 means proved before the case for the prosecution comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial.

A confession of accused 1 made from the dock in the magisterial proceedings admitting his own guilt and accusing accused 2 cannot be considered by the Court as against accused 2: *A.I.R.* 1923 *All.* 322 and *A. I. R.* 1929 *Mad* 285, *Foll.*; 4 *Cal.* 483, *Expl.* and *Dist.*; 38 *Mad.* 302 and *A. I. R.* 1930 *Bom.* 354, *Diss. from.*

[P 821 C 2]

V. L. Ethiraj and *A. S. Sivakaminathan*—for Petitioner.

K. N. Ganapathi—for the Crown.

Beasley, C. J.—The appellant with another accused was convicted by the Stationary Sub-Magistrate, Kumbakonam, of theft of money and jewels from a closed receptacle under Ss. 461 and 380, I. P. C. The case was forwarded by him to the Joint Magistrate of Kumbakonam for sentence because accused 1 in the case was a juvenile. The Joint Magistrate upheld the conviction of both the accused and sentenced accused 1 to be detained in the Borstal School, Palamcottah, for a period of two years and accused 2 to undergo rigorous imprisonment for six months under each of the Ss. 461 and 380, I. P. C., the sentences to run concurrently. An appeal was taken from that judgment by accused 2 to the Sessions Court of West Tanjore. The learned Sessions Judge dismissed the appeal and confirmed the conviction and sentence of accused 2, the appellant. The case was then taken up to the High Court in revision because in all the three Courts a confession made to the Sub-Magistrate in Court after the close of the case for the prosecution when questions under S. 342, Criminal P. C., were put to him, was considered. In that confession accused 1 admitted his own guilt and also accused 2nd accused, the appellant here. The question raised was whether under S. 30, Evidence Act, the confession of accused 1, who was jointly tried with the appellant here, could be considered by the Court against the appellant.

It is quite clear that that confession was so considered and formed the basis of the conviction of the appellant. There was other evidence to which we do not propose to refer since, if the legal point taken here prevails, the case must be sent back to the Sessions Court for a reconsideration of the facts of the case apart from the confession made by accused 1. When the case came before our learned brother Jackson, J., he considered that in view of certain decisions to which I shall refer later, the matter should come up before a Bench of two Judges and hence its appearance here before us. The cases to which reference has to be made are a decision of Ayling, J., in *In re Vempalli Bali Reddy* (1), a decision of Walsh, J., in *Mahadeo*

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(1) [1915] 38 Mad. 302=15 Cr. L. J. 13=22 I. C. 157.

Prasad v. *Emperor* (2), a decision of Waller, J., in *In re Govinda Naidu* (3), a decision in *Empress* v. *Ashootosh Chuckerbutty* (4), and a decision of the Bombay High Court in *Emperor* v *William Cooper* (5). It must be stated that the observations of Sir Richard Garth, C. J., and the other Judges in *Empress* v. *Ashootosh Chuckerbutty* (4), were possibly obiter with regard to this question and moreover the facts in that case were that the confession made by the co-accused in that case was made previous to the trial. In *Mahadeo Prosad* v. *Emperor* (2), which is a decision directly in point, the facts of the case being similar to those here, Walsh, J., held that such a confession could not be considered by the Court as against the other accused person or persons under S. 30, Evidence Act. This view was approved of by Waller, J., in *In re Govinda Naidu* (3). The decision *In re Vempalli Bali Reddy* (1), of Ayling, J., takes the contrary view, but on a perusal of that case it is clear that the point does not seem to have been fully discussed, at any rate no detailed reasoning has been given by the learned Judge. In *Emperor* v. *William Cooper* (5), which is a decision of a Division Bench, Broomfield, J., it is clear, comes to the decision with considerable hesitation that such a confession can be considered under S. 30, Evidence Act. I think that the greatest weight must be attached to the decision of Walsh, J., in *Mahadeo Prasad* v. *Emperor* (2), where the position is very clearly and ably discussed by that learned Judge. He says amongst other things:

"In the first place an accused is entitled to know what the evidence against him is, before he is called upon for a defence at all, and the closing of the case for the prosecution is no mere form but, with certain exceptions, closes the door to any further evidence against the accused."

Again at p. 325: (of 45 *All.*)

"To use a statement made in the dock by one accused against the other in a joint trial offends against at least two of the fundamental principles of the criminal law. The legislature in India saw fit to create an exception which is contained in S. 30, Evidence Act. In my opinion, that must be coustrued with reference to the fundamental principles to which it creates an exception. If the section is carefully read, I think nobody bearing in mind the fundamental principles which I have just mentioned ought to have any difficulty in coming to the conclusion that what is contemplated is formal proof by the prosecution of a confession previously made. The only objection I can see to such an interpretation is that I am inserting in the section the words "as part of the case for the prosecution." But such words would be tautalogous and a draftsman in my opinion would consider it superfluous to insert them, because the only thing that an accused person has to meet in a criminal trial is the case for the prosecution and such additions thereto as he may have voluntarily added by his own statement and those of the witnesses whom he calls in his defence."

With these observations I entirely agree. S. 30, Evidence Act, creates a very marked exception to the fundamental principles of the criminal law and as such must be strictly construed in favour of an accused person. This is a view which I have expressed on more than one occasion. That being so, we have to decide what is meant by the section and to read the words in it strictly. The section says that when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is "proved" the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. There is no difficulty in interpreting the word "proved." That must mean proved before the case for the prosecution comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial. In my view, there is no difficulty in construing that section in that way and that is my interpretation of it. Under these circumstances I am bound to hold that the confession of accused 1 made from the dock in the magisterial proceedings could not be considered by the Court as against the appellant here and it must accordingly be ruled out. With regard to the facts of the case, as already stated, I do not propose to consider them because the best course is to send the case back to the Sessions Court for a decision by the learned Sessions Judge upon the facts of the case excluding the confession of accused 1 wrongly admitted.

Sundaram Chetty, J.—I agree.

P.R.S./K.N. *Case sent back.*

(2) A. I. R. 1923 All. 322=76 I. C. 1025=25 Cr. L. J. 305=45 All. 323.
(3) A. I. R. 1929 Mad. 285=118 I. C. 512=30 Cr. L. J. 932.
(4) [1879] 4 Cal. 483=3 C. L. R. 270.
(5) A. I. R. 1930 Bom. 354=127 I. C. 105=31 Cr. L. J. 1137=54 Bom. 531.

A. I. R. 1931 Madras 822

MADHAVAN NAIR, J.

(*Sri Sri Sri Izttasar Kandukuri*) *Balasuryaprasada Rao Pantulu Garu*—Plaintiff—Appellant.

v.

Taluk Board of Chicacole — Defendant—Respondent.

Second Appeal No. 257 of 1929 and Civil Revn. Petn. No. 278 of 1929, Decided on 17th August 1931, against decree of Dist. Judge, Ganjam, in A. S. No. 188 of 1927.

Local Boards Act (1920), S. 228 — Professional tax collected from person who is not taxable—Suit for recovery of amount thus collected is not barred by S. 228.

If the professional tax is collected from a person who is not taxable under the Act at all, it would amount to a substantial disregard of the provisions of the Act and therefore Cl. (2), S. 228 will, not be a bar to the institution of a suit by the person so taxed for the recovery of the amount of the tax collected from him. (*Case law discussed*). [P 822 C 1, 2]

B. Somayya and *Kasturi Seshagiri Rao* —for Appellant.

B. Satyanarayana —for Respondent.

Judgment. — The plaintiff is the appellant. This second appeal arises out of a suit instituted by the plaintiff for the recovery of professional tax of a sum of Rs. 119-12-0 together with interest alleged to have been collected from him wrongfully by the defendant, the Taluk Board of Chicacole, represented by its President. The Board assessed the appellant to a professional tax on the ground that he was carrying on money-lending business as his profession. His case is that he is not carrying on the profession of a money-lender and that his accounts, if inspected, would prove his plea ; but that the President of the Board refused to look into them. Without examining the merits of his contention, the lower Courts dismissed the suit, as barred by S. 228, Local Boards Act 14 of 1920. Cl. (2) of this section expressly bars a suit

"to recover any sum of money collected under authority of this Act ..... provided that the provisions of this Act have been in substance and effect complied with,"

The plaintiff's argument is that an examination of his accounts would show that he is not carrying on the profession of a money-lender, and that if the tax is collected from a person who is not taxable under the Act at all, there has been a substantial disregard of the provisions of this Act and that therefore Cl. (2), S. 228 will not be a bar to the institution of a suit. I think this contention is supported by authority. In *Municipal Council, Cocanada* v. *The Standard Life Assurance Company* (1), a decision under S. 262, District Municipalities Act 4 of 1884, which corresponds to S. 228 of the present Local Boards Act, the Municipal Council of Cocanada levied profession tax on the Standard Life Assurance Company for carrying on business within the Municipality. On the ground that the company was not doing business in Cocanada, this Court held that the Municipal Council went beyond their powers in exacting the tax and that S. 262 would not be a bar to the suit to recover the tax from the Municipal Council. The learned Judges (Shepherd and Boddam, JJ.) formulated the question for decision thus :

"The question really is whether, when a company which in respect of its particular business is not taxable under the Act, or does not transact business within the Municipality is nevertheless taxed, it can be said that the provisions of the Act have been in substance and effect complied with."

The question whether there has been a substantial compliance with the Act is one of fact which has to be determined with reference to the particular circumstances of the case. Then after referring to some cases for distinguishing them from the case under consideration, the learned Judges stated :

"We can see no difference in principle between an exaction of a tax which has not been legally imposed and the exaction of a tax from a person who is not taxable under the Act. In the latter case no less than in the former there has been a substantial disregard of the provisions of the Act."

I think these observations may well be applied to the present case. Under S. 93, Local Boards Act, a tax can be levied on a person who carries on money-lending as a profession within the Municipality. If the plaintiff's case is true, his accounts will show that though he may have on a few occasions lent money, he has not been actually exercising the profession of a money-lender and that therefore he is not taxable under the Act. If he is able to substantiate his case then the tax has been collected from him who is not taxable under the Act and according to the decision just quoted there has been a substantial disregard of the provisions of the Act and S. 228, Local Boards Act,

(1) [1901] 24 Mad. 205=10 M.L.J. 401.

would not be a bar to the suit. In *Municipal Council of Mangalore* v. *The Codial Bail Press* (2), it was held by Sir Subramania Ayyar, Officiating Chief Justice and Bashyam Ayyangar, J., that if a person was assessed under S. 53, Sch. (a), Act 4 of 1884 on his "gross income" instead of on his "net income" the provisions of the Act have not been in substance and effect complied with and that S. 262 of the Act would not be a bar to the suit to recover the amount of tax paid under the assessment.

This decision was followed by Devadoss, J., in *Arunachalam Chettiar* v. *Namakkal Union Board* (3), wherein it is stated that when the basis of the assessment is in question a civil Court can entertain a suit for setting aside the assessment on the ground that the basis of the assessment itself is wrong and that S. 228 does not bar such a suit. In this case also the question was whether the net income or the gross income should have been the basis of assessment. The decisions in *Municipal Council, Cocanada* v. *Standard Life Assurance Co., Ltd.* (1) and *Municipal Council, Mangalore* v. *Codial Bail Press* (2) were followed by Beasley, J., as he then was in *Bombay Company Limited* v. *Municipal Council, Dindigul* (4). Reference may also be made to the case in *Chairman of the Municipal Council, Kumbakonam* v. *Rally Brothers* (5), (Curgenven and Bhashyam Ayyangar, JJ.), a decision under sub-S. (2), S. 354, District Municipalities Act 5 of 1920, corresponding to S. 228, Cl. 2, Local Boards Act. The learned Judges followed the decision in *Municipal Council Cocanada* v. *The Standard Life Assurance Co., Ltd.* (1) and *Municipal Council of Mangalore* v *The Codialbail Press* (2). In that case the action of the Municipal Council in fixing the rates of municipal license fees was found to be ultra vires, and it was therefore held that the provisions of the Act have not been in substance and effect complied with.

As against these decisions, which in my opinion amply support the contention of the appellant, the respondent mainly relies on a decision by Krishnan, J., in *Municipal Chairman, Virudupatti* v. *Saravana Pillai* (6). In that case which was under S. 228, Act 4 of 1884, the learned Judge observed that

> "it would not thus be open to the civil Court to find that his assessment was erroneous on facts or go into the questions of the amount of a person's income as that is not the ground on which the application for prohibition against suits in S. 262 can be avoided."

Having regard to the fact that the contention of the appellant is that he is not taxable under the Act at all these observations will obviously not apply to the present case. It is important to notice that in the earlier part of the judgment the learned Judge states :

> "There is no case made here that in assessing the plaintiff any of the relevant provisions of the Act were not complied with ; nor is this a suit falling within the proviso to S. 262."

This would show that if the provisions of the Act were not complied with as in this case, by taxing a person who is not taxable at all the case would certainly not be barred under S. 228, Local Boards Act.

The decision in *Pattarani Purnachandra Mala Jamma* v. *President, Taluk Board, Chicacole* (7), by Jackson, J., may at first sight appear to support the respondent. But the facts mentioned in the judgment show that no provision of the Act was violated by the Municipality in making the assessment. But what happened was that a mistake of fact was committed bona fide by the assessing authority. In the present case the Board has disregarded a provision of law and taxed a person not taxable at all if the plaintiff's case is true. Cases of "fundamental departures from the meaning of the statute" are excluded from the operation of the bar by the learned Judge and he accepts the authority of *Municipal Council, Cocanada* v. *Standard Life Assurance Co., Ltd.* (1) the leading Madras case on the subject. The decision in *Krishnamachariar* v. *Municipal Council, Srirangam* (8), is clearly distinguishable on the facts from the present case and it follows a prior decision of this Court which has been explained in *Municipal Council, Cocanada* v. *Standard Life Assurance Co., Ltd.* (1). In *A. I. R.* 1928 *Mad.* 208, *Lakshmanan Chettiar* v. *Municipal Council, Trichinopoly*, the learned Judge is clearly of opinion that the provisions of the Act were complied with in

(2) [1904] 27 Mad. 547.
(3) A.I.R. 1928 Mad. 346=110 I.C. 5.
(4) A.I.R. 1929 Mad. 146=108 I.C. 216.
(5) A.I.R. 1931 Mad. 497=130 I.C. 750.
(6) [1920] 54 I.C. 454.
(7) [1928] 113 I.C. 560.
(8) A.I.R. 1926 Mad. 448=91 I.C. 933.

substance and effect by the Municipality.

Following the decisions in *Municipal Council, Cocanada* v. *The Standard Life Assurance Co., Ltd.* (1) and *Municipal Council of Mangalore* v. *The Codialbail Press* (2), I would hold that the complaint of the plaintiff being that he was not liable to be taxed under the Act, S. 228 (2) is not a bar to the suit and that the lower Courts should have gone into the merits of the case and disposed of it in accordance with law. For the above reasons, the decrees of the lower Courts are set aside and the case is remanded to the Court of the District Munsif of Chicacole, for disposal according to law. Costs will abide the result. Court-fee will be refunded

C. R. P. No. 278 *of* 1929.—No special order is necessary in this civil revision petition. The order in the Second Appeal will apply to this civil revision petition, also. No costs.

P.R.S./B.V. *Case remanded.*

A. I. R. 1931 Madras 824

RAMESAM, OFFG. C. J. AND CORNISH, J.

B. Thavasimuthu Nadar (*minor*) and *another*—Appellants.

v.

R. Thavasimuthu Nadar and *others*—Respondents.

Appeal No. 1 of 1930, Decided on 6th August 1931, against decision of Beasley, C. J., in C. S. No. 655 of 1921, D/- 14th November 1929.

(a) Hindu Law—Debts—Son can question father's debt even after decree against father by creditor—But son must be in existence at time of decree—Conception of son is tantamount to his existence.

A Hindu's son would in general have the right of questioning the nature of the father's debt either in execution or in a separate suit and after the insertion of S. 53 in the new Code of Civil Procedure, the question can be raised by a son after decree. A Hindu's son has always such a right, but it is subject to the qualification that he was in existence at or before the time when the decree against the father was passed. It is a principle of Hindu law that a person should be regarded as in existence from the time of the conception: 13 *Cal.* 21, *Foll.*

[P 825 C 1]

(b) Hindu Law—Partition — Institution of suit for partition effects severance of joint family, if suit is continued to end — Date of severance is date of plaint.

When a suit for partition in a joint family is filed, the filing of the suit effects a severance of the family, subject to condition that the suit is proceeded with. If the suit is withdrawn there is no severance; but if the suit is ultimately decreed, whatever the interval of time may be, the date of severance is the date of the plaint: 35 *All.* 80 (*P.C.*) and *A.I.R.* 1917 *P.C.* 39, *Foll.*; *A.I. R.* 1925 *Mad.* 717 and *A. I. R.* 1927 *Mad.* 801, *Ref.*

[P 825 C 1]

K. Gopalaswami and *S. G. Sadagopa Mudaliar*—for Appellant.

Srinivasaraghavan and *Thyagarajan*—for Respondent.

Ramesam, Offg. C. J. — This is an appeal from the order of Beasley, C. J., dated 14th November 1929 dismissing an appeal from the order of the Master dated 15th October 1929 refusing the appellant leave to file a written statement in C. S. No. 655 of 1921. The facts of the case are as follows. The suit was filed in July 1921. There was a preliminary decree on 18th January 1924. The present appellant was born on 2nd February 1924. Defendant 1, the appellant's father, became a lunatic some time in 1929 and on the application of the appellant he was allowed to be impleaded in the case as a defendant by Kumaraswami Sastri, J. This was on 19th February 1929. But in that order Kumaraswami Sastri, J., said: "He must take matters as they stood when the preliminary decree was passed." This practically precluded him from filing any fresh written statement. Defendant 1 died on 5th July 1929. The respondents filed an application to record the fact that the appellant would be the legal representative of the deceased defendant 1. This was ordered on 19th August 1929. The present application was filed on 6th September 1929 to receive a fresh written statement on behalf of the appellant who was impleaded as defendant 12. The Master refused this application and on appeal Beasley, C. J., dismissed the appeal. Hence the appeal before us.

One of the points raised by the respondents before us is that an appeal against this order does not lie and a decision in *Imambandi* v. *Mutsaddi* (1), is relied on. So far as I am concerned, if there is any other point on which I can dispose of the appeal I would leave this objection alone and would not prefer to rest my judgment upon the decision of this question. Coming to the merits seeing that the appellant had been already made a party in February 1929, the application in August 1929 is undoubtedly an application under O. 22,

(1) A. I. R. 1918 P. C. 11 = 47 I. C. 513 = 45 I. A. 73=45 Cal. 878 (P.C.).

R. 2 and not an application under O. 22, R. 4. That being so, the appellant would not have a right to file an additional written statement by reason of the fact that he was noted on record as the legal representative of the deceased defendant 1 in August 1929. But it may be said that he had a right to file an additional written statement when he was originally brought into the record i. e., in February 1929. Kumaraswami Sastri, J., held that he must take matters as they stood on the record at the date of the preliminary decree. If this order is erroneous the remedy of the appellant was to have appealed against that order.

But apart from this view which may be regarded as a technical view, there is another ground on which it may be held that the appellant had really no right to file any additional plea. It is true that a Hindu's son would in general have the right of questioning the nature of the father's debt either in execution or in a separate suit and after the insertion of S. 53 in the new Code of Civil Procedure the question can be raised by a son after decree. The judgment of Lord Hobhouse in *Nanomi Babuasin* v. *Modhun Mohan* (2), shows that a Hindu's son has always such a right, but it is subject to the qualification that he was in existence at or before the time when the decree against the father was passed.

In the present case though no doubt the appellant was not born by 18th January 1924 he must have been conceived and it is a principle of Hindu law that a person *en ventre sa mere* should be regarded as in existence from the time of the conception. So we must regard the appellant as in existence on 18th January 1924. But that is not enough to help the appellant. It is now an established principle that, when a suit for partition in a joint family is filed, the filing of the suit effects a severance of the family, subject to the condition, that the suit is proceeded with. If the suit is withdrawn there is no severance; but if the suit is ultimately decreed, whatever the interval of time may be, the date of severance is the date of the plaint. This principle is established by the Privy Council cases in *Suraj Narain* v. *Iqbal Narain* (3) and *Kawal Nain* v. *Budh Singh* (4). This principle was applied in *Krishnaswami Thevan* v. *Pulukaruppa Thevan* (5) and in *Sri Ranga Thathachariar* v. *Srinivasa Thathachariar* (6).

That being so, in this case there is a complete severance between the branch of the appellant and his father on the one hand and the other members of the family on the other hand in July 1921, the date of plaint and there is a preliminary decree against the appellant's father declaring his accountability which must be taken to date back to the date of plaint. Now in July 1921 the plaintiff was not in existence either actually or *en ventre sa mere*. That being so, he cannot raise the question as to whether the joint family property of his father in his hands should be liable for the obligations incurred by his father, which obligations are declared in the preliminary decree. Therefore I am inclined to think that the conditions imposed upon him in the order of Kumaraswami Sastri, J., in February 1929 were rightly imposed. The result is that the appeal is dismissed with costs. One set.

P.R.S/B.V. *Appeal dismissed.*

(2) [1886] 13 Cal. 21=13 I. A. 1 = 4 Sar. 682 (P.C.).

(3) [1913] 35 All. 80=18 I. C. 38=16 O.C. 129 =40 I. A. 40 (P.C).

(4) A. I. R. 1917 P. C. 39=40 I.C. 286=44 I.A. 159=39 All. 496 (P.C.).

(5) A. I. R. 1925 Mad. 717 = 88 I. C. 424 = 48 Mad. 465.

(6) A. I. R. 1927 Mad. 801=104 I. C. 472=50 Mad. 866.

A. I. R. 1931 Madras 825

CURGENVEN, J.

S. R. M. A. R. Ramanathan Chettiar —Petitioner.

v.

Annamalai Chettiar and *others*—Respondents.

Civil Revn. Petn. Nos. 1907 to 1911 of 1930, Decided on 26th August 1931, against order of Principal Sub-Judge, Devakottah, D/- 13th December 1930.

(a) Civil P.C. (1908), O. 7, R. 14 and O. 11, R. 15—List of documents is to be deemed part of plaint for granting inspection.

The only reasonable way of reading O. 7, R. 14, with O. 11, R. 15, is to hold that the expression "referred to" is equivalent to "entered in the list." For this purpose the list must be deemed to be part of the plaint and consequently inspection can be granted of documents entered in a list attached to the plaint: 21 *C. W. N.* 302, *not Foll.* [P 826 C 2]

(b) Civil P. C. (1908), O. 11, R. 18—Fact that inspection is sought for before written statement is filed is no ground for refusing it.

While the Court has a certain discretion, limited to the terms of the proviso to O. 11, R. 18 (1), it would not be a proper exercise of that discretion to refuse inspection on the general ground that it was sought before the written statement was filed. The mere number of documents can afford no guide to the exercise of discretion, and the Court has to look at the nature of the claims made in the plaint: *Quilter* v. *Heatly*, 23 *Ch. D.* 42 and 18 *Bom.* 368, *Rel. on.*; *In re H.W. Strachan*, (1895) 1 *Ch.* 439 and *Hope* v. *Brash*, (1897) 2 *Q.B.* 188, *Dist.*

[P 828 C 1]

S. Srinivasa Ayyangar and *V. Ramaswami Ayyar*—for Petitioner.

A. Krishnaswami Iyer, *M. Subbaraya Ayyar*, *M. Patanjali Sastri*, *K. S. Rajagopala Ayyangar*, *U. Umamaheswaram* and *T. S. Krishnamurthi Ayyar* — for Respondents.

Judgment.—These five civil revision petitions are preferred against an order of the Subordinate Judge of Devakottah passed under O. 11, R. 18 (1), Civil P.C., and allowing the respondents, who are defendants in O. S. No. 109 of 1930 on his file, inspection of the documents contained in a list attached to the plaint. The substantial questions which I have to decide are, firstly, whether the Court could pass such an order in respect of these documents; and, secondly, whether it was justified in allowing inspection before the defendants had filed their written statements.

A plaintiff's documents are of two kinds, differentiated by O. 7, R. 14, into (1) those which he sues upon and (2) those which he relies upon as evidence in support of his claim. The order requires him to produce class (1) with his plaint and to enter class (2) in a list to be added or annexed to the plaint. Under R. 15, O. 11, a party may at any time give notice to any other party in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice. An attempt has been made to contend that this rule only refers to documents of the former class, those on which the plaintiff sues, and not to documents relied on as evidence in support of his claim. It appears to me that this contention must fail because, in the first place, since the plaintiff has to produce documents upon which he sues at the time when he presents his plaint and has to deliver them or copies of them with the plaint, no necessity could arise to call upon him to give inspection of such documents. If a party wants to inspect the documents or copies of the documents filed with the plaint, provision is made for his doing so at the Court by R. 63, Civil Rules of Practice. Further, if the right to inspection were limited to documents sued upon, the rule would have been framed in different language. It is then argued that documents entered in a list attached to the plaint do not come within the description in R. 15, O. 11 of documents to which reference is made in the pleadings. This position too, I think, is untenable. The method which the Code prescribes of specifying the documents relied on in the plaint is to enter them in a list to be added or annexed to the plaint, and to hold that inspection could not be granted because these documents are mentioned in a list and not in the body of the plaint would be to render the rules relating to inspection futile. The only reasonable way of reading O. 7, R. 14 with O. 11, R. 15 is to hold that the expression "referred to" is equivalent to "entered in the list." It seems to me that for this purpose the list must be deemed to be part of the plaint, as for instance would be a schedule of property. It is to be noted that R. 14, O. 7 is headed "documents relied on in plaint," which goes in support of this view. It is probable enough, as has been suggested, that one at least of the reasons for requiring the plaintiff to furnish a list of his documents with the plaint is to enable a defendant to apply for their inspection. I am unable to agree with *Chandmull Ganeshmull* v. *Dhanraj Ganpatroy* (1), where a learned Judge of the Calcutta High Court has expressed a contrary opinion. I think that the learned Subordinate Judge has decided this point correctly.

It is then said that he has conceded inspection to the defendants as a matter of right, whereas R. 18 (1), O. 11, invests him with a discretion which he should have used in order to refuse the request. It is not very clear from the terms of the lower Court's order what amount of discretion it believed itself to possess. After adverting to a conflict in the Indian decisions the learned Subordinate Judge decides to follow the English law on the

(1) [1920] 56 I. C. 457.

subject which he says allows the defendant "as a matter of course" to inspect the documents referred to by the plaintiff in his statement of claim, even before the defendant files his written statement. On the other hand, in one particular at least, he does consider the special position of the defendants, because he remarks that defendant 4 being a minor it would be unjust to call upon him to answer the plaintiff's claim without being allowed to inspect the documents. As to there being a discretion in the Court to withhold inspection, it is unnecessary to go beyond the terms of O. 11, R. 18 (1), which closes with the proviso:

"Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

To the extent indicated the Court clearly has discretion, though it is equally clear, I think, that the onus rests on the party resisting an order to show that it should not be made in the special circumstances of the case. This view of the intention of the rule is, I think, borne out by an examination of the corresponding English provision and of the case law based upon it. Before doing this it is perhaps advisable to set out the grounds upon which the plaintiff claims that discretion should have been exercised in his favour. He disclaims any intention of founding his objections upon the nature of any particular documents and the question accordingly is whether the request should be granted or refused as a whole. The main objection raised, as has been already noted, is that it would be unfair to the plaintiff to allow inspection of his documents before the defendants file their written statements. It has also been urged that, considering the nature of the subject-matter of the suit, and the large body of documentary evidence involved, it would be oppressive to make such an order. The case law cannot be expected to give much assistance in deciding this latter point, but it has been examined with special reference to the question whether it is usual to grant inspection before the written statement is filed.

There is a statement in Halsbury (Vol 11, p. 50) that

"as a general rule discovery cannot be obtained till after defence has been delivered, since it is not until then that it is known what are the matters in dispute."

But this statement, I think, is general as regards discovery, which includes various methods of obtaining information from the opposite party such as the administration of interrogatories, calling for affidavits, etc. As regards the production of documents for inspection the rule is given (p. 68) much in the terms of our O. 11, R. 15. It is unnecessary to go back to the rules in force before the Judicature Acts, when they appear to have been different on the Chancery side from what they were at Common law. Such a case, for instance *Halliday* v. *Temple* (2), is probably no longer good law. In Bray's Law of Discovery, p. 244, the law is noted as:

"that a defendant is as a rule entitled to see the documents referred to in the statement of claim before putting in his defence,"

which was the old Common law rule. The leading case since the Judicature Acts is *Quilter* v. *Heatly* (3), which was decided under a rule corresponding to our R. 18, but without the proviso. The Court of appeal, while holding that the rule even as it stood then, gave the Court a discretion to refuse an application if good cause was shown, was of opinion that a defendant could claim inspection before putting in his defence Jessel, M. R. says:

"It is suggested that although the terms of the rule are general it is sufficient for the plaintiff, in answer to such an application by a defendant, to say that the defendant has not put in his defence. I cannot conceive that this is a sufficient answer."

The defendant may say:

"Your case depends partly on a set of documents which you may have set out incorrectly. I wish to see them. It may be that I have made admissions which will put me out of Court. I wish to see the documents to know whether I have made such admissions and it is important for me to see them before I put in my defence."

And Lindley, L. J., expresses the view that the rules were intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings. It is true that this learned Judge in *In re H. W. Strachan* (4) has stated that in England it is considered contrary to the interests of justice to compel a litigant

(2) [1856] 44 E. R. 325.
(3) [1883] 23 Ch. D. 42=48 L. T. 373=31 W. R. 331.
(4) [1895] 1 Ch. 439=64 L. J. Ch. 321=72 L. T. 175=43 W. R. 369=60 J. P. 36.

to disclose to his opponent before trial the evidence to be adduced against him, but I doubt whether in making that general statement he had in view the production for inspection of a plaintiff's document. The case related to an application for the production of documents not in the party's custody but in the custody of the Court in Lunacy. So too in *Hope* v. *Brash* (5) the question related not to the inspection of a document which the defendants proposed to produce in evidence, but of a document in their possession which they had no intention of producing and which the plaintiff only wanted to see for a purpose unconnected with the prosecution of the suit. Several other English Cases have been cited before me on behalf of the petitioner, but they deal with some other form of discovery, such as the filing of interrogatories, and cannot be followed upon the subject of inspection.

I see no reason to doubt that the English rule is ordinarily to allow inspection even though the defence may not have been put in. For an authority in India *Ram Dayal Saligram* v. *Nurhurry Balkrishna* (6), which follows *Quilter* v. *Heatly* (3), may be referred to. My conclusion is that while the Court has a certain discretion, limited to the terms of the proviso to O. 11, R. 18 (1), it would not be a proper exercise of that discretion to refuse inspection on the general ground that it was sought before the written statement was filed. Nor can I find anything in the special circumstances of this case to depart from the general principle. It has been urged that, having regard to the nature of the subject-matter of the suit and especially to the number of documents (834), to make such an order would be oppressive. The mere number of documents can afford no guide to the exercise of discretion and we have to look at the nature of the claims made in the plaint. It contains allegations that defendant 1 and defendant 4's adoptive father had assumed management and control of the plaintiff's estate and used that position in order to despoil it over a long term of years and in the course of a large number of transactions in India and elsewhere.

Defendant 1, in his reply to the plaintiff dated 11th August 1930, has denied that he ever managed the estate, but this denial does not amount to an assertion that he never had anything to do with it, whether as adviser or in some other capacity falling short of management. The allegations in the plaint are made in a more or less general form and it would certainly be very difficult for defendant 1, having regard to their multiplicity and range, to prepare an answer unless he is allowed to see upon what documentary evidence they are based. As for defendant 4, who is a minor and who cannot be supposed to have any acquaintance with these transactions, it would be a sheer impossibility. I think accordingly that, so far from this being a case in which the ordinary rule should be relaxed in plaintiff's favour, it is eminently one in which it should be applied. Even though the learned Subordinate Judge has not dealt expressly with these aspects of the matter, yet, after hearing the petitioner's learned advocate at length, I have come to the conclusion that there are no grounds to set aside the lower Court's order and reopen the application. The civil revision petitions are dismissed but in the circumstances I make no order as to costs.

P.R.S./P.N. *Revisions dismissed.*

(5) [1897] 2 Q. B. 188=66 L. J. Q. B. 653=76 L. T. 828=45 W. R. 659.
(6) [1894] 18 Bom. 368.

A. I. R. 1931 Madras 828

CURGENVEN, J.

K. A. Muhammad Sultan Sahib—Petitioner.

v.

Nagoji Rao—Respondent.

Civil Revn. Petn. No. 799 of 1928, Decided on 4th August 1931, against order of Dist. Munsif, Tiruppur, D/- 1st June 1928.

(a) Civil P. C. (1908), S. 145, O. 38, R. 2 and O. 47, R. 1—Notice issued to surety under O. 38, R. 2, to produce judgment-debtor—Execution sought to be issued against him on failure—Further notice to show cause why execution should not issue is necessary.

Although a notice is issued to surety to produce his judgment-debtor, it is necessary when he fails to do so, to issue a further notice to him to show cause why execution of the decree should not issue against him.

A stood surety for *B* who was arrested before judgment, and after a decree had been passed against *B* a notice was served on *A* to produce *B*. *A* was unable to comply with the order but himself appeared and asked for time which was refused and the Court directed the arrest of *A*

under S. 145. The order was in fact stayed and *A* later on produced *B* and applied for review of the order directing execution to issue against him.

Held: that the order directing execution to issue against *A* was ultra vires and the Court in refusing to review the order committed an error and if it had any discretion to review the order the discretion has been vitiated by the error: *A. I. R.* 1925 *Rang.* 135, *Foll.*

That the circumstances did not satisfy any part of the specific terms of O. 47, R. 1, nor could the words "for any other sufficient reason" be availed of: *A. I. R.* 1922 *P. C.* 112, *Rel. on.*

That although the Court might have acted without jurisdiction, a review did not lie as the remedy for *A* was to appeal against the order. [P 829 C 1, 2]

(b) Civil P. C. (1908), Ss. 114 and 115—Review or revision cannot be granted when remedy is by way of appeal.

Remedy by way of review or revision against an order should not be ordinarily allowed to petitioner where the obvious remedy for him is to appeal against the order. [P 830 C 1]

K. V. Sesha Iyengar—for Petitioner.

S. T. Srinivasa Gopalachari—for Respondent.

Judgment.—I am asked to revise the order of the District Munsif of Tiruppur refusing to review an order passed by his predecessor under S. 145, Civil P. C. The petitioner stood surety for the defendant, who was arrested before judgment, and after a decree was passed against his principal a notice was served on him on 12th February 1928 to produce the judgment-debtor on the following day, the 13th. He was unable to comply with this demand, but he himself appeared and asked for time, which was refused. The Court then reserved its order against the surety under S. 145 and on the following day directed his arrest under that provision. The order was in fact stayed, and on the 20th of the same month the surety produced the judgment-debtor. He then applied, as I have said, for a review of the order directing execution to issue against him. The learned District Munsif who has declined to grant the review has, it seems to me, taken an erroneous view of the requirements of S. 145. He appears to think that so long as notice is issued to a surety to produce his judgment-debtor it is unnecessary, when he fails to do so, to issue a further notice to him to show cause why execution of the decree should not issue against him. It is of course no answer to the requirements of the Civil Procedure Code to say that the execution application filed by the decree-holder asked that the surety might be directed to produce the judgment-debtor and that in default he might be arrested. We have to look to the terms of the notice that was in fact issued to the surety, and all that the notice directs is that he should produce the judgment-debtor on the 13th February. A similar case was disposed of in *Tan Kin Shan* v. *U Che Si* (1). There too notice was issued to the sureties of a certain judgment-debtor to produce him in Court on a certain date, and when that date arrived, there being no appearance for the sureties or the judgment-debtor, the Court at once passed orders for the issue of a warrant of attachment of the property tendered as security by the surety.

The learned Judges held that inasmuch as no notice of any kind was issued under the proviso to S. 145, Civil P. C., which requires that the surety should be called upon to show cause against the issue of execution, the order passed was ultra vires. I can find nothing in the record which justifies me in presuming that, notwithstanding the absence of any formal notice issued to him, the surety did in fact have notice of the course which the Court proposed to take. I think accordingly that in refusing to review the order of his predecessor on the ground that notice in fact was issued, the learned District Munsif has committed an error, and if he had himself any discretion to review that order exercise of that discretion has, it may be said, been vitiated by that error.

I am however not satisfied that in circumstances of this kind a review would lie. A Calcutta case has been brought to my attention, *Rash Behari Mandal* v. *Hemanta Kumar Ghose* (2), in which it was held that a Court has jurisdiction to review its order passed ex parte for issue of a writ or delivery of possession. It appears that on an application after the decree was passed an order for delivery was issued by the Court, and immediately afterwards, before that order could be put into execution or had reached the opposite party, the peon who carried it was recalled and other orders were passed. The learned Judges who came to the conclusion that the Court was en-

(1) A. I. R. 1925 Rang. 135=84 I. C. 993=2 Rang. 567.

(2) A. I. R. 1925 Cal. 1023=88 I. C. 921.

titled to take this course have not explained their reasons for the view, nor have they considered the matter with reference to the terms of O. 47, R. 1. I do not think that it can, with any success, be contended that the circumstances satisfy any part of the specific terms of that rule, they do not include the discovery of new and important matter, or any mistake or error apparent on the face of the record; nor am I prepared to hold that the words "for any other sufficient reason" can be availed of in view of the Privy Council decision in *Chhajju Ram* v. *Neki* (3). It may be that the Court in the present instance acted without jurisdiction, but the obvious remedy which the petitioner had in his hands was to appeal against the order, and I should only in very rare and unusual cases be disposed to allow any other kind of remedy such as review and revision to a petitioner who has failed to adopt that course. In these circumstances I think that there are no sufficient grounds to interfere with the order of the learned District Munsif, based though it may be upon an erroneous view of the facts and the law applying to them. The Civil Revision Petition is dismissed with costs.

P.R.S./P.N. *Petition dismissed.*

(3) A. I. R. 1922 P. C. 112=72 I. C. 566=49 I. A. 144=3 Lah. 127 (P.C.).

A. I. R. 1931 Madras 830

CURGENVEN, J.

Yaddanapudi Lakshmi Narasimham —Defendant--Appellant.

v.

Dorapalli Lakshmipathi and *others*—Plaintiffs—Respondents.

Appeal No. 281 of 1929, Decided on 31st July 1931, against order of Sub-Judge, Bezwada, D/- 28th March 1929.

(a) Practice—Relief—Leave to file separate suit cannot be granted in respect of any relief which Court itself cannot grant.

Except where a power is conferred by law, such as for example under O. 23, R. 1, a Court is not competent to give a party leave to file a separate suit in respect of any relief which it does not itself grant : 11 *All.* 187 and *A. I. R.* 1925 *P. C.* 55, *Foll.* [P 831 C 1]

(b) Civil P. C. (1908), S. 11 and O. 2, R. 2—Liberty to bring fresh suit granted as Court felt restrained to grant particular relief claimed—Subsequent suit is not barred either under S. 11 or O. 2, R. 2.

If in a former suit between the same parties, the Court, finding itself unable to come to a decision on certain point owing to an error of form in the frame of suit, refrains from deciding that point and leaves it to the plaintiff to bring a fresh suit to seek relief on that point, the question advisedly left undecided in the former suit cannot be said to have been heard and finally decided within the meaning of S. 11, nor is subsequent suit barred by O. 2, R. 2. [P 832 C 1]

P. Satyanarayana Rao—for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri*—for Respondents.

Judgment. — Defendant 2 appeals against an order of remand of a suit made by the Additional Subordinate Judge of Bezwada. Designating the parties as they stand in the present suit, the few facts which have to be known are these. Defendant 2 obtained a mortgage decree against defendant 1, and in the Court sale defendant 3, it is said benami for the second, bought defendant 1's property. There then ensued an arrangement between the three defendants and the plaintiff who appears to have been a creditor of the judgment-debtor in that suit, according to which defendant 1 executed a mortgage to the plaintiff for Rs. 400 of the property which had already been sold by the Court, and the auction purchaser, defendant 3, undertook to get the Court sale set aside. He failed to do this, so that, as matters stood, the mortgage bond passed no legal title to the plaintiff. In these circumstances the plaintiff sued in O. S. No. 368 of 1920 for the recovery of the mortgage amount which the defendants had received from him, by the sale if necessary of the mortgaged property. The District Munsif who tried the suit gave him a decree which merely declared his mortgage right over the property and left him at liberty to enforce his right in a separate suit. He accordingly filed another suit, O. S. 88 of 1925, against the same three defendants to enforce this right. The District Munsif found that this suit was barred both by res judicata and under O. 2, R. 2, Civil P. C. In the judgment appealed against, the learned Additional Subordinate Judge differs from this view, holding that the former suit was not one for the recovery of the money paid by sale of the hypotheca but was a suit for damages for breach of contract. He considered that the two suits were based upon different causes of action He accordingly restored the suit and remanded it for trial upon the other issues framed.

So far as the decree in O. S. 368 of 1920 declares the plaintiff at liberty to enforce his charge by a separate suit, it is, as the learned District Munsif has held, a nullity. There is ample authority: see for instance *Sukh Lal* v. *Bikhi* (1) and *Fateh Singh* v. *Jagannath Baksh* (2), that except where such a power is conferred by law, as for example under O. 23, R. 1, Civil P. C., a Court is not competent to give a party leave to file a separate suit in respect of any relief which it does not itself grant. The plaintiff cannot therefore rely upon this term in the decree to save his suit if it is otherwise barred.

The learned Subordinate Judge considers, as I have said, that the earlier suit was for damages, but in this view I am unable to concur. The first nine paragraphs of the plaint recount the facts. In para 10 it is stated that

"the plaintiff is entitled to recover from the defendants the amount of Rs. 400 received by the defendants from the plaintiff"

the reason given being that

"defendants have fraudulently defeated the object of the contract entered into by them."

It is added that

"as the defendants have received money from the plaintiff on the liability of the suit properties by giving assurance to the plaintiff, he is entitled to recover the suit amount by the sale of the scheduled properties."

In para. 12 the cause of action is stated to have arisen on 21st December 1918, which was the date of the mortgage and of the alleged oral agreement, and 23rd July 1920 the date upon which the sale was confirmed.

The relief which the plaintiff prayed for was a direction to the defendants to pay the plaintiff the suit amount and as they had received the suit amount on the liability of the scheduled properties, in default of payment to order the sale of the properties; a declaration that the Court sale is not binding on the plaintiff was also asked for.

The District Munsif who tried the suit described it as

"a suit to recover money from the defendants after establishing the plaintiff's right to a charge upon the plaint properties."

The only issue requiring specific notice was the third which ran thus:

"Is the plaintiff entitled to any charge on the plaint scheduled land by virtue of the mortgage executed by defendant 3 pursuant to the agreement alleged in para. 5 as urged by the plaintiff?"

The District Munsif found the alleged agreement true and continued thus:

"I therefore find consequentially that the plaintiff is entitled to a decree establishing his mortgage right over the plaint scheduled properties by virtue of Ex. C (the mortgage bond) as against defendants 1, 2 and 3."

From these quotations from the record it appears to me clear that what the plaintiff sued for was the amount advanced by him under the mortgage, for an order to the defendants to pay it, and in default of such payment its recovery by sale of the mortgaged property; and that the suit was tried upon this footing. There is no reference to damages in the plaint or in the judgment, and it is quite clear I think that in no suit for damages could any question of the sale of the mortgaged property arise. The position adopted seems to be that taking the mortgage together with the agreement, the Court should find the mortgage enforceable because the parties to the agreement must in equity be held to have performed it. That seems to me to be the only view compatible with the terms of issue 3 and with the finding of the Court that the plaintiff had a mortgage right over the property. Instead of merely making this declaration and referring the plaintiff to a separate suit the District Munsif should then I think have proceeded to grant him a mortgage decree. I am not clear what obstacle he saw to such a course. All the facts had been pleaded and the issue framed. Mr. Lakshmanna draws my attention to the fact that the interest claimed in the plaint was not at the mortgage rate of Re. 1-2-0, but only at 12 annas per cent per mensem and he asks me to infer from this that the suit was not on the mortgage. Whatever may have led the plaintiff to claim a different rate, this circumstance by itself cannot alter the nature of his suit, which must depend not only on the contents of the plaint but on the view taken by the parties of the meaning and intention of the plaint, as disclosed by the nature of the trial which ensued upon it. How could the District Munsif have found "consequentially" that the plaintiff was entitled to a decree establishing his mortgage right if the case had been put before him as a claim for damages?

(1) [1889] 11 All. 187=(1889) A W. N. 13.
(2) A. I. R. 1925 P. C. 55=91 I. C. 280=52 I. A. 100=27 O. C. 331=47 All. 158 (P. C.).

What in effect the plaintiff asked for was not damages but the specific performance of the agreement, and the consequential enforcement of his mortgage. I find it very difficult to see therefore how the former suit could have been founded upon a different cause of action and how it did not comprise what was in substance a claim to enforce the mortgage.

But I am unable to see that, on this view of the earlier suit, the later suit, is barred. It is not barred under O. 2, R. 2, Civil P. C, because the plaintiff did not omit to put forward his whole claim, though he may have put it forward in a form which deterred the Court from giving him the full remedy open to him. Nor am I clear that the second suit is barred by res judicata. The first District Munsif did not decide that the mortgage was unenforceable. On the contrary, he declared the plaintiff entitled to a decree establishing his mortgage right. When I asked the learned advocate for the appellant what matter or issue between the parties had been heard and finally decided in the prior suit, he was at a loss for a reply. The most he could say was that it was decided that a mortgage decree could not be given in that suit. I do not think that Expl. (5), S. 11 of the Code is of any help to him, because it is not possible to infer from the terms of the judgment that a mortgage decree was, on the merits of the case between the parties, refused. The most that can be inferred is that the suit was, in the view of the District Munsif, wrongly framed for the grant of such relief, and even as to that the opinion expressed is not very decided. The case bears a strong resemblance to a Calcutta case cited to me, *Ramcharan Bahadur* v. *Reazuddin* (3), There too the Courts which dealt with the earlier suit found themselves unable to come to a decision by reason of errors of form in the frame of the suit. They therefore refrained from deciding a certain point and left it to the plaintiff to bring a fresh suit framed in such a manner that the Court might be able to grant the relief sought. Garth, C. J. says:

"It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised and to have tried those issues upon the best evidence that the parties could have adduced, but we are not prepared to say that the course adopted by these Courts was ultra vires. They considered rightly or wrongly that they were not in a position to try the main question in the case; and it is clear that the question, which was advisedly left undecided in the former suit, cannot be said to have been heard and finally decided within the meaning of S. 13 (now S. 11) of the Code."

So in the present case it may be that the District Munsif ought to have forthwith granted a mortgage decree. But rightly or wrongly he considered himself precluded from the manner in which the suit was brought from doing this. I am unable to see that he thereby decided any such matter as would make it res judicata between the parties. For the appellant I am referred to the Privy Council case, *Fateh Singh* v. *Jagannath Baksh* (2). But the facts there were quite different, the plaintiffs having omitted to plead in their first suit a certain family custom which in their second suit they made the foundation of their claim. It was held that they were barred by res judicata by virtue of Expl. (4). No such circumstance exists in the present case.

In the circumstances therefore I am not prepared to say that the issue whether on the facts alleged by the plaintiff he can get a mortgage decree has been heard and finally decided between him and the defendants. The appeal accordingly fails and is dismissed with costs.

P.R.S./V.B. *Appeal dismissed.*

(3) [1884] 10 Cal. 856.

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